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ABSTRACT

This report by the U.S. Commission on Civil Rights assembles information about religious discrimination in the nation's public schools. The commission concentrated its review on: (1) assessing school districts' compliance with the Equal Access Act, and the Supreme Court decisions governing equal access to school facilities by religious groups; (2) determining whether schools are maintaining the delicate balance between the legally mandated separation of church and state while complying with equal access laws; (3) determining whether all religious groups are being accorded protection under existing law; and (4) identifying specific religious practices and beliefs that may be subject to discrimination or denial of equal protection. The transcripts that follow the summary embody an ample supply of facts, concerns, and recommendations about an important area of civil-rights law presented by knowledgeable witnesses. Appendices contain a letter by the Secretary of Education and the text of a radio address by President Clinton. (DFR)

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Proceedings Before
The United States
Commission on Civil Rights

Schools and Religion

Executive Summary and Transcripts of Proceedings
Held in Washington, DC, New York City, and Seattle, WA
Spring / Summer 1998

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The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices;
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin;
- Submit reports, findings, and recommendations to the President and Congress;
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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The United States
Commission on Civil Rights**

Schools and Religion

**Executive Summary and Transcripts of Proceedings
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Executive Summary

The Schools and Religion Project

The following executive summary and transcripts have been produced as the result of an effort by the U.S. Commission on Civil Rights to study and collect information about religious discrimination in the Nation's public schools. The Commission was concerned with those acts that deprive individuals of certain rights because of their religious beliefs or practices.

Within the broad area of nondiscrimination in the context of religious expression in public schools, the Commission concentrated its review on (1) assessing school districts' compliance with the Equal Access Act, 20 U.S.C. § 4071 (1995), and Supreme Court decisions governing equal access to school facilities by religious groups; (2) determining whether schools are maintaining the delicate balance between the legally mandated separation of church and state while complying with equal access laws; (3) determining whether all religious groups are being accorded protection under existing law; and (4) identifying specific religious practices and beliefs that may be subject to discrimination or denial of equal protection.

These issues were addressed by the Commission in three different proceedings: a May 1998 hearing in Washington, D.C.; a June 1998 hearing in New York City; and an August 1998 briefing in Seattle, Washington. While the first proceeding in Washington, D.C., addressed the issues from a national perspective, the second and third proceedings examined the issues at a local level.

The witnesses who testified before the Commission were selected due to their knowledge of and/or experience with the issues addressed. The Commissioners heard from public officials, civil rights and religious advocates, academics, and other concerned individuals.

Growing Consensus

Most of the witnesses agreed that the Equal Access Act¹ and the *Statement of Principles of*

¹ 20 U.S.C. §§ 4071-4074 (1995 & Supp. 1999).

Religious Expression in Public Schools,² issued by the Department of Education in 1995, have fostered a significant decrease in the number of claims of religious discrimination in public schools.³ Efforts by State and local governments and private community groups have assisted as well.

Equal Access Act

The Equal Access Act applies when public secondary schools allow extracurricular student clubs to meet on school premises during noninstructional time.⁴ When allocating use of school facilities, school officials may not discriminate against student clubs on religious grounds.⁵ Oliver Thomas, special counsel to the National Council of Churches, testified that the Equal Access Act is "being implemented and adhered to in a manner that surpasses any period in our nation's history."⁶ According to W. Theodore Vander Wel, a pro bono attorney for the Rutherford Institute, the act has caused a decline in the number of claims of religious discrimination in public schools.⁷ He attributes this trend to the recent understanding of the strength of the Equal Access Act.⁸

Guidelines on Religion in the Public Schools

In April of 1995, numerous organizations, representing a wide variety of religious affiliations, jointly drafted a pamphlet entitled *Religion in the Public Schools: A Joint Statement on*

² U.S. Department of Education, *Statement of Principles of Religious Expression in Public Schools* (1995) (hereafter cited as *Statement of Principles*).

³ For a discussion of the decrease in the number of claims of religious discrimination, see the section entitled "Guidelines on Religion in Public Schools."

⁴ 20 U.S.C. §§ 4071-4074 (1995 & Supp. 1999).

⁵ *Id.*

⁶ Oliver Thomas, testimony, *Hearing Before the U.S. Commission on Civil Rights, Washington, DC, May 20, 1998*, transcript, p. 50 (hereafter cited as *National Perspectives Hearing*).

⁷ W. Theodore Vander Wel, testimony, *Briefing Before the U.S. Commission on Civil Rights, Seattle, WA, Aug. 21, 1998*, transcript, p. 183 (hereafter cited as *Seattle Briefing*).

⁸ *Ibid.*

Current Law.⁹ Subsequently, President Clinton directed Secretary of Education Richard Riley to issue the Department of Education's *Statement of Principles of Religious Expression in Public Schools*,¹⁰ based on the private organizations' *Joint Statement*.¹¹

The Department of Education released a *Revised Statement of Principles on Religious Expression in Public Schools* in May 1998, after President Clinton discussed the issue in his weekly radio address to the Nation.¹² The President said that while the issue of prayer and religion in public schools is a "complex and emotional one" for many Americans, "nothing in the Constitution requires schools to be religion-free zones, where children must leave their faiths at the schoolhouse door."¹³ The *Statement of Principles* was expanded again in December 1999; see editorial note on page 24.¹⁴

Michelle L. Doyle, the Secretary's liaison to the religious community for the Department of Education, said the Department sent the *Statement of Principles* to every State superintendent of instruction, every school district superintendent, and approximately 300-400 national re-

ligious leaders.¹⁵ The Department of Education published an article about the *Statement* in *Community Update*, a newsletter with a circulation of 250,000 people.¹⁶ In addition, the Department worked cooperatively with the Freedom Forum and the National Parent and Teachers Association in publishing a parent's guide.¹⁷ Julie K. Underwood, general counsel of the National School Boards Association (NSBA), testified that the NSBA made Secretary Riley's *Statement* available to every school district and every school attorney in the United States.¹⁸

Following the issuance of the *Statement*, the number of inquiries concerning how schools should handle Thanksgiving and Christmas holidays dropped dramatically, at both the Department of Education¹⁹ and the NSBA.²⁰ In addition, according to a May 1998 article in the *Washington Post*, the number of religious clubs in public schools increased due to the guidelines.²¹

Charles C. Haynes, senior scholar at the Freedom Forum First Amendment Center, testified that the guidelines have improved relationships between school officials and parents who previously viewed public schools as hostile to religion.²² Joseph P. Infranco, a lawyer with Migliore & Infranco, P.C., testified that the *Statement* has been remarkably helpful in New York.²³ Susan Douglass of the Council on Islamic Education testified that nearly all the State teaching standards about religion now follow the *Statement* for balance and neutrality among world faiths.²⁴

⁹ *Religion in Public Schools: A Joint Statement of Current Law* (April 1995). The drafting committee for the guidelines consisted of representatives from the following organizations: American Jewish Congress, American Civil Liberties Union, American Jewish Committee, American Muslim Council, Anti-Defamation League, Baptist Joint Committee, Christian Legal Society, General Conference of Seventh-day Adventists, National Association of Evangelicals, National Council of Churches, People for the American Way, and Union of American Hebrew Congregations. *Ibid.*, cover page. The guidelines were endorsed by several additional organizations.

¹⁰ Attached hereto as appendix A.

¹¹ Richard W. Riley, Secretary of Education, cover letter to Fellow Citizen, April 1998; Richard W. Riley, Secretary of Education, "Dear American Educator" (speech delivered August 1995) found at <<http://www.ed.gov/Speeches/08-1995/religion.html>>. The Office of Legal Counsel of the Department of Justice worked with the Department of Education to ensure that the *Statement of Principles* was legally correct and constitutional. Stuart Ishimaru, testimony, *Hearing Before the U.S. Commission on Civil Rights, New York, NY*, June 12, 1998, transcript, p. 169 (hereafter cited as *New York Hearing*).

¹² President William Jefferson Clinton, "Radio Address of the President to the Nation," May 30, 1998.

¹³ *Ibid.*

¹⁴ President Clinton announced the release of "expanded guidelines" to supplement the *Statement of Principles* in his Dec. 18, 1999, radio address.

¹⁵ Michelle L. Doyle Testimony, *National Perspectives Hearing*, p. 34.

¹⁶ *Ibid.*, p. 35.

¹⁷ *Ibid.*, p. 34.

¹⁸ Julie K. Underwood Testimony, *National Perspectives Hearing*, p. 86.

¹⁹ Michelle L. Doyle Testimony, *National Perspectives Hearing*, p. 30.

²⁰ Julie K. Underwood Testimony, *National Perspectives Hearing*, p. 87.

²¹ Caryle Murphy, "At Public Schools, Religion Thrives; Students of all Faiths Increasingly Active," *Washington Post*, May 7, 1998, p. A-1.

²² Charles C. Haynes Testimony, *National Perspectives Hearing*, p. 31.

²³ Joseph P. Infranco Testimony, *New York Hearing*, p. 113.

²⁴ Susan Douglass Testimony, *New York Hearing*, p. 127.

Witnesses told the Commission that the Department of Education should improve the process of distributing the *Statement*. Charles C. Haynes testified that because superintendents remain in their posts for an average of only about 2½ years, many may not be familiar with the *Statement*, and therefore, it should be distributed every year.²⁵ Michelle L. Doyle testified that she did not know how many secondary school districts have used the *Statement* to issue guidelines to individual schools because the Department is not responsible for retaining such statistical information.²⁶

Steven T. McFarland, director of the Christian Legal Society, and Terri A. Schroeder, legislative analyst for the American Civil Liberties Union, suggested that the Department of Education should be authorized to collect data and to create a reliable database of information on religious discrimination.²⁷ However, Marc D. Stern, co-director of the Commission on Law and Social Action of the American Jewish Congress, raised concerns regarding a proposal that the Department of Justice and the Department of Education begin to track incidents of religious discrimination.²⁸ He stated that it would embroil any Administration in defining what incidents qualify as religious discrimination.²⁹ In addition, Mr. Stern argued that there are strong political sentiments in favor of local control of public education, which also inhibit accurate factfinding.³⁰ Allowing the Federal Government to track incidents of religious discrimination could make it possible for the Federal Government to intervene at an administrative level.³¹

Efforts by State and Local Governments

State and local efforts to increase awareness concerning the rights of religious expression among school administrators, teachers, parents,

²⁵ Charles C. Haynes Testimony, *National Perspectives Hearing*, p. 35.

²⁶ Michelle L. Doyle Testimony, *National Perspectives Hearing*, pp. 39–40.

²⁷ Steven T. McFarland Testimony, *National Perspectives Hearing*, p. 45; Terri A. Schroeder Testimony, *National Perspectives Hearing*, p. 88.

²⁸ Marc D. Stern Testimony, *National Perspectives Hearing*, p. 69.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

and students have resulted in a reduction in the number of religious disputes around the Nation. The Commission received information about the policies used by the public schools in New York and Washington State.

New York

Dr. Margaret Harrington, chief executive for school and support services of the New York City Board of Education, described New York City policies and practices in the following areas: curriculum and instruction, distribution of materials, student clubs, display of holiday symbols, prayer and religious observance, graduation, and the use of school property during noninstructional hours.³² The Board of Education has adopted a policy consisting of a Bill of Student Rights and Responsibilities, which has been widely disseminated.³³ The policy provides that public school students have the right to distribute religious notices within the school, subject to reasonable guidelines established by the school at the school level, except when such material or notices are libelous, obscene, commercial, or materially disruptive to the school, or when they cause substantial disorder or invade the rights of others.³⁴ The Bill of Student Rights also recognizes that students have the right to participate in clubs pursuant to the Equal Access Act.³⁵

With respect to student prayer, the policy states that students have the same rights to engage in individual or group prayer and religious discussion as they do to engage in activities and expressions of a nonreligious nature.³⁶ The right of students to engage in voluntary prayer or religious discussion free from discrimination does not, however, include the right to have a captive audience listen to their religious expressions, or to compel others to participate.³⁷ Finally, students who observe holy days are generally excused for religious observance upon the submission of a written request by their parents before the day of observation, in accordance with pro-

³² Margaret Harrington, Testimony, *New York Hearing*, pp. 158–59.

³³ *Ibid.*

³⁴ *Ibid.*, p. 158.

³⁵ *Ibid.*, p. 159.

³⁶ *Ibid.*

³⁷ *Ibid.*

cedures set forth in the chancellor's regulations.³⁸

Dr. Harrington testified that the New York City Board of Education Office of Monitoring and Review is in the schools on a daily and weekly basis and makes reports back to the Central Board.³⁹ It is not a specific unit that deals solely with religion in the schools, but rather it monitors compliance with all city rules and regulations.⁴⁰ The Office of Equal Opportunity handles complaints of religious discrimination.⁴¹ Any questions of religious expression and allegations of discrimination are investigated at the school level, then at the Office of the Superintendent, and then at the Central level.⁴² If the remedy crafted by the Board of Education's Office of Equal Opportunity is not sufficient, complainants can appeal to the city Office of Equal Opportunity.⁴³

According to Dr. Harrington, there is a structured response system between the board's Office of Equal Opportunity and the Central Board.⁴⁴ Dr. Harrington was under the impression that there has been no systemic listing of religious complaints, but records of all civil rights complaints are kept and reviewed.⁴⁵ She testified that the chancellor could, however, identify the number of complaints filed in a particular school, if necessary.⁴⁶

Washington State

Witnesses testified that the number of disputes involving issues of religion in schools has declined in Washington State. Julya Hampton from the Washington chapter of the American Civil Liberties Union explained that several years ago the number of religious liberty conflicts in public schools was increasing.⁴⁷ At the time, a survey showed that only 13 to 20 percent of the school districts in the State had written

policies concerning religious expression.⁴⁸ After an effort that lasted several years, the State Board of Education adopted an administrative regulation that required each of the individual school districts to adopt a local policy addressing religious expression.⁴⁹ The board required school districts to formulate policies but did not give a mandate regarding the content of the policies.⁵⁰

Approximately 95 percent of Washington State's school districts have since adopted policies on religious expression.⁵¹ In crafting policies, many of the districts used the policy service provided by a statewide organization called the Washington State School Directors Association.⁵² According to Ms. Hampton, the public meetings where policies were formulated in each school district provided a valuable educational experience.⁵³

Ms. Hampton testified that she noticed a marked decline in the number of religious discrimination complaints after the school districts adopted policies.⁵⁴ W. Theodore Vander Wel, a pro bono attorney for the Rutherford Institute in Washington State, testified that he also received a smaller number of complaints.⁵⁵ Mr. Vander Wel stated that he did not know the reason for the decline in the number of complaints.⁵⁶ However, three possible explanations he discussed were that the school districts are adopting policies, or school administrators and districts are better informed, or that parents have "given up" regarding discrimination and have chosen to leave the public school system to send their children to private schools or to engage in homeschooling.⁵⁷

According to Douglas Vande Griend, director of the Western Center for Law and Religious Freedom, the problem in Washington and Oregon is that school superintendents and school districts generally are of the opinion that prohibitions on the establishment side override prohi-

³⁸ Ibid.

³⁹ Ibid., p. 160.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Julya Hampton Testimony, *Seattle Briefing*, p. 176.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Richard Wilson Testimony, *Seattle Briefing*, p. 175.

⁵³ Julya Hampton Testimony, *Seattle Briefing*, p. 176.

⁵⁴ Ibid.

⁵⁵ W. Theodore Vander Wel Testimony, *Seattle Briefing*, p. 177.

⁵⁶ Ibid.

⁵⁷ Ibid.

bitions on the free exercise side.⁵⁸ Ellen Johnson, president of the American Atheists Association, testified that, in fact, the establishment clause still does not prevent religious adherents from harassing people of minority religions and atheists, nor does it prevent them from performing and holding religious rituals in the public schools.⁵⁹ Ms. Johnson stated that the first amendment “has and continues to be ignored in the schools because it can be.”⁶⁰

Efforts by Community Groups

In an attempt to help resolve conflicts, several private sector organizations have initiated programs to educate school officials and religious communities about constitutionally permissible religious activity and instruction. These organizations have also worked to encourage a dialogue between the schools and religious groups.

Among these organizations are BridgeBuilders and the 3Rs Project in California. Wayne L. Jacobsen, president of BridgeBuilders, testified that he consults with educators and parents to help resolve conflicts concerning religion in the schools.⁶¹ Keith Naylor, a consultant for California’s 3Rs Project, testified about his involvement in instructing teachers how to teach about religion.⁶² According to Dr. Naylor, the study of different religions and different religious perspectives is important in a pluralistic society such as the United States.⁶³ The 3Rs Project provides teachers with the academic content necessary to teach about religion in our public school system.⁶⁴ This content must be based on the secular, meaning civil or nonecclesiastical.⁶⁵ Dr. Naylor goes on to point out that “secularization in structural terms does not threaten religion in cultural terms,” but rather our voluntary system of religion is in large part responsible for the vitality of religion.⁶⁶

Also working to resolve school and religion issues is the Comprehensive Health Education Foundation (CHEF), which has begun a partnership project to encourage cooperation and understanding between faith communities and public educators.⁶⁷ Jerry Don Warren, a health education specialist with CHEF, testified that CHEF conducts seminars and workshops for school administrators, principals, curriculum developers, and health teachers in an attempt to establish health education programs that will be supported by educators as well as the faith communities.⁶⁸

Finally, Christopher Meidl, executive director of the Center for Jewish and Christian Values of the International Fellowship of Christians and Jews, testified that his organization has attempted to ensure that the *Joint Statement* is “in the hands of teachers and administrators all across the country.”⁶⁹ The organization’s three-phase program then works on constructing teacher training programs within the school districts, and eventually will implement a teacher training seminar.⁷⁰

Individual Religious Freedom Rights of Public School Students

First Amendment

The first amendment of the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁷¹ The constitutional right of freedom of religion derives from both the establishment clause and the free exercise clause.⁷² The two religion clauses impose different requirements that often “overlap.”⁷³ It is through maintaining a proper balance between the competing concerns addressed by each clause that the first amendment

⁵⁸ Douglas Vande Griend Testimony, *Seattle Briefing*, p. 190.

⁵⁹ Ellen Johnson Testimony, *Seattle Briefing*, p. 192.

⁶⁰ *Ibid.*

⁶¹ Wayne L. Jacobsen Testimony, *Seattle Briefing*, p. 234.

⁶² D. Keith Naylor Testimony, *Seattle Briefing*, p. 236.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, pp. 236–37.

⁶⁵ *Ibid.*, p. 236.

⁶⁶ *Ibid.*

⁶⁷ Jerry Don Warren Testimony, *Seattle Briefing*, pp. 233–34.

⁶⁸ *Ibid.*

⁶⁹ Christopher Meidl Testimony, *Seattle Briefing*, pp. 237–38.

⁷⁰ *Ibid.*, p. 238.

⁷¹ U.S. CONST. Amend. I.

⁷² *See* School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203, 222–23 (1963).

⁷³ *Id.* at 222.

protects religious rights.⁷⁴ Individual students' rights to freedom of religion are implicated in public schools when officials either force students to engage in prayer that offends their religious beliefs, or prohibit students from engaging in individual prayer.

The free exercise clause ensures that the government does not regulate religious beliefs.⁷⁵ The freedom to exercise one's religion has two components: the freedom to believe and the freedom to perform religious acts.⁷⁶ Because the freedom to engage in religious practices is not absolute, the government may impose some burdens on the ability of individuals to practice.⁷⁷ However, the government may not enact policies whose object is to ban certain acts because of the belief they embody, or when they are conducted for religious purposes.⁷⁸ Thus the overriding principle that derives from the free exercise clause is one of accommodation: The government may not unnecessarily curtail religious practices.⁷⁹

The establishment clause serves to prevent the inherently coercive pressure on members of minority religions to conform to an "officially approved religion," when the government supports particular religious beliefs.⁸⁰ It is certainly not to be used to allow the majority to practice its beliefs through the instruments of the State.⁸¹ Thus, under the establishment clause, the government must remain neutral and may not promote one religion over others, religion over nonreligion, or nonreligion over religion.⁸² The principle underlying government action with regards to religion is, therefore, neutrality based on both the free exercise and establishment clauses.⁸³ The government may not engage in discrimination based on religion.⁸⁴

Taken together, the two clauses require that the government maintain a delicate balance between accommodating individual religious beliefs while upholding establishment clause limitations.⁸⁵ The government must further do so without promoting or advancing one belief over others.⁸⁶

Under the protections of the first amendment, students enjoy very broad rights to practice their religion and to act according to their religious beliefs.⁸⁷ Marc D. Stern of the American Jewish Congress testified that situations where students are not allowed to engage in these activities sometimes merely reflect school officials' ignorance of the law.⁸⁸

Though there is case law to protect students, Ronald D. Rissler, legal coordinator of the Rutherford Institute, testified that incidents of discrimination occur and may be traumatic to the students.⁸⁹ Vincent McCarthy, senior regional director of the American Center for Law and Justice (ACLJ) in New York, believes the rules are disregarded.⁹⁰ The ACLJ has represented students who were told that they could write papers on any subject they wanted, except their faiths.⁹¹ He testified that in his experience religious viewpoints are not treated neutrally but rather are considered by educators in this country as superstitious, not worthy of consideration together with other viewpoints, and should be eliminated from the public square.⁹²

Mr. Stern testified that his overriding concern is that many of those incidents may be cleared up by simply placing a phone call explaining the law and the *Joint Statement*, as opposed to initiating a Federal case.⁹³ Mr. Stern emphasized that the rules are often broken on the other side as well, causing damage to stu-

⁷⁴ Cf. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

⁷⁵ See *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 877 (1990).

⁷⁶ *Id.* at 877-78.

⁷⁷ See *id.* at 878.

⁷⁸ *Id.*

⁷⁹ See *id.*

⁸⁰ *Engel v. Vitale*, 370 U.S. 421, 431-32 (1962).

⁸¹ *Schempp*, 374 U.S. at 225-26.

⁸² *Id.* at 216.

⁸³ *Id.* at 222.

⁸⁴ *Id.*

⁸⁵ See *Lee*, 505 U.S. at 588.

⁸⁶ *Id.*

⁸⁷ Meyer Eisenberg Testimony, *National Perspectives Hearing*, p. 75.

⁸⁸ Marc D. Stern Testimony, *National Perspectives Hearing*, p. 66.

⁸⁹ Ronald D. Rissler Testimony, *National Perspectives Hearing*, pp. 64-65.

⁹⁰ Vincent McCarthy Testimony, *New York Hearing*, pp. 109-10.

⁹¹ *Ibid.*, p. 110.

⁹² *Ibid.*

⁹³ Marc D. Stern Testimony, *National Perspectives Hearing*, p. 67.

dents.⁹⁴ He testified that the situations such as the Governor of Alabama pronouncing his exemption from the Supreme Court's rulings and his school system ignoring the law for 35 years, seriously disadvantaged two generations of students.⁹⁵

Further, Meyer Eisenberg, national vice chair of the Anti-Defamation League of B'nai B'rith (ADL), testified that some school districts ignore Supreme Court establishment clause precedent mandating that a school not give its students the impression that it officially endorses a specific religion, or religion in general.⁹⁶ Mr. Eisenberg stressed that support, such as that of the ADL, for separation between church and state is not hostile toward religion.⁹⁷ Rather, the religious freedom granted by the first amendment also includes the right to freedom from religious coercion.⁹⁸

According to Dr. Mohamed A. Nimer, research director with the Council on American-Islamic Relations (CAIR), students who are followers of Islam find it very difficult to exercise their right to pray.⁹⁹ Muslims regard prayer as the most important element of their faith and are obliged to perform certain prayer rituals five times a day, including once at midday when students and teachers are at school.¹⁰⁰ In addition to daily prayer, Muslims who have reached puberty must attend congregational prayer at midday every Friday.¹⁰¹ Sometimes accommodations have been made to allow Muslim students to pray in school, and other times they have been denied.¹⁰² Kevin Hasson, president of the Becket Fund, also described a situation involving a Muslim student who was denied the right to engage in prayer.¹⁰³ According to a 1996 poll of members of the Islamic Society of North America, the majority of respondents favor allowing

prayer in school.¹⁰⁴ However, recognizing the needed sensitivity to the diverse nature of prayer for people of different faiths, they did not choose teacher-led prayer.¹⁰⁵ Dr. Nimer recommended that public schools make arrangements so that Muslim children can pray without having to miss any significant instructional time, leave classrooms unsupervised, or disturb the use of school space.¹⁰⁶

Student Religious Expressive Rights and Third Parties

The situations that are more difficult to resolve are those involving student speakers who assert a right to express themselves concerning their religious views, and other students who assert their right to be free of unwelcome religious persuasion in a public classroom. Marc D. Stern of the American Jewish Congress testified that there is no room for officially sponsored religious speech when there is a captive audience at school.¹⁰⁷ Ronald D. Rissler of the Rutherford Institute believes that students should be allowed to proselytize on their own time, before or after school, or at lunch time, but not during instructional time, when it would be disruptive to the educational process.¹⁰⁸

Distribution of Literature

Generally, students have the right to distribute religious literature to their schoolmates, subject to reasonable time, place, and manner restrictions, other constitutionally acceptable restrictions imposed on the distribution of all nonschool literature, and reasonable school guidelines.¹⁰⁹ At the New York hearing, the Commission heard testimony from students who complained that they had been prevented from distributing religious literature.

Christian and Lindsey Smith, 9 and 12 years old, respectively, testified concerning their experience distributing National Day of Prayer invi-

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Meyer Eisenberg Testimony, *National Perspectives Hearing*, pp. 74-75.

⁹⁷ Ibid., pp. 75-76.

⁹⁸ Ibid., p. 76.

⁹⁹ Mohamed A. Nimer Testimony, *National Perspectives Hearing*, pp. 63-64.

¹⁰⁰ Ibid., p. 63.

¹⁰¹ Ibid.

¹⁰² Ibid., p. 64.

¹⁰³ Kevin Hasson Testimony, *New York Hearing*, p. 128.

¹⁰⁴ Mohamed A. Nimer Testimony, *National Perspectives Hearing*, pp. 63-64.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., p. 64.

¹⁰⁷ Marc D. Stern Testimony, *National Perspectives Hearing*, p. 63.

¹⁰⁸ Ronald D. Rissler Testimony, *National Perspectives Hearing*, p. 74.

¹⁰⁹ Margaret Harrington Testimony, *New York Hearing*, p. 156.

tations to their classmates and their teacher. Christian explained that he distributed the literature before class, while his fellow students were unpacking.¹¹⁰ The next day, the principal said that religious papers could not be distributed and ordered both students to collect them and take them home.¹¹¹

Describing a different incident, William A. Donohue, president of the Catholic League for Religious and Civil Rights, testified that in April of 1997, the art department of a high school in Manhattan authorized the distribution of flyers containing a sexually explicit depiction of the Sacred Heart of Jesus.¹¹² He cited several other incidents involving materials he believed depicted Catholic girls in an offensive manner.¹¹³ The Catholic students complained that their religion was being mocked at school.¹¹⁴

Classroom Activities

Kevin Hasson of the Becket Fund testified that “when public schools systematically eliminate religion from all facets of public school life, they teach children that their religious impulses are unimportant.”¹¹⁵ He cited as an example an instance where a teacher told her students they could bring any book they wanted for the open reading period.¹¹⁶ When one student sought to read from a children’s Bible, the teacher thought the religious story was inappropriate for public school, and did not let the student read it in public.¹¹⁷ Instead, she required him to read it to her in private.¹¹⁸ According to Mr. Hasson, the problem is pervasive, based on an entrenched culture among public servants that says religion causes trouble, and that the best way to avoid trouble is to avoid religion.¹¹⁹

According to Dr. Margaret Harrington of the New York City Board of Education, schools have

a responsibility to ensure an educational environment that balances students’ right to be free from government-sponsored religion with their right to religious expression.¹²⁰ Consequently, teachers must maintain official neutrality toward religious activity and are prohibited from encouraging, discouraging, or participating in religious activities.¹²¹ Meyer Eisenberg of the ADL explained that depending on the grade levels, teachers can teach morality, can teach about religion and the history of religious holidays, but cannot attempt to indoctrinate students or advocate adherence to a particular religion.¹²²

Susan Douglass, principal researcher and writer for the Council on Islamic Education, stated that there is an opportunity over the next generation to practice civic responsibility in the context of discussing religion and history in the classroom, which is a type of mediated forum.¹²³ She testified that proselytizing about the pre-eminence of one’s own faith is born of ignorance of other faiths and traditions.¹²⁴ Dr. Douglass stated that classroom discussions of religion should include a focus on the commonalities shared by the various faiths.¹²⁵ Allowing such conversations will permit students to practice the civic discourse that they will carry out as adults.¹²⁶ According to Dr. Naylor of California’s 3Rs Project, the study of different religions and their perspectives is important in our pluralistic society, but it must be done with an academic content based on the secular.¹²⁷

Concerts

The Commission heard testimony regarding the issues that may arise when school officials open a public forum outside the classroom. At school programs or concerts, students are sometimes authorized to choose and present their own selections. When a student attempts to present a religious message, however, problems

¹¹⁰ Christian Smith Testimony, *New York Hearing*, pp. 139–44.

¹¹¹ Lindsey Smith Testimony, *New York Hearing*, pp. 139–45.

¹¹² William A. Donohue Testimony, *National Perspectives Hearing*, p. 77.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Kevin Hasson Testimony, *New York Hearing*, p. 128

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, pp. 128–29, 131.

¹²⁰ Margaret Harrington Testimony, *New York Hearing*, p. 158.

¹²¹ *Ibid.*

¹²² Meyer Eisenberg Testimony, *National Perspectives Hearing*, p. 81.

¹²³ Susan Douglass Testimony, *New York Hearing*, pp. 126–29.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ D. Keith Naylor, Testimony, *Seattle Briefing*, p. 236.

may arise.¹²⁸ For example, Rebekkah Gordon, a 9-year-old student, testified before the Commission at the New York hearing. She planned to sing a religious song called "Happy Birthday Jesus" for a concert at her school, but the principal told her that she could not sing the song because it was religious.¹²⁹

Meyer Eisenberg of the ADL testified that a significant problem arises when public schools undertake concerts that consist of predominantly christological music.¹³⁰ This is particularly problematic when the students spend a considerable amount of time practicing, and then go on to perform a concert in which a great majority of the songs are of a reverential nature, and a few token non-Christmas songs are included.¹³¹ Mr. Eisenberg compares this situation to the unconstitutional "separate but equal" premise, noting that children must either participate in an activity contrary to their beliefs, or be excluded.¹³²

Holiday Displays

In *Allegheny County v. Greater Pittsburgh ACLU*,¹³³ the Supreme Court upheld the display of a menorah, but found that the display of a nativity scene was a violation of the Constitution.¹³⁴ The crèche, a symbol of the Christian religion, was by itself in the display,¹³⁵ while the menorah, a symbol of a Jewish holiday with both secular and religious dimensions, was accompanied by a banner saluting liberty¹³⁶ and a Christmas tree, a secular symbol of the season.¹³⁷ The Court held that the crèche with a banner reading "Glory to God in the Highest!" standing alone without other symbols to detract from its religious statement,¹³⁸ had "the effect of

endorsing a patently Christian message."¹³⁹ The display of the menorah was permissible because "the combination of the tree and the menorah communicates . . . a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition."¹⁴⁰

The Commission heard testimony at the Washington, D.C., hearing regarding controversies involving holiday displays. William A. Donohue, president of the Catholic League for Religious and Civil Rights, said that many of the complaints he receives concern holiday displays.¹⁴¹ Mr. Donohue testified that menorahs are displayed throughout the schools in New York City during December.¹⁴² He asserts that although celebrations of Hanukkah are usually tolerated, celebrations of Christmas frequently are not.¹⁴³ Meyer Eisenberg of the ADL joked that this would "come as significant news" to many of the people he knows, saying that usually the situation is reversed.¹⁴⁴

Mr. Eisenberg stated that there is no question that a Hanukkah menorah is a religious symbol, just like a crèche is a religious symbol, and the ADL has opposed the erection of both symbols on public school grounds because of the appearance of sponsorship.¹⁴⁵ However, he pointed out that in any situation where there is a question of Hanukkah versus Christmas, or the symbols of one versus the symbols of the other, Hanukkah will lose.¹⁴⁶

Dr. Margaret Harrington of the New York City Board of Education said New York has guidelines addressing the display of religious symbols. She testified that holiday symbols such as the Christmas tree, menorah, and the Star and Crescent may be displayed simultaneously.¹⁴⁷ Such displays must be temporary and

¹²⁸ Ronald D. Rissler Testimony, *National Perspectives Hearing*, p. 65.

¹²⁹ Rebekkah Gordon Testimony, *New York Hearing*, pp. 142-44.

¹³⁰ Meyer Eisenberg Testimony, *National Perspectives Hearing*, p. 79.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ 492 U.S. 573 (1989).

¹³⁴ *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 621 (1989).

¹³⁵ *Id.* at 598.

¹³⁶ *Id.* at 613-14.

¹³⁷ *Id.* at 616.

¹³⁸ *Id.* at 598.

¹³⁹ *Id.* at 601-02.

¹⁴⁰ *Id.* at 617-18.

¹⁴¹ William A. Donohue Testimony, *National Perspectives Hearing*, pp. 76-77.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Meyer Eisenberg Testimony, *National Perspectives Hearing*, p. 78.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, p. 79.

¹⁴⁷ Margaret Harrington Testimony, *New York Hearing*, p. 159.

should not appear to promote or celebrate any single religion or holiday.¹⁴⁸ Dr. Harrington said that the menorah is treated as a secular symbol after a court decision adjudicated the issue.¹⁴⁹

Mohammed A. Nimer of CAIR testified that since Christians are in the majority in this country, Muslims should not ask that schools ignore Christmas or Easter.¹⁵⁰ At the same time, in those schools where the majority of students are Muslim, the two major Muslim holidays need to be recognized by the school administrations.¹⁵¹

Graduation Ceremonies

Conflicts also arise when students seek to offer prayers at their graduation ceremonies. *Lee v. Weisman*,¹⁵² a leading Supreme Court case on graduation prayer, involved a challenge to a religious invocation and benediction offered by a rabbi at a middle school graduation in Rhode Island.¹⁵³ The graduation prayer was struck down based on the degree of government involvement through the actions of school officials, and how this involvement violated the central principles that government may not coerce anyone to either participate in or support religion or its exercise.¹⁵⁴ The Court questioned the legitimacy of producing a prayer to be used in a ceremony that students were obliged, though not required, to attend.¹⁵⁵

Marc D. Stern testified about a graduation prayer case he was working on that was being litigated in the ninth circuit.¹⁵⁶ Mr. Stern believes that if school officials had allowed the prayer, they would have impinged on the rights of audience members not wanting to hear a prayer.¹⁵⁷ His opposition maintained that the

school officials denied students their freedom of speech by refusing to allow them to decide whether they were going to have a prayer at graduation.¹⁵⁸

Kevin Hasson of the Becket Fund believes that if speech is to be free, students should have the right to say whatever they want to, even in a captive audience setting.¹⁵⁹ According to Steven T. McFarland of the Christian Legal Society, students across the country are told they have free speech at the commencement ceremony, unless they broach a religious topic.¹⁶⁰ He contends that students can understand that when a fellow student prays or offers a religious point of view at a commencement ceremony, the student is not doing so with the endorsement of the government.¹⁶¹

Conversely, Meyer Eisenberg of the ADL, pointed out that it is important that students never feel coerced due to a fear of public pressure to participate in a religious program or exercise.¹⁶² He testified that religious discrimination includes such attempts to pressure students, particularly of minority religious groups, into participating in any religious practices, including organized prayer or school-supported religious observances.¹⁶³

Federal Enforcement of Individual Student Religious Freedom Rights

Michelle L. Doyle, the Secretary's liaison to the religious community for the U.S. Department of Education, testified that the Department does not have enforcement powers with regard to religious expression in public schools.¹⁶⁴ Officials at the Department believe that the most effective way to assist schools in protecting the religious freedom of their students is to provide them with clear guidelines about what is allowed under the Constitution.¹⁶⁵ The assistance provided by these guidelines enables local communities to find

¹⁴⁸ Ibid.

¹⁴⁹ Ibid., p. 165. See *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (stating that the menorah is a religious symbol, but "its message is not exclusively religious." Rather it is a symbol of a holiday with religious and secular dimensions).

¹⁵⁰ Mohamed A. Nimer Testimony, *National Perspectives Hearing*, p. 72.

¹⁵¹ Ibid.

¹⁵² 505 U.S. 577 (1992).

¹⁵³ *Lee v. Weisman*, 505 U.S. 577 (1992).

¹⁵⁴ *Id.* at 587.

¹⁵⁵ *Id.* at 589.

¹⁵⁶ Marc D. Stern Testimony, *National Perspectives Hearing*, p. 194.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Kevin Hasson Testimony, *New York Hearing*, p. 134.

¹⁶⁰ Steven T. McFarland Testimony, *National Perspectives Hearing*, p. 34.

¹⁶¹ Ibid.

¹⁶² Meyer Eisenberg Testimony, *National Perspectives Hearing*, p. 75.

¹⁶³ Ibid.

¹⁶⁴ Michelle L. Doyle Testimony, *National Perspectives Hearing*, p. 29.

¹⁶⁵ Ibid.

common ground when questions of religious expression are raised.¹⁶⁶

Steven T. McFarland, director of the Christian Legal Society, recommended that when the Department of Education is unable to persuade a school district to enforce Federal rules concerning religious expression in public schools, it should provide certain mediation opportunities.¹⁶⁷ If the mediation is unsuccessful, the matter should be referred to the Department of Justice for enforcement.¹⁶⁸

Stuart Ishimaru, counsel to the Assistant Attorney General for Civil Rights at the Department of Justice, described the Department's jurisdiction concerning religious discrimination.¹⁶⁹ The Department has jurisdiction to address hate crimes based on religion in schools.¹⁷⁰ Additionally, the Department's Office of Justice Programs has authority to enforce the Omnibus Crime Control and Safe Streets Act¹⁷¹ where it finds reasonable cause to believe that a public school district is engaging in a pattern or practice of discrimination.¹⁷² The Department does not have jurisdiction to enforce title VI of the Civil Rights Act in this context, but it does have jurisdiction to challenge discrimination based on religion in public school employment under title VII of the Civil Rights Act of 1964.¹⁷³

Most of the cases involving religious discrimination that are handled by the Department of Justice are referred to it from the Equal Employment Opportunity Commission.¹⁷⁴ In recent years, the Department has not received any referrals in this area.¹⁷⁵ Title IV of the 1964 Civil

Rights Act now gives the Department of Justice authority to investigate complaints that individuals were denied admission or continued attendance at a public college by reason of religious discrimination.¹⁷⁶ The Department has jurisdiction over written complaints from parents of children in primary or secondary schools alleging that their children were being denied equal protection of the law.¹⁷⁷ The Civil Division of the Department also defends statutes enacted by Congress, including the Equal Access Act, if they come under constitutional challenge.¹⁷⁸

Religious Expression of Teachers

At the Federal level, religious expression of public school teachers is defined by the U.S. Constitution and title VII of the Civil Rights Act of 1964.¹⁷⁹ States may also have provisions in their constitutions or statutes that govern teacher expression within the parameters of Federal law. Similar to the other topics covered by these hearings, the religious expressive rights of teachers are subject to the tension inherent in the first amendment in which religious expression is guaranteed by the free exercise clause and at the same time restricted by the establishment clause.¹⁸⁰

In addition to constitutional guarantees, title VII of the Civil Rights Act of 1964 requires an employer to reasonably accommodate an employee's religious observances, practices, and beliefs, unless the employer can show that an accommodation would cause "undue hardship."¹⁸¹ There is no comprehensive definition of what constitutes an undue hardship, but in one case the Supreme Court held that an employer need not bear more than a de minimis cost to accommodate an employee.¹⁸²

To some extent, teachers' rights of religious expression may be informed by examining the law and policies on religious expression of public employees generally. On August 14, 1997, President Clinton issued the *Guidelines on Religious Exercise and Religious Expression in the Federal*

¹⁶⁶ *Ibid.*, pp. 30-31.

¹⁶⁷ Steven T. McFarland Testimony, *National Perspectives Hearing*, p. 45.

¹⁶⁸ *Ibid.*

¹⁶⁹ Stuart Ishimaru Testimony, *New York Hearing*, p. 168.

¹⁷⁰ *Ibid.*

¹⁷¹ 42 U.S.C. § 3789d(c)(1) (1994): "No person in any State shall on the ground of . . . religion . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under . . . any programs or activity funded in whole or in part with funds made available under this [act]."

¹⁷² Bill Lann Lee, acting assistant attorney general, Civil Rights Division, U.S. Department of Justice, letter to Edward A. Hailes, Jr., deputy general counsel, U.S. Commission on Civil Rights, Aug. 30, 1999.

¹⁷³ Stuart Ishimaru Testimony, *New York Hearing*, p. 168.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*, pp. 168-69.

¹⁷⁷ *Ibid.*, p. 169.

¹⁷⁸ *Ibid.*

¹⁷⁹ 42 U.S.C. § 2000e (1994).

¹⁸⁰ U.S. CONST. Amend. I.

¹⁸¹ *Id.*

¹⁸² *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

Workplace.¹⁸³ These guidelines were based on recent Supreme Court law addressing the issue of public employees' religious rights. The Supreme Court has used a balancing test outlined in *Pickering v. Board of Education*¹⁸⁴ to address these issues. The test weighs the interest of an employee as a citizen, to speak on certain issues, against the interest of the government as an employer, to promote efficient public services through its employees and was applied by the Court in *Lumpkin v. Brown*.¹⁸⁵ The *Lumpkin* Court resolved that a government employee does not leave his or her "First Amendment rights at the door of City Hall," but rather that the employee's first amendment rights may be "trumped by the more important interests of the City" that he or she agreed to serve.¹⁸⁶

In 1986 a Federal court of appeals ruled that a public school could prohibit teachers from holding religious meetings on school premises before the start of the school day.¹⁸⁷ In that case, the teachers held prayer meetings on school facilities before students were allowed in the building.¹⁸⁸ When the principal prohibited the meetings, one of the teachers sued, alleging that the ban violated her free speech rights.¹⁸⁹ The court reasoned that the school was not required to permit meetings on the premises by private citizens during those hours, noting that the plaintiff's status as an employee did not grant her that right.¹⁹⁰ This case was decided on free speech, not religious exercise grounds. Furthermore, the establishment clause was not an overriding concern because students were not aware of the meetings.¹⁹¹

Questions of religious accommodation also arise when teachers wear religious dress or religious symbols. As stated previously, employers

must generally make reasonable accommodations, unless they involve incurring an undue hardship.¹⁹² In the teacher context, a public school must balance the teacher's right of expression with maintaining a neutral learning environment. Some States have simply passed statutes prohibiting public school teachers from wearing religious dress while teaching.¹⁹³ The U.S. Supreme Court has not ruled on the constitutionality of these statutes. Other courts, however, have upheld statutes restricting religious dress.¹⁹⁴

The Commission heard testimony from witnesses with different views as to whether teachers could take sides on religiously contested questions. Barry W. Lynn, executive director, Americans United for Separation of Church and State, thought that whenever teachers interact with students, taking sides on religious questions could create a problematic situation.¹⁹⁵ Students may understand that they will do better if they go along with a teacher's belief, even if they do not agree with the religious sentiments being expressed by the teacher.¹⁹⁶ Meyer Eisenberg of the ADL testified that teachers' rights of free speech are generally limited in the classroom.¹⁹⁷

William A. Donohue of the Catholic League for Religious and Civil Rights testified that if a teacher is trying to proselytize and make the student accept the teacher's religious views, the teacher is acting improperly.¹⁹⁸ However, Mr. Donohue stated that it is not improper for a

¹⁸³ *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*, President William Jefferson Clinton, Aug. 14, 1997 (hereafter cited as *Federal Workplace Guidelines*).

¹⁸⁴ 391 U.S. 563 (1968).

¹⁸⁵ 109 F.3d 1498 (9th Cir. 1997).

¹⁸⁶ *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997).

¹⁸⁷ *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105 (7th Cir. 1986).

¹⁸⁸ *Id.* at 1107.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1110-11.

¹⁹¹ *Id.* at 1110.

¹⁹² 42 U.S.C. § 2000e (1994).

¹⁹³ See Or. Rev. Stat. § 342.650 (1995) (the Oregon statute states that "[n]o teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher"); 24 Pa. Cons. Stat. § 11-1112(a) (1998) (the Pennsylvania Religious Garb Statute states that "no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, set [sic] or denomination").

¹⁹⁴ See *Cooper v. Eugene Sch. Dist. No. 4J*, 723 P.2d 298 (Or. 1986); *United States v. Board of Educ. of Sch. Dist. of Phila.*, 911 F.2d 882 (3d Cir. 1990).

¹⁹⁵ Barry W. Lynn Testimony, *National Perspectives Hearing*, p. 36.

¹⁹⁶ *Ibid.*

¹⁹⁷ Meyer Eisenberg Testimony, *National Perspectives Hearing*, p. 80.

¹⁹⁸ William A. Donohue Testimony, *National Perspectives Hearing*, p. 80.

teacher simply to state that he or she believes it is wrong to steal because he or she is a Christian.¹⁹⁹ Dr. Margaret Harrington, chief executive for school programs at the New York City Board of Education, testified that teachers and administrators are prohibited from encouraging, discouraging, or participating in religious activities with students.²⁰⁰

Charles C. Haynes of the Freedom Forum First Amendment Center testified that students' rights are sometimes abused by public school systems that have ignored the Supreme Court's decisions.²⁰¹ For example, in Alabama, Dr. Haynes found many teachers who did not understand that teachers cannot promote religion while on duty.²⁰² In DeKalb County, Alabama, teachers were leading prayer and devotionals in classrooms and at mandatory assemblies, sending home church announcements with report cards, and allowing distribution of Gideon Bibles.²⁰³

Equal Access

In *Lamb's Chapel v. Center Moriches Union Free School District*, the Supreme Court faced the question of whether a State, in this case New York, may deny a church access to public school premises to exhibit, for public viewing and for religious purposes, a film series dealing with family and child-rearing issues during nonschool hours.²⁰⁴ The Court held that such a ban violated free speech because it discriminated against a particular viewpoint.²⁰⁵ In other words, since the school's facilities were open to other community groups, school officials could not exclude religious organizations' use of the facilities during nonschool hours simply because of the religious messages they intended to convey.²⁰⁶

Steven T. McFarland, director of the Center for Law and Religious Freedom, Christian Legal Society, testified that the New York City School Dis-

trict denies religious exercise to individuals who cannot afford to buy a church in that city because it does not permit its school facilities to be rented or used by groups whose use would entail religious instruction or worship.²⁰⁷ Dr. Margaret Harrington explained that the use of school facilities to outside groups is governed by the New York State Education Law and the Board of Education's Standard Operating Procedure.²⁰⁸ In accordance with board policy and the law, permits for space cannot be granted to outside groups for the use of school facilities for religious worship or religious instruction. According to Joseph P. Infranco, a lawyer with Migliore & Infranco, P.C., school officials in New York, in order to avoid controversy in making school facilities available to religious groups, "either close the forum or . . . exclude all religious speech as a category."²⁰⁹

According to Mark Troobnick, special litigation counsel for the American Center for Law and Justice, New York Education Law, section 414, lists several types of permissible purposes for access to school facilities.²¹⁰ Though this law does not specifically exclude religious groups, some New York trial and appellate courts seem to have interpreted it to that effect.²¹¹ Pursuant to the statute, the New York City Board of Education established a written policy governing the use of school buildings and school grounds under its jurisdiction.²¹² The policy prohibited use of public school facilities by outside organizations or groups to conduct religious services or religious instruction after school.²¹³ The Second Circuit Court of Ap-

¹⁹⁹ Ibid.

²⁰⁰ Margaret Harrington Testimony, *New York Hearing*, p. 158.

²⁰¹ Charles C. Haynes Testimony, *National Perspectives Hearing*, p. 35.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ 508 U.S. 384, 387 (1993).

²⁰⁵ *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993).

²⁰⁶ *Id.* at 394.

²⁰⁷ Steven T. McFarland Testimony, *National Perspectives Hearing*, p. 33.

²⁰⁸ Margaret Harrington Testimony, *New York Hearing*, pp. 159-60.

²⁰⁹ Joseph P. Infranco Testimony, *New York Hearing*, p. 114.

²¹⁰ Mark Troobnick Testimony, *National Perspectives Hearing*, pp. 92, 94; N.Y. Educ. Law § 414 (McKinney 1988 and Supp. 1999).

²¹¹ Mark Troobnick Testimony, *National Perspectives Hearing*, p. 94 ("[T]here's never been a definitive reading of the statute by the Court of Appeals, which is the Supreme Court of New York").

²¹² *Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207, 210 (2d Cir. 1997) *cert. denied*, 118 S. Ct. 1517 (1998).

²¹³ *Id.* at 207 ("However, the use of school premises by outside organizations or groups after school for the purposes of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible").

peals upheld the city's policy in *Bronx Household of Faith v. Community School District No. 10*.²¹⁴

Another religious group tried to challenge section 414's restriction in another case, similarly without success. One of the plaintiffs was the Good News Club, a Christian nondenominational organization that seeks to teach students "moral values . . . from a Christian perspective."²¹⁵ The Reverend Steven Fournier testified that one school refused to allow the students to meet on the school premises because their activities consisted of formal religious instruction in violation of New York State Education Law, section 414.²¹⁶ On October 23, 1998, a Federal court upheld the school prohibition stating that plaintiff Good News Club's proposed use and religious subject matter placed it in a different genre than groups such as the Boy Scouts, Girl Scouts, and the 4-H Club.²¹⁷ Moreover, unlike the film series in *Lamb's Chapel* which dealt with a subject otherwise permissible under the school's policy but from a religious standpoint, the Good News Club is a religious organization whose "proposed use deals specifically with religious subject matter—and not, as plaintiffs contend[ed], merely a religious perspective on secular subject matter."²¹⁸

Mr. Troobnick argued against the prohibition on the use of school facilities for religious instruction, relying on the *Lamb's Chapel* holding. Mr. Troobnick asserted that there is no difference between the film series and what a pastor might say to his congregation during services.²¹⁹ Julie K. Underwood, general counsel of the National School Boards Association, strongly disagreed with Mr. Troobnick's testimony pointing out various important differences, including issues of captive audience, intent, and appearance of State sponsorship.²²⁰ She stated, "To say that

there's no distinction between teaching about religion and proselytizing from a religious perspective, I would be offended."²²¹

Pamela Bethel, president of the New York School Boards Association, said that her association has taken the position that the New York State Education Law does not authorize school districts in New York to permit their buildings to be used for worship and will, therefore, follow the law.²²² According to Jay Warona, attorney for the New York School Boards Association, the association has to enforce this prohibition because it is the law, despite protests from religious organizations.²²³

Equal Access Act

The Equal Access Act requires public schools to permit all student-initiated clubs to meet at a school's facilities, regardless of the religious, political, philosophical, or other content of speech at the club meetings.²²⁴ The act was adopted by Congress in 1984, and its constitutionality was upheld by the U.S. Supreme Court in *Board of Education of Westside Community Schools v. Mergens*.²²⁵

According to Terri Schroeder of the American Civil Liberties Union, it has been difficult to get accurate information as to the number of prayer groups in schools.²²⁶ Marc D. Stern, co-director of the Commission on Law and Social Action of the American Jewish Congress, testified that his group conducted a study with the National Association of School Boards and determined that 80 to 90 percent of the schools that responded to the

²¹⁴ *Id.* at 217.

²¹⁵ Rev. Steve Fournier Testimony, *New York Hearing*, p. 147.

²¹⁶ *Ibid.*

²¹⁷ *Good News Club v. Milford Cent. Sch.*, 21 F. Supp. 2d 147, 161 (N.D.N.Y. 1998). The Good News Club appealed the decision. The U.S. Court of Appeals for the Second Circuit heard oral arguments on June 23, 1999.

²¹⁸ *Id.* at 160 ("There is considerable difference between the formal religious instruction and prayer offered by Good News and a film series which focuses on strengthening family relationships").

²¹⁹ Mark Troobnick Testimony, *National Perspectives Hearing*, p. 90.

²²⁰ Julie K. Underwood Testimony, *National Perspectives Hearing*, p. 91.

²²¹ *Ibid.*

²²² Pamela Bethel Testimony, *New York Hearing*, p. 111.

²²³ Jay Warona Testimony, *New York Hearing*, p. 118.

²²⁴ 20 U.S.C. §§ 4071–4074 (1995 & Supp. 1999) ("It shall be unlawful for any public secondary school . . . which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious . . . or other content of the speech at such meetings").

²²⁵ 496 U.S. 226 (1990).

²²⁶ Terri A. Schroeder Testimony, *National Perspectives Hearing*, p. 93 (However, she also testified that a national youth ministry group that coordinates prayer club activities throughout the country estimated that one in every four schools has a prayer club that is functioning well without problems").

survey had put rules into place to assist in adhering to the Equal Access Act.²²⁷

Despite these efforts, Joseph P. Infranco, a lawyer with Migliore & Infranco, P.C., believes that there are serious and longstanding patterns of abuse and discrimination against religious entities seeking to express their faith in a public forum—particularly with respect to high school Bible clubs.²²⁸ Anna Crespo, an 18-year-old senior at Freeport High School, presented an example. She testified that the school would not allow the picture of her Bible club to be published in the yearbook because the club was not sponsored by the school.²²⁹ Ms. Crespo believed that other clubs that were not sponsored by the school were allowed to appear in the yearbook.²³⁰

Ellen Johnson, president of American Atheists, criticized the manner in which religious clubs operated.²³¹ She called the clubs “satellites for the local churches for proselytizing and recruitment in the schools.”²³² She did not believe these clubs to be clubs in the traditional sense: “rather they often consist of religious rituals, scriptural readings, songs, prayers, and similar activities usually reserved for the church setting.”²³³ Additionally, her organization received reports of “exuberant prayer advocates aggressively pushing their religious faith on other students who disagree or are repulsed by such proselytizing.”²³⁴ In fact, testimony from one student at the hearings suggested as much. Ms. Crespo, whose group was denied yearbook space, argued in response to a question about students who did not believe in Christian principles:

They have the right to do other things in school that are not valuable to this country. How come we don't have the right to talk to other students or to spread our feelings about the word of God or about the Bible? We're not trying to convert people to Christianity. We're just trying to let them know the truth . . . [the truth being that] we believe that Jesus is still the

only way, the truth and the light, and nobody can come to him [God] except by him.²³⁵

Enforcement

The primary enforcement mechanism of the Equal Access Act is a lawsuit in Federal court by students claiming denial of their right to meet by the school.²³⁶ They may ask for an injunction or monetary damages.²³⁷ According to Marc D. Stern of the American Jewish Congress, in the 14 years since the Equal Access Act was passed, there have only been a dozen lawsuits.²³⁸ Considering that the country has more than 15,000 school districts, the small number of lawsuits does not suggest a major problem.²³⁹ However, Ronald D. Rissler of the Rutherford Institute testified that more cases have not been filed because parents do not want to risk retaliation by school officials against their children.²⁴⁰

In terms of Federal enforcement, the act limits the abilities of various government agencies. Section 4071(e) of the act provides that “[n]otwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing shall authorize the United States to deny, or withhold federal financial assistance, to any school.”²⁴¹ Michelle L. Doyle, liaison to the religious community for the U.S. Secretary of Education, says the Department does not have power to enforce the Equal Access Act.²⁴² She said that the act has no provisions, similar to those in title VI, to withhold funds due to noncompliance.²⁴³ Stuart Ishimaru of the U.S. Department of Justice arrived at the same conclusion in his testimony, saying that the Department does not have authority to enforce the Equal Access Act and that the act is

²²⁷ Marc D. Stern Testimony, *National Perspectives Hearing*, p. 62.

²²⁸ Joseph P. Infranco Testimony, *New York Hearing*, p. 108.

²²⁹ Anna Crespo Testimony, *New York Hearing*, p. 140.

²³⁰ *Ibid.*

²³¹ Ellen Johnson Testimony, *Seattle Briefing*, p. 192.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ Anna Crespo Testimony, *New York Hearing*, p. 146.

²³⁶ *Student Coalition for Peace v. Lower Merion Sch.*, 776 F.2d 431, 440–41 (3d Cir. 1985) (holding that a private right of action exists for students to enforce the act's provisions).

²³⁷ *Id.* at 441.

²³⁸ Marc D. Stern Testimony, *National Perspectives Hearing*, p. 62.

²³⁹ *Ibid.*

²⁴⁰ Ronald D. Rissler Testimony, *National Perspectives Hearing*, p. 65.

²⁴¹ 20 U.S.C. § 4071(e) (1995).

²⁴² Michelle L. Doyle Testimony, *National Perspectives Hearing*, pp. 29, 39.

²⁴³ *Ibid.*

enforced through its private right of action provision.²⁴⁴

Proposed Changes

The witnesses testifying at the hearings suggested several changes to the Equal Access Act. Advocates hoped to broaden its application and enforcement. Detractors sought to better define the act.

Younger Children

Some advocates for changes to the act support extending its coverage to younger students. They seek to expand its application from "secondary schools," where it has been applied to high school students (usually 9th through 12th grades), to include "grade school" students (usually 1st through 6th grades) and "middle school" students (usually 7th and 8th grades).²⁴⁵

Julie K. Underwood, general counsel of the National School Boards Association, says there are two practical problems with extending the act to elementary school students: (1) many elementary schools have neither open forums nor student-initiated clubs, and (2) elementary school-children require more supervision.²⁴⁶

Terri Schroeder of the American Civil Liberties Union agreed with Ms. Underwood's comments, since her organization questions the capacity of high school age students to understand the difference between student-initiated and student-sponsored clubs, and to operate independently without requiring the level of supervision that would create an establishment problem.²⁴⁷

However, Mark Troobnick of the American Center for Law and Justice believes the act should be extended to students younger than those in secondary schools because the act already covers middle school students in States that include them in their definition of secondary schools.²⁴⁸ He does believe that a threshold of understanding must be established and that stu-

dents in elementary school cannot start clubs on their own.²⁴⁹

Requirement that Religious Club Officers Profess the Same Beliefs

Religious advocates such as Steven T. McFarland of the Christian Legal Society want an exemption in the Equal Access Act to permit religious clubs to require in their bylaws that a group's leaders and officers profess a belief in the religion for which the group stands.²⁵⁰ According to Mr. McFarland, the first amendment protects religious autonomy, and the "government should therefore not be in a position to dictate to religious groups, whether they are meeting at a public facility or not, who will lead their groups."²⁵¹

Currently, an exemption to provisions of the Civil Rights Act of 1964 exists to permit religious associations to prefer to employ people of their own faith for work connected with religious activity.²⁵² Indeed, the Supreme Court in *Corporation of Presiding Bishop v. Amos*²⁵³ upheld the section 702 exemption allowing religious organizations to ensure that their employees are of the same faith.²⁵⁴ The Court held that it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious message.²⁵⁵

In response to concerns that this preferential leadership requirement would foster disruptive groups, Mr. McFarland responded that the Equal Access Act does not limit a school's authority to prohibit meetings that would "materially and substantially interfere with the orderly conduct of educational activities within the school."²⁵⁶ Mr. Infranco discussed a case in which he was involved as local counsel, *Hsu v. Roslyn Union Free School Dist. No. 3*.²⁵⁷ The court held that the con-

²⁴⁴ Stuart Ishimaru Testimony, *New York Hearing*, p. 168.

²⁴⁵ 20 U.S.C. § 4071(a) (1995).

²⁴⁶ Julie K. Underwood Testimony, *National Perspectives Hearing*, p. 89.

²⁴⁷ Terri A. Schroeder Testimony, *National Perspectives Hearing*, p. 90.

²⁴⁸ Mark Troobnick Testimony, *National Perspectives Hearing*, p. 89.

²⁴⁹ *Ibid.*

²⁵⁰ Steven T. McFarland Testimony, *National Perspectives Hearing*, pp. 33-34.

²⁵¹ *Ibid.*, p. 38.

²⁵² 42 U.S.C. § 2000e-1 (1995).

²⁵³ 483 U.S. 327 (1987).

²⁵⁴ *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

²⁵⁵ *Id.*

²⁵⁶ 20 U.S.C. § 4071(c)(4) (1995).

²⁵⁷ 85 F.3d 839, 857-58 (2d Cir. 1996), *cert. denied* 117 S. Ct. 608 (1997).

stitution of an after-school Christian Bible study club, with membership open to all students, could require the club's officers to be "professed Christians," since their duties required them to lead Christian prayers and devotions.²⁵⁸ However, the court in *Hsu* recognized that the students' Equal Access Act claims did not automatically prevail since, on a constitutional level, the right to expressive association is not absolute and the school may need only show a valid reason for denying the club recognition.²⁵⁹

Barry W. Lynn, executive director of Americans United for Separation of Church and State, suggested that what religious groups really want is a special exemption so they are the only groups permitted to discriminate on the basis of religion.²⁶⁰ "I think that genuine equality would say that they can't discriminate, just like no other club can discriminate," he said.²⁶¹ If they choose to discriminate, he continued, they should not be the beneficiaries of benefits at these universities: "In a public school or a public university, I think they [religious clubs] do not have the right to be bigots in the choosing of their own officers and still receive the benefit of support from that institution."²⁶²

Protection of Atheists

Ellen Johnson, president of the American Atheist Association, said at the Seattle briefing that the U.S. Commission on Civil Rights should suggest a category to prohibit discrimination against atheists, distinct from religion.²⁶³ Ms. Johnson testified that atheism is not a religion either dogmatically or functionally.²⁶⁴ It does not have a doctrine that members have to sign and agree to.²⁶⁵ Atheists do not have a common world

²⁵⁸ *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 857-58 (2d Cir. 1996), cert. denied 117 S. Ct. 608 (1997).

²⁵⁹ *Id.* at 859, 872 ("We do not hold that administrators must allow religious discrimination in the schools. Religious discrimination by student clubs will often be invidious and will rarely fall within our holding. . . . We hold only that, on this record, the Hsus are likely to succeed on that part of their Equal Access claim that relates to the Club's President, Vice-President, and Music Coordinator").

²⁶⁰ Barry W. Lynn Testimony, *National Perspectives Hearing*, p. 37.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ Ellen Johnson Testimony, *Seattle Hearing*, p. 193.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*, p. 200.

view and are simply people who live without a reference to a supreme being.²⁶⁶ Ms. Johnson contended that since there is no category for bias against atheists, members of the group must reluctantly list atheism as a religion to receive legal protection.²⁶⁷

Douglas Vande Griend, director of the Western Center for Law and Religious Freedom, associated with the Christian Legal Society, expressed a different view than Ms. Johnson and stated, in essence, that atheism is a religion.²⁶⁸ He testified that it is his view that everyone, including atheists, has a religious perspective.²⁶⁹ For him, it is a matter of labels and not one of real differences in beliefs: "We call things Scotch tape, but they're really transparent tape. We Xerox things, but it's really a photocopier. And I think when we say religion equals Baptist or Mormon, we get into the name brand thing."²⁷⁰

Curriculum

In general, school boards, not parents, select the curricula for public schools and have broad discretion in the management of school affairs, according to the Supreme Court decisions in *Board of Education v. Pico*.²⁷¹ During his testimony, Charles C. Haynes, senior scholar at the Freedom Forum First Amendment Center, put forth several recommendations that he believed would assist public school boards in adhering to "the promise of the religious liberty principles of the first amendment."²⁷² With respect to curriculum issues, Dr. Haynes stated:

1. State curriculum frameworks and national standards must include significant study of religion across the curriculum.²⁷³
2. Local school districts must offer more electives in religious studies, and religious studies must become a certifiable field so that there will be teachers to teach in this field.²⁷⁴

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*, p. 201.

²⁶⁸ Douglas Vande Griend Testimony, *Seattle Briefing*, p. 199.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Board of Educ. v. Pico*, 457 U.S. 853, 863 (1982).

²⁷² Charles C. Haynes Testimony, *National Perspectives Hearing*, p. 32.

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*

3. Schools of education must do more to prepare teachers and administrators to address religious liberty issues in the school culture and religion in the curriculum.²⁷⁵
4. States must encourage textbook publishers to provide textbooks and other materials that include substantial and accurate treatment of religion.²⁷⁶

Dr. Warren A. Nord, director of the Program in the Humanities and Human Values at the University of North Carolina at Chapel Hill, testified he believed that public school textbooks and curricula discriminate against religion.²⁷⁷ He based his judgment on his reading of the national content standards in education and on a review of 70 widely used high school textbooks.²⁷⁸ Dr. Nord testified that apart from a very few notorious incidents and movements (such as the Holocaust, or Islamic Fundamentalism), religion is “all but invisible” in textbook accounts of the 20th century.²⁷⁹

Dr. Nord testified that the “conventional wisdom” of modern education is that students can learn “everything they need to know about whatever they study, other than history, without learning anything about religion.”²⁸⁰ And even with the study of history, said Dr. Nord, students learn to interpret history and historical causation “in secular terms that drain history of its religious meaning.”²⁸¹ Thus Dr. Nord concluded that “public education nurtures a secular mentality that marginalizes religion, both intellectually and culturally.”²⁸² He testified that he did not believe that educators are intentionally hostile to religion, or that there is a “conspiracy of secular humanists at the root of our problem.”²⁸³ Rather, public education “naïvely” and “uncritically” reflects the “dominant intellectual and cultural temper of our times,” which he believes is secular.²⁸⁴

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Warren A. Nord Testimony, *National Perspectives Hearing*, p. 48.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid., p. 49.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

Finally, Dr. Nord said it is naïve to assume that schools can be neutral toward religion by ignoring it, or by not attacking it overtly. Dr. Nord testified that neutrality requires *inclusion* of religion, stating, “Consider an analogy. We now all recognize that textbooks that ignored women’s history and black literature weren’t neutral in matters of race or gender but were prejudiced. . . . For schools to be truly neutral the study of religion must be integrated into the curriculum.”²⁸⁵

However, for John Naylor, professor and chair of religious studies at Occidental College and a consultant for California’s 3Rs Project, the term “secular” should not be a threatening term since its technical definition is “beyond church control or nonecclesiastical, in other words, civil.”²⁸⁶ Indeed, “secularization certainly does not prohibit religion. And it need not be hostile to religion. Our voluntary system regarding religion is responsible in large part for the vitality of religion here as compared with countries that have established religion.”²⁸⁷ Maintaining nonestablishment of religion and secularization of public institutions promotes civil institutions and ensures the vitality of religious expression.²⁸⁸

The subject of religion and public school curricula is problematic. The competing constitutional issues of free expression and government establishment of religion permits teaching about religions but not proselytization, so a fine line must be constantly walked.²⁸⁹ Elliot Minberg, vice president and general counsel and legal director of People for the American Way Foundation, testified that sometimes in the guise of “teaching about religion,” there are instances in which some school districts “seek to cross the line and promote religion. . . .”²⁹⁰ Mr. Minberg testified:

You can’t properly teach the stories and precepts of the Bible as literal history without teaching and promoting a religious point of view. You can’t treat the Resurrection like it was the Gettysburg Address. It just doesn’t work. And it’s important because to do that is to pro-

²⁸⁵ Ibid.

²⁸⁶ D. Keith Naylor Testimony, *Seattle Briefing*, p. 236.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Elliot M. Minberg Testimony, *National Perspectives Hearing*, p. 51.

²⁹⁰ Ibid., p. 52.

mote religious beliefs and to denigrate the religious beliefs of everybody else.²⁹¹

Mr. Minberg testified that a "history of the Bible" course is "fraught with problems," and it would be better to focus on comparative religion courses for high schools "so that by definition in the course you're not going to talk about just one religion but a series of religions so that [the students] can kind of get different points of view."²⁹² Mr. Minberg testified that while creationism can be talked about in history, comparative religion, and science classes, the courts "have made clear that it isn't appropriate to teach creationism in the same way that one teaches evolution."²⁹³

Finally, Mr. Minberg testified that it is not the "right time" for changes in the laws or the Constitution with respect to schools and religion, "because there [are] serious risks when that occurs."²⁹⁴ Rather, said Mr. Minberg, "Encouraging better education, encouraging all school districts to adopt policies . . . encouraging better training, those are the best things that can be done in the area of schools and religion."²⁹⁵ The Federal Government, according to Mr. Minberg, should play a "kind of bully pulpit role."²⁹⁶

Oliver Thomas, a minister and lawyer who serves as special counsel to the National Council of the Churches of Christ, testified that State legislatures and boards of education should be encouraged to provide training for their teachers and administrators, stating, "Most teachers really want to do the right thing. They're confused about what the right thing is."²⁹⁷ Mr. Thomas elaborated on how a lack of basic training can result in wide variations in the way different school districts treat religion:

I go in school districts where kids are told that they can't put a piece of artwork up on a bulletin board because it has a cross or a Star of David on it. I've been in school districts where children have been told they can't sing a particular religious song because of its religious content. Other school districts you go in and you are in a December concert and you think you are at a local church. It is that diverse.²⁹⁸

Mr. Thomas also suggested that local boards of education be urged to develop policies on how religion will be treated in the curriculum, and that textbook publishers be encouraged "to produce more study about religion in existing courses, such as history and literature, as well as in electives."²⁹⁹

Neutrality

Neutrality involves evenhanded treatment between religious groups, or between religious groups and secularism. In *Everson v. Board of Education*,³⁰⁰ the Supreme Court stated that public schools must be neutral among religions, and not prefer one over the other.³⁰¹ As the United States becomes a more pluralistic society the requirement of neutrality has become increasingly important. Testimony at the Commission hearings revealed a dispute as to whether governments have remained neutral toward religion in complying with constitutional mandates requiring separation of church and state and forbidding government establishment of religion.

According to John Eidsmoe, legal counsel to the National Council on Bible Curriculum in Public Schools, if the government's policy is that secular ideas may be expressed in the public arena, but religious ideas may not, then the government has come down squarely on the side of the secular and against the religious.³⁰² Mr. Eidsmoe argues that such a policy is not neutral toward religion but hostile toward religion.³⁰³

Kevin Hasson, president and general counsel of the Becket Fund, a bipartisan, ecumenical public interest law firm, says public schools literally teach students who they are through the curricula

²⁹¹ Ibid.

²⁹² Ibid., p. 57.

²⁹³ Ibid. The Supreme Court ruled more than 30 years ago that it is unconstitutional to restrict the teaching of evolution. *Epperson v. Arkansas*, 393 U.S. 97 (1968). Moreover, in 1987 the Court held that it is unconstitutional to require educators who teach evolution to also teach creationism. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

²⁹⁴ Ibid., p. 53.

²⁹⁵ Ibid.

²⁹⁶ Ibid., p. 55.

²⁹⁷ Oliver Thomas Testimony, *National Perspectives Hearing*, p. 51.

²⁹⁸ Ibid., p. 55.

²⁹⁹ Ibid., p. 51.

³⁰⁰ 330 U.S. 1 (1947).

³⁰¹ *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

³⁰² John Eidsmoe Testimony, *Seattle Briefing*, p. 206.

³⁰³ Ibid.

and by the behavior of the teachers and administrators. Mr. Hasson believes that when public schools systematically eliminate religion from all facets of public school life, they teach children that their religious impulses are unimportant.³⁰⁴

Jeffrey H. Ballabon, a member of the Board of Directors of Toward Tradition, testified from an orthodox Jewish perspective on the "critical matters facing schools and religion."³⁰⁵ Mr. Ballabon contends that the view that "there is no God" is "inhabiting the secular culture . . . and . . . infiltrating into the way children are being taught."³⁰⁶ Mr. Ballabon concluded that taking the whole idea of God out of the teaching of children is not neutral.³⁰⁷

Barry W. Lynn, executive director of Americans United for Separation of Church and State, says that public schools may teach about religion from an objective and academic perspective, but that does not mean that schools are free to incorporate devotional or proselytizing materials into the curriculum.³⁰⁸ According to Mr. Lynn, the mere fact that public schools do not teach courses from a religious perspective does not mean that schools are antireligious.³⁰⁹ Mr. Lynn "fundamentally" rejected the notion that anything that is not proreligion is necessarily antireligion: "Indeed, schools can and must in our constitutional system be neutral in their curriculum, especially in this religiously diverse culture, because to do otherwise would be to relegate some students to second-class citizenship within their own schools."³¹⁰

Another area of concern is whether the increasing complexity of religious diversity places in jeopardy the possibilities of true neutrality in public education among all different groups that are vying in the public square. Gilbert T. Sewall, director of the American Textbook Council, believes part of the reason school officials have been unwilling to acknowledge religion and its place in

human history, civics, arts, and literature is fear based upon legal considerations.³¹¹

Warren A. Nord of the Program in Humanities and Human Values at University of North Carolina at Chapel Hill argues that history cannot be taught without including some discussion of religion.³¹² The way to improve history and social studies, according to Dr. Nord, is to implement religious traditions and ideas incrementally.³¹³

Fostering Religious and Cultural Diversity

Witnesses discussed the treatment of Christianity and Islam in history standards. John Eidsmoe, legal counsel to the National Council on Bible Curriculum in Public Schools, believes that teaching about Christianity in history is appropriate because "Christianity is based upon certain truth claims and truth claims based upon history."³¹⁴ Susan Douglass of the Council for Islamic Education agreed, in part, that "effective teaching about religion is an essential component of an equitable and educationally sound framework for teaching about the human past."³¹⁵ However, she added that the best way to "foster respect for religious and cultural diversity is to focus on shared human tasks through a comprehensive structure for teaching world history that does not depend on extolling one group as superior to the others."³¹⁶

The Council for Islamic Education, according to Dr. Douglass, is concerned with the conformity of State history/social science standards and testing on the guidelines for teaching about religion.³¹⁷ The council is concerned with which group's history is included, which is thrown out, which heroes and heroines are listed among the required facts, and how much multiculturalism is enough or too much.³¹⁸ As an example, Dr. Douglass noted that at least two States inappropriately mandated instruction of Islam only in relation to Christianity, thus preferring one over the other:

³⁰⁴ Kevin Hasson Testimony, *New York Hearing*, p. 128.

³⁰⁵ Jeffrey H. Ballabon Testimony, *New York Hearing*, p. 125.

³⁰⁶ *Ibid.*, p. 135.

³⁰⁷ *Ibid.*

³⁰⁸ Barry W. Lynn Testimony, *National Perspectives Hearing*, p. 39.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ Gilbert T. Sewall Testimony, *Seattle Briefing*, p. 211.

³¹² Warren A. Nord Testimony, *National Perspectives Hearing*, p. 48.

³¹³ *Ibid.*, p. 53.

³¹⁴ John Eidsmoe Testimony, *Seattle Briefing*, p. 215.

³¹⁵ Susan Douglass Testimony, *New York Hearing*, p. 102.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*, pp. 126–27.

³¹⁸ *Ibid.*

These two States require analysis of Islam in terms of, quote, the conflict between the Muslim world and Christendom, theological differences between Islam and Christianity, cultural differences between Muslims and Christians and religious, political, and economic competition between the two groups. Islam is the only world religion singled out for this restrictive and slanted treatment.³¹⁹

Requiring Muslim students to absorb this skewed point of view and be able to repeat it on tests to attend college and obtain scholarships would be a "clear violation of those students' civil rights," she said.³²⁰

Evolution/Creationism

Warren A. Nord, director of the Program in the Humanities and Human Values at the University of North Carolina at Chapel Hill, testified that "if students are to be liberally educated they should understand what are the different points of view" on the beginning of life.³²¹ According to Dr. Nord, there are many positions, including: (1) Neo-Darwinism, a natural selection acting on random mutation of genes; (2) a kind of creationism based on a literal reading of the first chapter of Genesis; (3) evolution as purposeful and divinely guided; (4) intelligent design theory; (5) eco-feminism; and (6) various kinds of other theological positions.³²²

At the briefing in Seattle there was a spirited debate between advocates of intelligent design and one of the principal defenders of neo-Darwinism. The advocates for intelligent design were Stephen Meyer, director of the Center for Renewal of Science and Culture at the Discovery Institute, and Richard Sybrandy, an attorney who represents a biology teacher who included materials on intelligent design along with materials on evolution in teaching his public school course. Intelligent design advocates argued that natural phenomena are far too complex to have arisen through random patterns of evolution and must be the product of some intelligent design.³²³ Evidence that has come to light since Darwin, such as the fossils of the Cambrian explosion which show all the basic forms of animal life appearing sud-

denly without clear precursors, and the encoded information in DNA, which suggests the prior action of a designing intelligence.³²⁴ Because intelligent design theory does not rely on any particular conception of the designer, and does not require belief in any particular biblical story, intelligent design is put forth as a science and not a religion.³²⁵ Moreover, the "intelligence" which designed life could be a god-figure, creator, alien, or, as Dr. Meyer stated, "I think you can define it by reference to a conscious mind without stipulating identity of the same."³²⁶

Opponents say that any deviation from a strictly neo-Darwinian presentation of origins constitutes an establishment of religion. Eugenie C. Scott, executive director of the National Center for Science Education, testified that the requirement that creation science be taught when evolution is taught, was ruled unconstitutional by the Supreme Court.³²⁷ In *Edwards v. Aguillard*³²⁸ the Court held that Louisiana's creation science law was unconstitutional because it had the purpose of promoting religion.³²⁹ Dr. Scott contends that students who are presented with these alternatives to evolution are receiving bad science.³³⁰ Dr. Scott believed that advocating for intelligent design theory is really a facade for promoting creation science.³³¹

Specific Courses about Religion

John Eidsmoe, general counsel of the National Council on Bible Curriculum, asserted that the best way to present the Bible in an objective manner is to use the Bible itself as the primary text but incorporate many other resources and supplements.³³² Mr. Eidsmoe also explained different ways of understanding the Bible. If the offering of an elective course on the Bible requires a school to give similar courses on other religions, Mr. Eidsmoe said he had no objection to such

³¹⁹ Ibid., p. 127.

³²⁰ Ibid., p. 105.

³²¹ Warren A. Nord Testimony, *National Perspectives Hearing*, p. 53.

³²² Ibid., pp. 53–54.

³²³ Richard Sybrandy Testimony, *Seattle Briefing*, p. 220.

³²⁴ Stephen C. Meyer Testimony, *Seattle Briefing*, pp. 217–18.

³²⁵ Ibid., pp. 217–18, 223.

³²⁶ Ibid., p. 223.

³²⁷ Eugenie C. Scott Testimony, *Seattle Briefing*, p. 218.

³²⁸ 482 U.S. 578 (1987).

³²⁹ *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987).

³³⁰ Eugenie C. Scott Testimony, *Seattle Briefing*, pp. 227–28 ("Maybe intelligent design theory will someday prove to be a valid scientific alternative. I doubt it, and thus far, it isn't").

³³¹ Ibid.

³³² John Eidsmoe Testimony, *Seattle Briefing*, p. 206.

courses being offered, provided they are electives and there is student demand for them.³³³ He pointed out that if the school board refused to offer a course on Buddhism while offering a course on the Bible for the purpose of advancing the Christian religion or Judaism, or as a hostility toward Buddhists, then there could be a valid legal challenge.³³⁴ However, said Mr. Eidsmoe, if the basis for the decision was that the Bible was relevant to Western culture and a course on Buddhism was not, he believes that the school board would be on solid ground.³³⁵

Barry Lynn, executive director of Americans United for Separation of Church and State, criticized course materials on the "Bible as history" produced by groups such as the National Council on Bible Curriculum. He argues that such materials are merely transparent attempts to return religious instruction to the public schools.³³⁶ Elliot Minberg says the whole idea of a history of the Bible is fraught with problems.³³⁷ He argues that it is much better to focus on comparative religion courses for high schools so that, by definition, the students are not going to talk about just one religion.³³⁸ Rather, the students will be introduced to a series of religions, and will thereby be introduced to several different points of view.³³⁹

Opting Out of Class

Some parents have focused their efforts on free exercise challenges urging that objecting students should be exempted from compulsory exposure to materials that offend their religious views. The Supreme Court has yet to rule on whether parents have a right to excuse students from attending specific courses or using specific course materials that the parents find burdensome to their free exercise of religion.

According to Oliver Thomas, special counsel for the National Council of Churches of Christ, "opt out" is an important alternative to try to

accommodate religious concerns.³⁴⁰ Case law does not place many obligations on school districts, but many school districts are trying to accommodate requests for opt outs.³⁴¹

Only lower Federal courts have provided an interpretation of this issue and have come down on the side of the schools. The Sixth Circuit Court of Appeals in *Mozert v. Hawkins County Board of Education*³⁴² held that a public school's use of textbooks containing religiously offensive viewpoints did not compel the students to act according to these viewpoints, and thus did not burden their free exercise rights.³⁴³ Furthermore, only religious beliefs that are fundamental tenets of a believer's religion need to be accommodated. In *Brown v. Hot, Sexy & Safer Productions, Inc.*,³⁴⁴ parents objected to compelled attendance at a sexually explicit AIDS awareness program.³⁴⁵ The court held that the parents failed to state a claim under the free exercise clause because "a one-time compulsory attendance at the [AIDS] Program [did not] threaten [] their entire way of life."³⁴⁶

Mark Troobnick of the American Center for Law and Justice explained that both these cases stand for the proposition that parents do not have the right to opt their children out of religiously offensive materials.³⁴⁷ Vincent McCarthy of the American Center for Law and Justice, doubts this can be resolved outside the legal arena.³⁴⁸ He believes this is a problem because

³³³ Ibid., p. 207.

³³⁴ Ibid., pp. 207-08.

³³⁵ Ibid.

³³⁶ Barry W. Lynn Testimony, *National Perspectives Hearing*, p. 36.

³³⁷ Elliot M. Minberg Testimony, *National Perspectives Hearing*, p. 57.

³³⁸ Ibid.

³³⁹ Ibid.

³⁴⁰ Oliver Thomas Testimony, *National Perspectives Hearing*, p. 50.

³⁴¹ Ibid.

³⁴² 827 F.2d 1058 (6th Cir. 1987).

³⁴³ *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987).

³⁴⁴ 68 F.3d 525 (1st Cir. 1995).

³⁴⁵ *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995). Because of the timing of the lawsuit, the court refused to apply, retroactively, the mandates of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1995). Instead, it applied the Supreme Court's ruling in *Employment Div., Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), which held that a compelling interest test did not apply to free exercise challenges to facially neutral and generally applicable laws unless burdening religion was the object of the law. *Brown*, 68 F.3d at 537.

³⁴⁶ *Brown*, 68 F.3d at 539.

³⁴⁷ Mark Troobnick Testimony, *National Perspectives Hearing*, p. 101.

³⁴⁸ Vincent McCarthy Testimony, *New York Hearing*, p. 120.

parents do not make school board decisions.³⁴⁹ Rather, says McCarthy, school boards oftentimes “defer to a superintendent who has been trained in the theory of sex education that prevails in this country.”³⁵⁰ Mr. McCarthy believes that if a child is introduced to sex education from kindergarten through fourth grade, the child will be “presexualized,” thereby interfering with his or her sexual development.³⁵¹

Julie K. Underwood, legal counsel to the National School Boards Association, said that it is, in fact, appropriate for schools to teach about AIDS if the school board determines that it should be a part of the curriculum.³⁵² In the area of AIDS, says Ms. Underwood, community health is more important than parents’ religious beliefs.³⁵³ Jay Warona of the New York School Boards Association said that in New York they have a commissioner regulation that allows children to opt out of AIDS instruction and receive instruction at home.³⁵⁴ The problem, according to Mr. Warona, is that if a core part of the curriculum is involved, the school would not have authority to grant a diploma at the end of that child’s tenure in school.³⁵⁵

Preparing Teachers

According to Oliver Thomas of the National Council of Churches in Christ, teacher colleges are not providing aspiring teachers with the training needed to confront the difficult and divisive issues of religion.³⁵⁶ According to Warren A. Nord of the Program in Humanities and Human Values at University of North Carolina at Chapel Hill, most educators think it is their job to teach secular ways of thinking.³⁵⁷ When these are the only ways of thinking that are taught,

says Dr. Nord, a de facto secularism is normative.³⁵⁸

Charles C. Haynes of the Freedom Forum First Amendment Center testified that at schools of education, most of the education provided is defined in secular categories.³⁵⁹ Therefore, most teachers and administrators in public schools probably have not had any religious studies.³⁶⁰ According to Dr. Haynes, most administrators know very little, if anything, about the first amendment in the context of religion as compared with speech.³⁶¹ He testified that in order to transform the curriculum, it must be opened to a number of perspectives, including religious ones.³⁶² He says that teacher education which ignores religious perspectives has to change.³⁶³ He contends that this is not a religious argument for changing schools of education or textbooks; rather, “it’s an educational argument” to expose students to the various ways of understanding and thinking about the world.³⁶⁴

Representatives of certain religions spoke about the need to train teachers to be more aware of other religious traditions. William Donohue thinks that there is a positive duty to educate teachers to reject intolerance against Catholics as they do for other groups.³⁶⁵ Susan Douglass of the Council on Islamic Education spoke about how civil rights for students of any religious faith begins with the “education of teachers, administrators and students to build awareness about the diverse religious traditions followed by members of this world community.”³⁶⁶

Dr. Haynes described the 3Rs Project in California, a nonprofit, nonpartisan educational program whose mission includes encouraging cooperation between schools and communities on religious freedom issues. According to Dr. Haynes, the social science curriculum in California was

³⁴⁹ Ibid.

³⁵⁰ Ibid.

³⁵¹ Ibid., p. 121.

³⁵² Julie K. Underwood Testimony, *National Perspectives Hearing*, pp. 98–99.

³⁵³ Ibid.

³⁵⁴ Jay Worona Testimony, *New York Hearing*, p. 118.

³⁵⁵ Ibid.

³⁵⁶ Oliver Thomas Testimony, *National Perspectives Hearing*, p. 51.

³⁵⁷ Warren A. Nord Testimony, *National Perspectives Hearing*, p. 49.

³⁵⁸ Ibid.

³⁵⁹ Charles C. Haynes Testimony, *National Perspectives Hearing*, pp. 38–39.

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Ibid., p. 39.

³⁶⁵ William A. Donohue Testimony, *National Perspectives Hearing*, pp. 80–81.

³⁶⁶ Susan Douglass Testimony, *New York Hearing*, p. 126.

changed to include "more substantive teaching about religion."³⁶⁷ This change led to a demand that teachers be qualified to teach about world religions, including Native American religions, Buddhism, Hinduism, Christianity, Judaism, and Islam.³⁶⁸ The project then linked the local school districts with academics in colleges and universities that specialized in the study of these religions.³⁶⁹ These academics were willing to assist local teachers in undertaking this endeavor.³⁷⁰

Dr. Naylor, professor and chair of the Department of Religious Studies at Occidental College and an advisory board member of the 3Rs Project, testified that "public schools must operate in a pluralistic society, as civil institutions, not ecclesiastical ones."³⁷¹ However, in many subject matters, including geography, history, literature, art, and music, "religious influences and actions" play roles that can be studied.³⁷² Moreover, studying different religions and religious perspectives "is essential in our long-time pluralistic society."³⁷³ The 3Rs Project seeks to assist teachers by giving them academic content and building their confidence in teaching about religion in a constitutionally permissible and educationally sound way.³⁷⁴

Conclusion

The study by the Commission into religious discrimination in the Nation's public schools has brought to light important testimony from witnesses about the significant presence of religious activities and religious diversity in today's public schools. The testimony also showed an appreciable decline in recent years in the number of religious discrimination claims filed against school districts. The Commission was enlightened by testimony that revealed that some school districts continue to burden certain rights because of individual religious beliefs or practices, while other districts persist in violating establishment

prohibitions by promoting certain religious beliefs and practices. The witnesses told of an emerging national consensus on how best to eliminate or resolve conflicts involving religion that may arise in the public schools. It may be possible that the remaining work in finding common ground on these issues can be completed through communication and education rather than litigation.

This summary is not intended to cover the totality of testimony presented in the three Commission proceedings conducted for this project. The transcripts that follow embody an ample supply of facts, concerns, and recommendations about an important area of civil rights law presented by knowledgeable witnesses. The Commission hopes that the publication of these transcripts will increase the awareness of the American people about the best approaches to protecting the right to the free exercise of religion, and ensuring the right to be free from State promotion of religion in the Nation's increasingly diverse public schools.

Editorial Note: President Clinton announced the release of "expanded guidelines" to supplement the *Statement of Principles on Religious Expression in Public Schools* in his Sunday, December 18, 1999, radio address. President Clinton said the expanded guidelines would provide "more practical help for teachers and principals, for parents and students for the whole community."³⁷⁵ The President added that the supplementary guidelines are designed to "help teachers better understand how to teach about religions and help faith-based organizations join the effort to improve public education."³⁷⁶ In a joint effort of the U.S. Department of Education and the Freedom Forum First Amendment Center, the guidelines will be mailed to every public school in the Nation, and to leading faith-based organizations. The packet of new materials includes specific materials for parents, for teachers, and for communities of faith. The full text of all these materials is available through the U.S. Department of Education's Web site (www.ed.gov).

³⁶⁷ Charles C. Haynes Testimony, *National Perspectives Hearing*, p. 43.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ D. Keith Naylor Testimony, *Seattle Briefing*, p. 236.

³⁷² Ibid., pp. 236-37.

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ President William Jefferson Clinton, "Radio Address of the President to the Nation," Dec. 18, 1999. The complete text of the address is attached as appendix B.

³⁷⁶ Ibid.

PROCEEDINGS

Washington, D.C.

May 20, 1998

CHAIRPERSON BERRY. The hearing of the United States Commission on Civil Rights will now come to order. May I please have all the court reporters, clerks, interpreters, and signers come forward, please.

[Whereupon, an oath was administered.]

CHAIRPERSON BERRY. Also, before leaving, could any sign reporter ask if anyone in the audience is in need of interpretation. [No response.] Not at the moment. Thank you very much.

Opening Statement, Mary Frances Berry, Chairperson

CHAIRPERSON BERRY. Good morning and welcome to this public hearing of the Civil Rights Commission. I'm Mary Frances Berry, Chairperson of the Commission. Scheduled testimony will commence shortly and conclude at 6:30 p.m., as indicated on the agenda. I am, in addition to being Chairperson of the Commission, the Geraldine R. Segal Professor of American Social Thought and professor of history and adjunct professor of law at the University of Pennsylvania in Philadelphia.

Joining me today are Commissioners Constance Horner, Robert George, Yvonne Lee, and the Vice Chair of the Commission, Cruz Reynoso. I understand that there may be two Commissioners on the telephone. This is not usual Commission practice, but because of some emergencies these Commissioners are not available here today. Is Commissioner Anderson on the phone? [No response.] Is Commissioner Redenbaugh on the phone? [No response.] He will be on the phone later. All right. We will proceed. I would like to ask the other Commissioners to further introduce themselves. Commissioner Horner.

COMMISSIONER HORNER. Yes. I'm a guest scholar in governmental studies at the Brookings Institution.

CHAIRPERSON BERRY. Commissioner George.

COMMISSIONER GEORGE. Yes. I'm associate professor of politics at Princeton University, where I teach the philosophy of law and constitutional interpretation.

CHAIRPERSON BERRY. Commissioner Lee.

COMMISSIONER LEE. I'm a principal of a consulting firm in San Francisco specializing in Asian community affairs.

CHAIRPERSON BERRY. And the Vice Chair, Cruz Reynoso.

VICE CHAIRPERSON REYNOSO. Yes. I'm professor of law at UCLA School of Law and of counsel with the law firm of Kaye, Scholer, Fierman, Hayes & Handler.

CHAIRPERSON BERRY. And finally, I would like to introduce our Staff Director Ruby Moy, and our deputy general counsel, Edward Hailes, Jr., who is sitting to my left.

Today the Commission is focusing on civil rights issues related to religious discrimination in the public schools. In other words, we're concerned with acts which deprive individuals of rights because of their religious beliefs and practices. We have, as a Commission, responsibility to ensure that the Nation's civil rights laws with respect to schools and religion are being applied and carried out in a nondiscriminatory manner through this investigation. We also seek to determine if further actions are necessary to ensure nondiscrimination. Within the broad area of religious discrimination as it relates to public schools, we will concentrate on curriculum issues, student and teacher rights within the schools, and the right of equal access to school facilities for religious groups.

This is the first of two hearings and one briefing that will address these issues. After today's national perspective proceedings the Commission will examine these issues at a local level during one additional hearing and one briefing.

As required by law, notice of this hearing was published in the *Federal Register* April 21, 1998.

A copy of this notice will be introduced into the hearing record and has been supplied to all persons scheduled to appear here today.

The authority of the Commission to conduct hearings comes from the 1957 legislation which established this independent, bipartisan Federal agency of the government. Among our duties is to appraise the laws and policies of the Federal Government; study and collect information; and to serve as a national clearinghouse for information, all in connection with discrimination or the denial of equal protection of the laws of this Nation because of race, color, religion, sex, age, disability, national origin, or in the administration of justice.

The Commission submits reports containing findings and recommendations for corrective legislative and executive actions to the President and to Congress. To enable us to fulfill our duties, Congress has given the Commission, or a subcommittee thereof, the right to hold hearings and issue subpoenas for the attendance of witnesses and the production of documents.

Consistent with our practice, all witnesses within our jurisdiction have been subpoenaed to attend today's hearings. The Commission has scheduled approximately 15 witnesses. They have been selected because of their knowledge and/or experience with the issues that we are discussing. We will hear from public officials, civil rights and religious advocates, academicians, and other concerned individuals, in addition to the scheduled witnesses. There will be a limited opportunity for testimony during an open session at the end of the day. Members of our General Counsel's Office staff will be available at the appropriate time to assist anyone who is interested in delivering sworn testimony during the open session.

Before we proceed, I want to stress that the Commission on Civil Rights, as the Supreme Court explained, does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders, nor does it indict, punish, or impose legal sanctions. It does not make determinations depriving anyone of life, liberty, or property. In short, the Commission does not and cannot take any action which will affect an individual's legal rights. The Commission takes very seriously, however, its mandate to find facts which may be used subsequently as a basis for legislative or executive

action designed to improve the quality of life for all Americans.

I am certain that my colleagues join with me in the hope that this hearing will lead to open dialogue and will educate the Nation on existing civil rights problems, encourage sensitivity in our continuing effort to resolve these problems, and aid generally in decreasing religious discrimination that may exist in public schools.

First, let me talk about the technical aspects of the hearing. The record will remain open for 30 days for the inclusion of materials or documents. Anyone who desires to submit information relevant to these proceedings may do so during this time period. Second, and most importantly, you may have noticed the presence of Federal marshals in the audience. The Commission's procedures require their attendance at all of our hearings. These marshals have developed security measures that will help to preserve the atmosphere of dignity and decorum in which our proceedings are held. Federal law protects all witnesses before the Commission. It is a crime punishable by a fine of up to \$5,000 and imprisonment of up to 5 years, or both, for interfering with a witness before the Commission. I want to thank you for your attention and indicate that I intend to adhere strictly to all the times set forth in this agenda.

Now, please direct your attention to Vice Chair Reynoso, who will read the statement of the rules for this hearing. Vice Chair.

Statement of the Rules, Cruz Reynoso, Vice Chairperson

VICE CHAIRPERSON REYNOSO. Thank you, Madam Chair. At the outset, I would like to emphasize that the observations which are about to be made concerning the Commission's rules constitute nothing more than brief summaries of significant provisions. The rules themselves should be consulted for a more full understanding. Copies of the rules which govern this hearing may be obtained from a member of the Commission's staff upon request. Scheduled witnesses appearing during the course of this hearing have been supplied a copy. Staff members will also be available to answer any questions that arise during the course of the hearings.

The Commission is empowered by statute to hold hearings and act at such times and places as it deems advisable. The hearing is open to all, and the public is invited and urged to attend. As

Chairperson Berry indicated, all witnesses appearing today within the Commission's jurisdiction have been subpoenaed for the hearing. Everyone who testifies or submits data or evidence is entitled to obtain a copy of the transcript upon payment of costs. In addition, within 60 days after the close of testimony, a person may ask the Commission to correct errors in the transcript of his or her testimony. Such requests will be granted only to make the transcript conform to testimony presented at the hearing.

If the Commission determines that any witness's testimony tends to defame, degrade, or incriminate any person, that person or his or her counsel may submit written questions which, in the discretion of the Commission, may be put to the witness. Such person also has a right to request that witnesses be subpoenaed on his or her request.

All witnesses have the right to submit statements prepared by themselves or others for inclusion in the record, provided they are submitted within the time required by the rules. Any person who has not been subpoenaed may be permitted at the discretion of the Commission to submit a written statement at this public hearing. Any such statements may be reviewed by the members of the Commission and made a part of the record.

The Chair has already advised you that the Federal law protects all witnesses at a Commission hearing. These witnesses are protected by title 18 U.S.C. sections 1505, 1512, and 1513, which make it a crime to threaten, intimidate, or injure witnesses on account of their attendance at government proceedings. The Commission should be immediately informed of any allegations related to possible intimidation of witnesses. I emphasize that we consider this to be a very serious matter, and we will do all in our power to protect witnesses who appear at the hearing.

Finally, I should note that these rules were drafted with the intent of ensuring that Commission hearings be conducted in a fair and impartial manner. In many cases, the Commission has gone significantly beyond congressional requirements in providing safeguards for witnesses and other persons. We have done so in the belief that useful facts are best developed in an atmosphere of calm and objectivity. We trust that such an atmosphere will prevail at this hearing.

Let me stress, however, that with respect to the conduct of every person in this hearing, whether testifying or not, all orders by the Chairperson must be obeyed. Failure by any person to obey an order of Chairperson Berry or the Commissioner presiding in her absence will result in the exclusion of the individual from this hearing room and criminal prosecution by the U.S. Attorney when required.

As previously noted, unless otherwise indicated, each session of this hearing will be open to the public. All are welcome. That's it. Thank you very much, Madam Chair.

CHAIRPERSON BERRY. Thank you very much, Vice Chair. At this time we would like to invite Elaine Coronado as representative of the chairperson of our Washington, D.C., State Advisory Committee to the podium to greet us. Thank you. Please, sit down, Ms. Coronado. As president and chief executive officer for Argus, International, Ms. Coronado coordinates media relations for a large number of Latino organizations. She has been a member of our Commission's State Advisory Committee for the past 2 years. We would like to thank you for joining us this morning, Ms. Coronado. Please, proceed.

**Welcoming Statement of Steven Simms,
Chairperson, District of Columbia Advisory
Committee to the Commission, Presented by
Elaine Coronado**

MS. CORONADO. Good morning. I'm reading this on behalf of Steven Simms, the chairman of the District of Columbia Advisory Committee.

My name is Steven Simms and I chair the District of Columbia Advisory Committee for the United States Commission on Civil Rights. On behalf of the Committee, I welcome the Commissioners and participants in today's proceedings in Washington. Let me first offer my sincere apology for not being able to attend today's event, but I feel fortunate to be represented by my colleague, Elaine Coronado.

I am pleased that the Commission has chosen to hold the first of three hearings in the District of Columbia as it seeks to evaluate the scope of religious freedom and exercise in our nation's public schools. The issue of religion and public schools is an extremely important one for the District of Columbia. The District's increasing demographic complexity has made the District a religiously more diverse place. The demographic changes occurring in our country have brought with them issues concerning the proper role

of religious beliefs and their expression in the public sector, most notably our public schools.

Dissatisfied with traditional educational services, many Americans consider charter and parochial institutions as an alternative. Since the number of parochial institutions cannot serve the entire population, parents and students have looked to public schools to offer similar ideals and beliefs found in religious institutions. In addition, many Americans are willing to allow greater exercise of religious beliefs in public schools in the hope that better learning environments will develop. This effort has culminated in an increased number of student-led religious groups and clubs which conduct activities on schoolgrounds. Coupled with the increasing demographic complexity, this trend further underscores the importance of today's topic.

Many observers believe our nation is at a critical juncture as Americans continue to encounter racial tensions, crime, and other barriers that divide us as a community and we must come together. As many have sought to return core values and greater religious tolerance to the schools, there remains the need to clarify what role, if any, Federal and State agencies play in the exercise of religion in our public schools.

The District of Columbia Advisory Committee is pleased that the Commission has undertaken this project to further the dialogue of the issues, which in turn will provide much needed information to the general public. I again welcome the Commission and guests to this important event and hope that your efforts will be successful and productive.

CHAIRPERSON BERRY. Thank you very much, Ms. Coronado. I'd like to welcome Commissioner Anderson. Commissioner Anderson.

COMMISSIONER ANDERSON. Thank you, Madam Chair.

CHAIRPERSON BERRY. Would you like to say something?

COMMISSIONER ANDERSON. Well, if some of the other Commissioners have, I would like to as well.

CHAIRPERSON BERRY. Could you first introduce yourself? Further introduce yourself.

COMMISSIONER ANDERSON. I am a member of the Commission. I was reappointed in my second term. I am vice president for public policy of the Knights of Columbus.

I want to say how pleased I am that the Commission is holding this hearing—its first on schools and religion. And I would like to take

this opportunity to commend our colleague, Commissioner George, for originating this idea and for his hard work, along with that of our staff, in bringing this hearing to reality. Like so many issues that come before the Commission, the question of schools and religion, and particularly questions surrounding the scope and enforcement of the Equal Access Act, are and should be nonpartisan. An example of this is the excellent *Statement of Principles of Religious Expression in Public Schools* developed by the Administration and sent to all school superintendents by the Department of Education in 1995. I look forward to hearing to what extent the Department has followed up on the statement in order that it be fully implemented, and also from the panelists, what if anything the Commission can do to aid in the effort to assure religious liberty in our nation's schools.

Of course, it is difficult to think about the question of schools and religion without thinking back to the early threshold Supreme Court cases on the matter, and particularly *Pierce v. Society of Sisters* [see 268 U.S. 510 (1925)] in which the State of Oregon had decreed by statute that students could no longer attend private and religious schools. But not so many persons know that the statute at issue in the *Pierce* case was a high priority of the National Americanism Campaign of the Ku Klux Klan during the 1920s to rid America of foreign influence. As it so happened in the *Pierce* case, a Catholic association challenged the statute, but other religious minorities, like Catholics, have been denied by law many rights, including the right to vote, hold property in the early history of our country—laws not unlike those that have been applied to African Americans.

The lesson of history is that all discrimination comes in whole cloth. It has a logic which is consistent and far reaching in its application, and I think it well that we proceed with this hearing today mindful of the history of racial and religious discrimination which, as we have seen in the recent spread of church burnings, has been intertwined in many ways.

With that, I would like to conclude by thanking all the panelists in advance for being here today and apologize for not being able to be present in person. Thank you very much.

Panel 1: Overview—Schools and Region

CHAIRPERSON BERRY. Thank you, Commissioner Anderson. The first panel of our hearing is an overview panel that will discuss generally the three topics of our hearing: curriculum issues—that is, teaching about religion rather than teaching religion; the right of religious expression of students and teachers in public schools; and the right of equal access of religious groups to school facilities. I'd like to ask our deputy general counsel, Mr. Hailes, to call the witnesses who are here today.

MR. HAILES. Thank you, Madam Chair. Ms. Michelle L. Doyle, Mr. Charles C. Haynes, Mr. Barry W. Lynn, and Mr. Steven T. McFarland, please come forward.

CHAIRPERSON BERRY. You need to stand first because I have to swear you in, please.

[Whereupon, an oath was administered.]

CHAIRPERSON BERRY. Ms. Doyle is the Secretary's liaison to the religious community, U.S. Department of Education. Mr. Haynes is senior scholar of the Freedom Forum First Amendment Center. Mr. Lynn, executive director, Americans United for Separation of Church and State. And Mr. McFarland, director, Center for Law and Religious Freedom, Christian Legal Society. Proceed, deputy general counsel.

MR. HAILES. Thank you, again, Madam Chair. I would ask each of our panelists at this time to identify yourself for the record.

CHAIRPERSON BERRY. Oh, they're going to do that. I shouldn't have done that. Sorry.

MR. HAILES. And, if you're accompanied by someone, please identify that person as well. And then we would ask each of you to present an opening statement.

MS. DOYLE. I'm Michelle Doyle. I both direct the Office of Non-Public Education at the U.S. Department of Education and I'm the liaison for Secretary Riley to the religious community. And I'm accompanied by Steve Freed from our Office of General Counsel at the Department.

DR. HAYNES. I'm Charles Haynes and I'm senior scholar at the First Amendment Center, which is a project of the Freedom Forum. And I work around the country with school districts and communities helping them to find common ground on these issues.

MR. LYNN. My name is Barry Lynn. I am executive director for Americans United for Separation of Church and State. I am an ordained

minister in the United Church of Christ and a member of the District of Columbia Bar.

MR. MCFARLAND. Madam Chairwoman, my name is Steve McFarland. I direct the Christian Legal Society's Center for Law and Religious Freedom in Annandale, Virginia. I'm an attorney and I specialize in the practice of religious liberty defense.

VICE CHAIRPERSON REYNOSO. Attorneys have taken over. [Laughter.]

MR. HAILES. Ms. Doyle, will you proceed at this time.

Michelle L. Doyle, Secretary's Liaison to the Religious Community, Department of Education

MS. DOYLE. Yes. Thank you. Madam Chairperson and members of the Commission. I'm pleased to have the opportunity to testify before you today on the principles of religious expression in public schools and the guidelines on this topic. These 1995 guidelines of August, issued by Secretary of Education Richard Riley at the direction of President Clinton and in consultation with Attorney General Janet Reno, provided every school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools.

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 consciences of our students or to convey official endorsement of religion, the public schools also may not discriminate against private religious expression during the school day. With these words, President Clinton set into motion a process by which local communities can work together armed with correct information to find common ground on a very personal and emotional issue, religious expression in public schools.

The U.S. Department of Education does not have enforcement powers or a specific monitoring role in regard to religious expression in public schools, nor does the Department collect statistics on incidents of religious discrimination in schools. Rather, the Department of Education believes that the most effective way to assist schools to protect the religious freedom of their students is to provide them with clear guidelines about what is allowed under the Constitution. The assistance provided by the guidelines en-

ables local communities to find common ground whenever questions of religious expression are raised and hopefully to help them to take this common ground into issues of concern for education.

As President Clinton explained in his address calling for these guidelines, the first amendment imposes two basic and equally important obligations on public school officials and their dealings with religion. First, schools may not discriminate against private religious expression by students, but must instead give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity. At the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity. The purpose in promulgating these guidelines was to end much of the confusion regarding religious expression in public schools that had developed over the last 30 years since the Supreme Court decision in 1962 regarding State-sponsored school prayer and provide a basis for school officials, teachers, parents, and students to work together to find common ground to solve their issues on the local level in a fair, equitable, and respectful manner. These guidelines have been used to assist local communities and help them to work together on this sensitive issue.

I'd like to share with you some examples. Following the issuance of the guidelines, the National School Boards Association [NSBA] wrote to Secretary Riley to tell him that NSBA had evidence that the guidelines had an impact. They write: "In the past 10 years we received numerous inquiries over the Thanksgiving and Christmas holidays on how schools can best handle these events. This year the number of calls has dropped dramatically. We believe this reduction of concern is a result of the help they received through the guidelines."

A recent *Washington Post* article entitled "At Public Schools, Religion Thrives," attributes the rise of religious clubs and other allowable forms of religious expression in public schools to the issuing of the guidelines. Kent Willis, executive director of the American Civil Liberties Union in Virginia, is quoted by the *Post* as saying that while there are still some gray areas, schools and students seem to have a better understanding than they ever had before of when religious expression is allowed on school property and

when it is not. This change in the landscape is attributed to the guidelines.

The St. Louis School Board adopted a new policy that more clearly defines students' rights regarding school prayer and other issues. The policies were adopted as part of a settlement of a suit by a student who claimed he had been disciplined for praying in school. The policy was taken from the guidelines issued by the U.S. Department of Education.

In a case decided last year in the U.S. District Court in Alabama, *Chandler v. James*, as part of the permanent injunction issued by the judge, the school district is required to maintain for circulation in the library of each school a copy of the Department's guidelines, referred to as the Riley Letter, and a copy of the *Joint Statement on Current Law*, a document on which the guidelines were based.

The issuing of these guidelines, however, was not an isolated activity taking place only at a specific point in time. Rather, these guidelines are part of an ongoing relationship between the religious community and education, a relationship that seeks to ensure that religious organizations, a strong voice in every local community, can be equal partners in ensuring that every child in America receives the best possible education. Many religious communities have taken a proactive approach because of the clarity provided by the guidelines. The United Methodist Church has been one of the most active, providing reading tutors, establishing their own summer reading programs, and partnering to support local reading improvement efforts. The Presbyterian Church, U.S.A., has declared 1998 the Year of Education, and the Progressive National Baptist Committee works with its ministers every year to adopt local schools.

One of the best examples of the effects of bringing religious and education leaders together to address local education issues took place in St. Petersburg, Florida. This was the site of Secretary Riley's third Religion and Education Summit. This community had been torn apart by racial unrest and was seeking a way to open the dialogue between diverse groups, and they chose education for that. As a result of the summit, faith community leaders are providing significant volunteer help throughout St. Petersburg. The school system is working with the University of Florida to find alternatives to suspension and expulsion, and the ministers of the

faith community there are working together to help parents be more involved in their children's education.

We believe that these guidelines have helped to clear up much of the confusion regarding school prayer and helped create an atmosphere that protects the religious freedom of the student to be able both to express their own personal religious beliefs as well as to be free from coercion. We find that the ability to work together and find common ground on the issue of religious expression in public schools has improved the right of students greatly. And, thank you.

MR. HAILES. Thank you very much. Mr. Haynes.

**Charles C. Haynes, Senior Scholar,
the Freedom Forum First Amendment Center**

DR. HAYNES. Well, I want to thank you for holding this hearing and for the invitation to testify about some of the most challenging and significant issues confronting our schools and our nation. For the millions of Americans deeply concerned about the future of public education, your inquiry could not be more timely or important.

Let's say that for too much of our history extremes have dominated this debate. On the one end of the spectrum are those who advocate what might be called the "sacred public school," where one religion—theirs—is preferred in school practices and policies. This was characteristic of the early history of public schools, and this approach still survives in some parts of our nation. In more recent decades, some on the other end of the spectrum have pushed for what might be called "naked public school," where religion is kept out in the name of a mistaken reading of the first amendment. This view is responsible, in my opinion, for the confusion among some educators about the religious liberty rights of students and the silence about religion in much of the curriculum.

Both of these models are unjust and, I would argue, unconstitutional. But the good news is that there is a third model and one that has growing support from across the religious and political spectrum. I call it the "civil public school," where religious liberty rights of students of all faiths or none are fully protected and school officials remain neutral concerning religion. This vision of religious liberty in schools has been articulated in a number of documents, in-

cluding a statement of principles entitled *Religious Liberty: Public Education and the Future of American Democracy*. It was first released in 1995, and it's now endorsed by 24 educational and religious groups. And principle four of that document says this:

Public schools may not inculcate nor inhibit religion. They must be places where religion and religious conviction are treated with fairness and respect. Public schools uphold the first amendment when they protect the religious liberty rights of students of all faiths or none, and schools demonstrate fairness when they ensure that the curriculum includes study about religion, where appropriate, as an important part of a complete education.

The challenge, of course, is to translate this vision of what I call a "civil public school" into actual policies and practices that change the school culture in local school districts. And over the past 5 years, the First Amendment Center has attempted to do just that. We have assisted hundreds of communities from New York to California, helping them to move beyond the battleground of culture wars to the common ground provided by the first amendment. In recent years, these efforts have been greatly aided by the legal consensus about the religious liberty rights of students, especially as reflected in the guidelines that President Clinton sent to all school superintendents. From Salisbury, Maryland, to Ramona, California, we have seen remarkable change. New policies protecting religious expression have rebuilt trust with many religious parents who have long viewed public schools as hostile to their faith. Inservice training has helped thousands of teachers to teach about religion in ways that are constitutionally permissible and educationally sound. We have discovered that where the first amendment is tried, it works.

In spite of the significant progress we have seen in recent years, many communities remain bitterly divided over religion in the schools. Many school boards are still without policies concerning religion, and much of the curriculum treats religion superficially, if at all. Clearly, we still have some distance to go and much work to do if we are to ensure that religious liberty and religion are taken seriously in every public school.

To that end, I recommend the following: One, that every school district must develop a comprehensive religious liberty policy that reflects the current legal consensus and provides a shared vision of religious liberty widely agreed to by the community. Two, that schools of education as well as local school districts must commit themselves to staff development so that all administrators and teachers understand and apply first amendment principles in ways that guard the religious liberty rights of every student and parent. Three, State curriculum frameworks and national standards must include significant study of religion across the curriculum. Four, local school districts must offer more electives in religious studies, and religious studies must become a certifiable field so that there will be teachers to teach them. Five, schools of education must do more to prepare teachers and administrators to address religious liberty issues in the school culture and religion in the curriculum. And finally, six, States must encourage textbook publishers to provide textbooks and other materials that include substantial and accurate treatment of religion.

At the heart of these recommendations is the urgent need for public education to live up to the promise of the religious liberty principles of the first amendment. I strongly urge this Commission to speak out clearly and forcefully about the appropriate constitutional and educational role of religion in the public schools. By so doing you will help Americans to reforge a common vision for the common good in public education and in our nation. Thank you very much.

CHAIRPERSON BERRY. Thank you, Mr. Haynes.
MR. HAILES. Mr. Lynn.

Barry W. Lynn, Executive Director, Americans United for Separation of Church and State

MR. LYNN. Thank you. And there really is a great deal of good news to report. There is a positively dizzying level of religious freedom in our country, and American public schools are certainly not religion-free zones. The rules that govern religious expression in schools were not thrown together randomly, but they do reflect a very careful deliberation by our highest courts with an eye toward protecting the rights of all students, especially those in the minority who might otherwise be forced to bow to the wishes of a majority faith in their community. Despite the heated rhetoric of some politicians and of some

far-right political operatives, there are countless concrete examples on a daily basis of religious expression in America's public schools. Students pray silently and read their Bibles at lunch. Religious images and ideas are incorporated in school assignments. T-shirts promoting religious messages are worn, and religious clubs are meeting before and after school in an estimated 25 percent of America's public high schools.

The clearest answer as to why so much religious activity is occurring is that the Supreme Court of the United States never outlawed anything except school-sponsored or school-promoted religious activity. While some advocacy and special interest groups have claimed hostility toward individual religious expression, official records actually expose most such complaints as examples of either properly instituted teacher discretion, which we do want to maintain in America's schools, or readily resolved misunderstandings which require telephone calls, conversations between reasonable people, not thoughts about amending the United States Constitution. A Supreme Court decision in 1989 upheld the constitutionality of the Equal Access Act, and where implemented as intended, we have found few problems with it. However, courts do seem to be willing to uphold special treatment for religious clubs which might not be accorded other kinds of student activities, and this is beginning to become a troublesome problem in a few parts of the country.

Bluntly, the real problem is not that religious students are prevented from being faithful witnesses while they are attending school. The problem is that some students and some special interest groups want religious officials to promote, enhance, or in a sense bless such religious conduct. Schools are constantly being pressured to provide so-called equal treatment for creationism or to adopt books and curriculum that are slanted toward a Christian worldview.

We at Americans United hear regularly of instances where school administrators allow evangelists or youth pastors to hold assemblies or approach unsuspecting students in the hallways and lunch rooms or where teachers seek to proselytize their students through reading assignments, class discussion, or even choral music. Most times parents and students decline to file complaints or go to court, preferring to leave well enough alone.

But some of the violations that took place in the DeKalb County, Alabama, public schools, and where we did file a lawsuit, illustrate what is going on in too many places. This is the case that was previously referred to, *Chandler v. James*. What we found in this case: teacher-led and student-assigned prayer and devotionals in the classroom; evangelistic rallies, as well as teacher and student prayers and devotional readings at mandatory assemblies; teachers sending home church announcements with report cards; classroom and school bus Bible distribution by the Gideons. A Federal judge, Judge Dement, found all of these activities had occurred and has in fact asked them to be enjoined. This is the same case that's now being criticized by some in Congress as being antireligious and in which the Governor of Alabama has called for massive resistance, echoing, I think, the sentiments of another Governor of Alabama on an issue, not of religion, but of race some decades ago.

Throughout the country, people who believe that the end justifies any means seek to mislead school administrators and manipulate the law to their advantage. And that's why the Equal Access Act should be so strictly followed. The act incorporates important safeguards to ensure that students, not outsiders, control the clubs and that school officials do not influence or participate in religious activities. Because of the immaturity and greater susceptibility to teacher and peer pressure of younger students, it would be inappropriate, although some have suggested this, to extend the Equal Access Act to elementary schools. An additional safeguard is the prohibition on religious activities by teachers and school administrators. In fact, that provision served as a predicate for the Supreme Court upholding the act. This prohibition on religious activity of teachers in the presence of their students does not in any way infringe on the religious rights of teachers, because whenever teachers are in the classroom or at school events, they are present as representatives of the school and their actions are representative of school policy.

Finally, with respect to the role of religion and public school curricula, the Supreme Court has held that schools may teach about religion from an objective and academic perspective, but that exception does not mean that schools are free to incorporate devotional or proselytizing materials into the curriculum. Bogus course ma-

terials on the Bible as history put out by groups such as the National Council on Bible Curriculum are merely transparent attempts to return religious instruction to the public schools. The mere fact that public schools do not teach courses from a religious perspective does not mean that schools are antireligious. I fundamentally reject the medieval mindset that says that anything that is not proreligious is antireligious. Indeed, schools can and must in our constitutional system be neutral in their curriculum, especially in this religiously diverse culture. Because to do otherwise would be to relegate some students to second-class citizenship within their own schools. Thank you very much.

CHAIRPERSON BERRY. Mr. McFarland.

Steven McFarland, Director, Center for Law and Religious Freedom, Christian Legal Society

MR. MCFARLAND. Thank you on behalf of the 4,000 member attorneys and law students of the Christian Legal Society for the opportunity to address this important topic. Much is healthy about religious liberty in our country but there are certainly some areas—and I'd like to suggest six for this Commission's consideration regarding areas of discrimination against religious expression in our public schools. Before doing so, I just want to thank also the Commission in its invitations. This is an outstanding series of panels, and I don't believe that you could find anyone who has done—any three individuals who have done more to promote religious liberty than Charles Haynes and Oliver Thomas and Marc Stern, who you'll hear from this afternoon. And that's not to take anything away from anyone else. Most of these folks are friends, and I greatly respect their perspectives.

The first area that I would encourage this Commission to take a look at is the weekend use of school facilities. That is, where school facilities are available to be rented or used by community groups except if they have a religious content, except if they will engage in religious instruction or worship. The New York City School District is an example, a very painful example of that, insofar as it denies religious exercise to more than—literally hundreds of thousands of individuals in that city who cannot afford to buy a church in that city.

Second, would commend to this Commission the issue of denying student organizations equal access to public and private university campuses

because they have religious qualifications for leadership. In other words, the selection of student leaders by religious student organizations, I believe, certainly should permit those organizations to require that their leaders share the same faith. The Jewish Law Students Association should be able to require that their leader be a Jew, and similarly, the Christian Legal Society chapter should be allowed to have a profession of faith requirement for its leaders. Unfortunately, it is not allowed to do so in many, many campuses.

Third, the issue of discrimination against low-income parents and students because they wish to educate their children from a religious worldview. We're talking here about vouchers and other tuition benefits. The government certainly does not have to subsidize private education. But if it does, if it chooses to do so, it may not discriminate against individuals because their choice of school has a religious worldview. And the government is singularly incompetent to draw lines between pervasively sectarian or nominally sectarian. The most neutral stance that the government can take is simply to make religiosity or the lack thereof irrelevant to the qualification of the school for these benefits. The parent, after all, is making the choice.

Fourth, we would commend this Commission's attention to the issue of discrimination against teacher equal access. The Equal Access Act has been a bright spot in the landscape of religious liberty, but ironically the teachers, outside of classroom time, outside of duty time, in many cases are not allowed to gather for private personal prayer, devotions, or mutual encouragement if it has obviously a religious content. They can gather before school in an empty classroom for union activities, for any number of secular activities. But if the topic turns to religion, they're told no.

Fifth, is the area of religious excusal, or opt outs. While much progress has been made, I strongly support Charles Haynes' suggestion that every school district should have a religion policy that includes opt outs, the right of parents to choose to excuse their child from objectionable curriculum.

And sixth, the issue of student religious speech at graduation ceremonies. Our students across the country are being given the wrong civics lesson; and that is that they have an open microphone, they have free speech at the com-

mencement ceremony unless they broach a particular topic. Certainly if these individuals graduating into adult society understand that every idea that the government permits is not endorsed by the government, certainly they can understand that when a fellow student prays or offers a religious point of view in a commencement ceremony that they are not doing so with the imprimatur of the government.

In these six areas—facility use, selection of student leaders, nondiscriminatory vouchers, discrimination against teacher equal access, opt out, and student religious speech at their own graduations, we believe there are still serious problems and room for growth. Thank you very much.

Discussion

MR. HAILES. Thank you. I would like to begin my questions with Ms. Doyle. In conducting interviews, our staff learned that certain groups believe that the guidelines were not sufficiently distributed to all of the stakeholders. How do you respond to that criticism?

MS. DOYLE. Let me tell you how the guidelines were distributed. First of all—well, the guidelines themselves contain a cover letter, and that is one unit. So you have the explanatory cover letter from Secretary Riley, immediately followed by the guidelines. That document was initially sent to every superintendent in the country, every State superintendent of public instruction, to a list of approximately 300 to 400—I can't quite remember how long that list is. It's about 300 or 400 religious leaders around the country, to ensure that they had that information. There was also an article that we immediately published in the Department's *Community Update* newsletter, which has a circulation of 250,000, making known the gist of the guidelines, the availability of them, and the toll-free number by which they could obtain those. We also did quite a bit of press on that. And to this day we are still getting requests for the guidelines through our Information Resources Center. So we do know that there is information out there about the guidelines.

I think the second thing I would add to that, and certainly this really goes to Charles, but I think the Department worked very cooperatively in the publication of a really excellent *Parent's Guide to Religion in the Public Schools* that the Freedom Forum and National PTA published.

And I believe their latest numbers on that are about 250,000 [in] distribution. And we've also made known to the people we work with, whether it's education organizations, religious leaders, community organizations, about the availability of that parent's guide, which is really a summary of about 10 points within the guidelines for religious expression, and written really from a parent's point of view. So we do feel that we have certainly tried to get the information out. We continue to try to keep it in public consciousness. We know we got it to leadership and we've certainly tried, like the *Community Update* newsletter and working with other organizations, to make that known.

The third thing I think I would say is that what we have encouraged, and we have evidence that it's actually been done at least by some organizations, is we've worked with many of the national leaders of religious organizations and we have asked them to help us to get the guidelines out. I know, for example, the United Methodist Church has published something that's been to every church in the country. The Progressive National Baptist Convention has done a lot. The Presbyterian Church, U.S.A., the American Friends of Lubovich have published this everywhere, the Church of Jesus Christ of the Latter-day Saints. I mean, those are just some of the organizations we've worked with that are publishing either the guidelines or a synopsis of them and the existence of those. And that's another avenue we've really tried, is to work specifically with religious leaders so that they can get those into the parents' hands and families, get the information to families.

MR. HAILES. Thank you very much. Mr. Haynes, in conducting your work in different school districts, what do you find to be the greatest misunderstanding among school officials, parents, religious leaders, with regard to student expression in public schools?

DR. HAYNES. It would be difficult to identify the greatest because the misunderstanding I think is general. In some places it moves in one direction, the examples Barry might give. We just came back from inservice training in DeKalb County, Alabama. The court ordered inservice training. And we found in DeKalb County that a great many teachers have a misunderstanding on one side. That is to say, they didn't understand that the coach could not lead the team in prayer and so forth. They didn't understand that

the teacher couldn't in other ways promote religion while on duty as a teacher.

But in many other places in the country I think the misunderstanding is more on the other side, particularly in large urban school districts. We work a lot in Los Angeles and places like that where many administrators have never heard of the Equal Access Act or they have some vague notion of it. And Mr. Thomas and I might ask a roomful of hundreds of administrators, "What do you think it is?" and three or four hands will go up. So there's a great deal of ignorance. And this leads to a misapplication of the law and the first amendment. They don't understand—you know, Barry said kids pray silently, but actually kids can pray out loud if they want to say grace together before lunch and so forth. A lot of administrators have no idea what those boundaries are. They have no idea how to implement equal access because their school districts don't have policies on distribution of religious literature. So if kids come to school with tracts, they don't know whether the kid can give them out or not.

Kids say something in a classroom—we still get lots of teachers who will say to us, "Can Sally say that she has this religious belief in a class discussion?" Of course, Sally can if it's appropriate to the discussion. But you would be amazed at how many teachers simply are unsure whether God can even be mentioned, not by the teacher, much less by the students, but by the student. So it would be hard to pick out. I think the general kind of confusion and vagueness in spite of the good efforts in recent years—and I think the guidelines have made an impact. Unfortunately, the shelf life of superintendents in this country is about 2½ years, so the turnover is great. And superintendents around the country have never heard of the guidelines, so we have to start all over again almost every year in some districts.

So I guess I'm saying that the level of misunderstanding and ignorance is still very high except in those school districts where we really get in there and work with folks. And then people understand the groundrules and are able to live by them.

MR. HAILES. Thank you very much. In that connection, Mr. Lynn, provide us with a practical definition of a captive audience. What is a captive audience, definitionally, that would help us determine when and when you cannot provide

the type of freedom from harassment or coercion due to student expression?

MR. LYNN. I think that whenever you have an official school event—that is to say a school assembly or the kind of event so closely connected to the life of that school, as an athletic event—that one should consider the students who are there to be an essentially captive audience. They're captive in this sense. They do have one out. They can simply leave and not participate in their own graduation or not participate in watching that part of the athletic event. But I don't think that's the kind of choice that we should force onto America's public school students.

There's no doubt that before graduation students who have religious convictions can get together at a baccalaureate sponsored by a local church. Americans United has chapters around the country, and some of our chapters actually go out before graduation and try to find churches in the proximity of the school who will be willing to sponsor these kinds of activities so that the religious aspect of graduation occurs at a separate event unconnected to that 45 minute or hour and a half event called graduation.

I think that whenever you have teachers participating in any event with their students or people who might be their students, you create a dangerous situation, a situation where students will get the impression that they will do better if they go along, even if they don't agree with the religious sentiments being expressed by the teacher or other school official or person perceived as a person in power.

I think we'd like to find a way to draw as clear a set of distinctions as possible between [student-initiated activity that creates] an atmosphere of extreme difficulty to get out of the situation, and those that are genuinely student initiated and noncoercive. I think that when a student simply observes others praying around the flagpole—that occurs in my son's junior high school out in Virginia every Friday. I don't consider him to be part of a captive audience. He doesn't participate, but he also is able to ignore it. I think that reasonable people can draw guidelines, do what the Equal Access Act intended and have these meetings before and after school. As Charles correctly points out, students can even vocally pray. But they can't force their ideas onto unwilling and unsuspecting other students. At some point that becomes harass-

ment, as deeply offensive as sexual harassment would be.

So I think that people of good faith, with or without the guidance of the people on this panel, are able to work out many of these issues. But there still, I would say, are more schools who push the envelope in the direction of encouraging students to be religious whether they want to or not than there are schools that are trying to engage in some warfare against Christian students or religious students in general.

MR. HAILES. Mr. McFarland, I have one question for you—and then I basically need a response, Mr. Lynn, from you to the response he may give—regarding the issue of student leadership of religious clubs. You talked about that in your testimony. Will you expound upon that at this time?

MR. MCFARLAND. Yes, I have a number of examples. Our firm represented a campus organization last year called Rejoice in Jesus Campus Fellowship. It's a national, primarily African American ministry on some 20-some odd campuses across the country. At Georgia Tech, Georgia Institute for Technology, they were repeatedly refused permission to be recognized as a charter organization. And a charter simply means that they are allowed to meet on campus or allowed access to facilities or allowed to talk with students in the quad or allowed to apply for student activities funds to which they contribute, treated equally with other student organizations. They were told no. And there was one reason: because they required that those who select their members and that those who serve as their student officers subscribe to a statement of Christian faith. That was the sole reason why they were denied charter status. It required thousands of dollars. If we charged for our time, it required many hours of our time and a formal attorney general's opinion from the State of Georgia after almost a year of prelitigation effort before we could finally convince the undergraduate and graduate senates. The university did nothing to intervene. They gave complete deference to the student legislature. Finally, by a 51 to 50—a split vote in the undergraduate legislature last—I believe it was December, Rejoice in Jesus was allowed to actually have and enjoy the same amenities that any other student organization would enjoy.

Christian Legal Society has chapters at some 85 law schools across the country. And repeat-

edly—I could name half a dozen or a dozen campuses, private and public, where we are not allowed to meet or not allowed to enjoy the full measure of treatment that any other student organization is allowed. In some cases, for example, at Harvard and Yale, they denied us the privilege, even after inviting us to interview on campus on the day for pro bono organizations, nonprofit organizations. We were invited to interview for summer internships. When we were honest enough to disclose that we could not subscribe and enjoy the title VII exemption from having to subscribe to a religious nondiscrimination clause that they had imposed, they said, “Then you’re not coming on campus.” And to this day we are not allowed to recruit at Yale Law School, a rather important place to try to reach students. University of Dayton, University of Illinois, Arizona, University of Washington—I represented Campus Crusade for Christ for almost a year, working with the attorney general’s office of the State of Washington when the same bigotry was applied to that organization, the largest organization at the time, the largest organization at the University of Washington campus. And they were told that they must get off campus if they were going to require that those who lead their Bible studies be members of the Christian faith, as they understood that to be.

One would think that that’s self-evident that a Christian group should be able to be led by Christians, but it wasn’t self-evident until, again, hundreds of hours of legal advocacy. Fortunately, we did not have to file suit, though we were on the verge. California State University at Monterrey Bay, Intervarsity Christian Fellowship, was also told to take a hike. Eastern Michigan University, about 4 or 5 years ago—I had to meet with the president of the university before he would reverse that—it may have been Central Michigan, I can’t recall—before they reversed their policy. This is an endemic problem of discrimination solely on the basis of the religious qualifications for leadership in a private student organization meeting in a public facility.

MR. HAILES. Mr. Lynn, do you have a view on that question?

MR. LYNN. Yes. I think this is not the world’s easiest question to answer, but I also think there’s a very fundamental difference of opinion between Steve McFarland and myself about the definition of bigotry and discrimination. In the

case, for example, at Georgia Tech, the Rejoice in Jesus group, Mr. McFarland and his associates said these people were not being treated equally. In fact, they were being treated equally. They were being told that they had no greater right to discriminate than anyone else on the campus.

I think what has happened is that religious groups are now being granted a special exemption where they are the only groups permitted to discriminate, at least on the basis—so far only of religion, I believe, when it comes to conducting themselves in these public facilities, including public universities and colleges. I think that genuine equality would say that they can’t discriminate, just like no other club can discriminate. If they choose to discriminate, then they don’t become the beneficiaries of the benefits at these universities. I don’t consider it bigotry to say to a group that will not allow certain people to be leaders—perhaps even members somewhere down the road. That strikes me as an act of a certain kind of discrimination. I don’t think that State officials have to give in to this discrimination and give special privileges to student religious groups.

The same issue is arising, and I think the Commission should know this, in high schools—where the claim is also made that student religious groups—although no other groups but religious groups should be able to select officers on the basis of their religious background. I think people in their private lives have the right to associate with whom they choose. In a public school or a public university, I think they do not have the right to be bigots in the choosing of their own officers and still receive the benefit of support from that institution.

MR. MCFARLAND. Mr. Hailes, would it be possible, or do you prefer not to have another answer?

CHAIRPERSON BERRY. You will have other opportunities to answer. Are you finished with your questioning?

MR. HAILES. Yes, I am.

CHAIRPERSON BERRY. Let me invite the Commissioners to question the witnesses first. Does any Commissioner have any question for any witness?

COMMISSIONER HORNER. Yes, I have several. Mr. McFarland, I’d first like to ask you to respond to Mr. Lynn.

MR. MCFARLAND. Well, as this Commission well knows, title VII of the ‘64 Civil Rights Act

explicitly contains several "special exemptions" that evidently Mr. Lynn would object to. Section 702 explicitly provides that religious associations may prefer people of their own faith for the hiring of any job with respect to the carrying on of any activity. This is a recognition. This is not congressional bigotry. This is a recognition that the first freedom, the first amendment, protects religious autonomy and that the government should not be in the business of telling religious groups, whether they're meeting at a public facility or not, who are going to lead their groups. The power to choose the leadership is the power to determine the mission of the organization, the speech, the message of the organization. The government would have complete control over all of that if they can choose the leadership or determine what the qualification are.

Of course only religious groups are asking for this preference. Who else would care? Would a political group care about the religious affiliation? No, because it is not relevant to the ideology or mission. Would a chess club at the high school care about the religion? No. Only the Bible club or the Jewish Law Students Association or what have you, there the defining element of their group, their ideology, is the faith of their leadership. And so I don't see this as a special exemption. And that would be news to the Supreme Court, as well, which in 1987 in the *Amos* case ruled that Congress does not establish religion. Ruled 8 to 1, I might add. Does not establish religions when it passed that section 702 exemption allowing religious organizations to ensure that their employees are of the same faith, are on the same team.

COMMISSIONER HORNER. I have just one other question for Mr. Haynes. You talked about six recommendations that you made. Two of them I have particular interest in. One is the recommendation respecting schools of education, asking that they do a better job presumably sensitizing educators to the situation as you see it or to the guidelines or how to handle these issues. And one had to do with textbooks. And I think I heard you say that there was hostility to religious expression still remaining in both these arenas. I may have put a couple of your thoughts together, but I would like to hear from you what the basis is for your belief that there is remaining hostility to religious expression in textbooks and schools of education.

DR. HAYNES. Barry is not going to like this, but I think sometimes silence is hostility. If you ignore me I think that I may take that as a hostile message. Sometimes I think the hostility takes the form of ignoring and sometimes it's unwitting. I think in schools of education, because like other academic institutions, most of the education that goes on is defined in secular categories, even at Christian colleges and universities that train teachers to go into public schools. They themselves—I'm speaking to them at their convention this week—they themselves are surprised to learn that they could actually prepare people to go in and be more fair about religion and deal with religion. They're afraid themselves to touch it.

Now, I wouldn't say that the Christian colleges and universities who prepare teachers to go into public schools are hostile to religion, obviously, but I think they simply have gotten the wrong message over the last 40 years or so that in fact they can't deal with this. And so that's turned into a hostility by default. In other colleges and universities that prepare people to teach in public school, I think—yes, that there's a kind of a secular worldview and mentality and framework that defines most of the disciplines, the academic disciplines, in the colleges and universities. Religious perspectives and ways of thinking and seeing the world religiously are simply not taken very seriously. And so most teachers and administrators who are prepared to go in public school probably have not had any religious studies. Very rare. Administrators probably know little or nothing about the first amendment. They may get a little smattering here and there. Most schools of education don't bother to deal with it. If they deal with the first amendment, they might deal with speech or something else, but religion is something that they don't want to touch. And I think there are a variety of reasons for that. Some is unwitting, as I say, and I think some is because of how we frame the conversation in academia today. And it's not framed in religious terms. It's framed in secular terms. And that's fine.

My contention is that to be fair and neutral one has to find someplace for religious perspectives to be articulated, discussed, talked about, alongside other perspectives. Some place for that to come in. That's one issue. Textbooks, I think, are looking at the market. They don't see a market for dealing with religious perspectives. And

here I'm not just talking about mentioning religion several more times. Martin Luther King was a minister or Jimmy Carter was born again. I'm talking about how religious people actually see the world and understand the world, not just back in the Middle Ages but today. How do people see the world? Are there alternative ways of seeing the world? Do we give any attention to them, even a little mention of them? And if you look at textbooks, the answer is no, we don't.

Now, is that hostility? Well, I think it translates into hostility to people who send their kid through 12 years of school, get out, and nowhere have they been exposed to other ways of seeing the world, various religious ways, and that, I think, sends a message of hostility. So I think on the textbook front and the teacher education front, in the long term if we're going to transform the curriculum, open it up to a number of different perspectives, including religious ones, really offer a full liberal education, if you will, in public school or at least attempt to, we're going to have to do some serious rethinking of this kind of odd notion that by leaving it out we're being fair. By leaving it out and ignoring religious perspectives we're neutral under the first amendment, but that's an odd notion of neutrality. It seems to me that that's not neutral. That's taking sides. And I think that's where we have to do a step back, not in the name simply of religion. This is not a religious argument for changing schools of education or textbooks. It's actually a civil argument. It's a public argument, and it's an educational argument for doing our best to expose kids to various ways of understanding and thinking about the world.

Schools of education—and then I'll stop. Schools of education are among the worst offenders in this area. We have, I think, among the toughest nuts to crack, if you will. We have much more openness to dealing with religion and thinking about how to include religions more substantially when we do in-service in a local school district or when we work with local administrators than we do when we talk to many teacher-educators, who are by and large tone deaf to this issue. So I think that that's where the rethinking needs to come.

CHAIRPERSON BERRY. Other Commissioners have questions for the witnesses? Vice Chair.

VICE CHAIRPERSON REYNOSO. I have a lot of questions.

CHAIRPERSON BERRY. Go right ahead.

VICE CHAIRPERSON REYNOSO. Ms. Doyle, I was fascinated by your introductory remarks where you disclaimed any Federal responsibility in this area, and yet you issued the guidelines. So the first question is, What propelled you to issue the guidelines since you disavowed any responsibility?

MS. DOYLE. Well, it isn't so much responsibility. What I wanted to make clear is that we don't have any enforcement powers. That has not been granted to us. So we cannot legally—and Steve may want to add to this, but we cannot legally go out as our Office of Civil Rights might be able to do on an issue of discrimination of race or sex, to go out and investigate and have powers to do that and powers of enforcement. We simply do not have that. What we do have is the ability, I feel, to reach school leaders, to reach a broad spectrum of American society and basically to get that word out to urge people, to make the information available, to help communities to come together with the right information. That's really as far as our legal ability takes us. And so I believe Secretary Riley really did see this as a need. Knowing we don't have enforcement powers, we have informational ability and that's how we attacked it.

VICE CHAIRPERSON REYNOSO. And certainly from everything that I've read and heard, you've succeeded to a large extent in that effort. But I have a further question of you or any of the panelists. In light of the fact that there are still many open questions that I would like to ask the panel about, nonetheless, there is a consensus as to what the U.S. Supreme Court says about religion in the schools. And yet there appears to be a reluctance on the part of many officials in universities, apparently, and certainly at the secondary level, from issuing their own guidelines. I'm fascinated that an issue would come up with an individual campus of the California State system rather than with the system as a whole. So somebody in the system has failed. No, we're going to leave that up to the individual campus rather than issue statewide guidelines, for example. So my question is, What percentage of secondary school districts or universities have in fact issued guidelines? You obviously have reached a lot of folk but apparently not others.

MS. DOYLE. I could not tell you what percentage have issued guidelines. Really, because we don't have an enforcement or statistical responsibility in this, our information is truly anecdotal.

tal. I can tell you where some have been issued but not if that accurately represents the entire spectrum.

VICE CHAIRPERSON REYNOSO. Let me restrict it to secondary level because that's where these issues so often come up. Mr. Lynn.

MR. LYNN. I think part of the problem is that in the areas—and I, of course, picked on one area that Mr. McFarland and I don't agree about. In regard to some others, including weekend use of school facilities and teacher equal access, I think we're largely in agreement. The problem with something like this issue that we have found contentious about—does title VII have any relevance here to these discriminatory decisions about who is an officer. I don't think that a school system or a secondary system of any kind would be likely to want to resolve this issue. To me, it's quite the opposite. I think I read the *Amos* case and what title VII was intended to do and say is utterly irrelevant to this. That in fact more relevant is to look at the Bob Jones University case. Now, we could have this discussion and try to compete and fight it out, but there's not a settled law, in my judgment, on this area, and in the judgment, I think, of many scholars. This does make it more difficult for people, again, of good will to try to figure out what the law is because it is still in flux.

The great advantage of the Department of Education guidelines is that all of us at this table and most of the people to come after us, we're all in agreement that whether we liked every decision or not it did accurately reflect the state of the law. When you move into some of these other areas, they are grayer, they are more complex. And I think it would be inappropriate for government agencies to try to figure out where the courts would go.

DR. HAYNES. But it would help a great deal if school districts have policies in the areas where we do agree, which are substantial.

MR. LYNN. That's certainly true.

VICE CHAIRPERSON REYNOSO. That was really my question.

DR. HAYNES. And the answer to your question—in my experience, we have a statewide project in California and in Utah. The one in California has been going on for 5 or 6 years. So our evidence is pretty strong that very few school districts have good or substantial or fulsome policies in this area. Some may mention one thing or another to do with religion. They

don't have it. If they did have it, many of the problems would go away. And when we do get to an issue where we disagree, the school district would be prepared to deal with that.

VICE CHAIRPERSON REYNOSO. And is that because even in those areas where there is agreement as to what the Supreme Court has said, in some areas even that might be controversial?

DR. HAYNES. No, I don't think so. I think if they don't know about the agreement, they've heard some hazy thing about it, or they get the guidelines, the superintendent does, and he files it in some place that no one sees. We've had actually superintendents tell us, "We're glad to have you in the district. We're glad to talk about these things. We don't have a policy. And I guess we don't really need one because we don't have a crisis." Many of the administrators are afraid to deal with this because they take the sleeping dogs lie approach to school management: "We haven't had a crisis or a lawsuit. Let's don't touch this." They think that if they begin to get the community together to talk about how you treat religion in the schools, which for the last 30 years or so in this country has been almost impossible to mention without somebody getting upset, they think they're going to get some group to come in from the right or the left and sue them or get angry at them.

MR. LYNN. But Charlie—

DR. HAYNES. And the truth of the matter is, Barry, they're not. The risk of doing it is much less than the risk of not doing it. Because by not doing a good policy and getting that community together, they are actually encouraging more hostility, and they are putting themselves at risk for a lawsuit. I mean, we try to convince them to tackle it, but it's hard.

MR. LYNN. But Charles, the point is, and I think the Commission needs to realize this, that the day that the guidelines were sent out there were some extraordinary statements made by—again, with the fear of being controversial—but right-wing groups who said—I remember one woman said, "What does this mean? That the Secretary of Education and Janet Reno will turn a school that doesn't abide by these regulations into the next Waco?" In other words, she was condemning the issuance of these. The Rutherford Institute, who you have as a later witness, a previous employee of theirs, also made highly critical comments claiming that these guidelines did not even accurately reflect the state of the

law. So Charles is right. There should be an effort to continue this educational process. But I think he underestimates the concern of the school districts, because everybody just doesn't see it the way the four of us see the state of the law and they are litigative and they use highly inflammatory rhetoric and they make life miserable for local school officials.

DR. HAYNES. But the good news is that where we've worked at this, we don't have a bad story. Knock wood. I'm telling you, we don't, Barry. We don't have a bad story. Where we get a community together—and we don't tell them what to do. They look at the national guidelines. They come up with their own policy, some of which are different, but they are consistent with the law. The thing is that when local communities go through this and think about this and they have a fair representation in the conversation from the so-called right and left, they usually come out on this with some common ground and some consensus and some trust. The bad news is that too few communities actually go through that process. And I don't know that any school district that has a good policy in our experience has had a lawsuit or a problem. So it's just not true. We spend all our time working in local communities, and I can tell you it's not true that local people can't do this. They can do this if they're given a chance and encouragement and support.

VICE CHAIRPERSON REYNOSO. I just have one or two more questions. I can have a couple of dozen questions, but I think in fairness others should have a chance. I'd like to jump back to the leadership that Mr. McFarland raised. I've wondered about this, and maybe you can answer the question. Why does it matter if you have a Christian group, as we do at UCLA Law School? Presumably they would elect a Christian to be their president or chair. On the practical side of it, I've not quite understood why this is as important as it seems to be.

MR. MCFARLAND. Well, let's use the example of say a prolife group that's meeting. The day that the officers are elected—and anyone, any student, any registered student, can vote—a vast majority, 12 prochoice individuals show up at the meeting, and they elect one of theirs as the head of that group. Now, that is not promotion of free speech, and it's not promotion of tolerance and diversity. It's steamrolling. It's homogenizing. Indeed it's suppressing private association.

VICE CHAIRPERSON REYNOSO. That could happen. But I suppose that most groups, even at universities, can say to be a member you've got to sign up. And you have a list of membership. That could obviously happen, but it seems to me that for practical purposes if that were to happen, that group would dissolve itself and another group would form. I'm just trying to conceptually—and I think—personally I think it makes a lot of sense that if you have a Christian group, the leadership be Christian. But I've never understood the practical side of it because it just seemed to be a natural outgrowth of the group.

MR. MCFARLAND. There's another practical aspect, and that is for national ministries like Christian Legal Society [CLS], Intervarsity Christian Fellowship, Rejoice in Jesus Campus Ministries, Navigators, and a number of them, they want to ensure that when a student goes to a Navigators group or goes to a Christian Legal Society group that it is a chartered organization. What does that mean? That means that our national headquarters has given the imprimatur that they subscribe to our four-point profession of faith. The only criteria that defines the Christian Legal Society is that religious mission and that profession of faith. So there is another practical aspect. Not just—well, we'll just dissolve that CLS chapter and start another one. We want to ensure that it means something to be a CLS member.

VICE CHAIRPERSON REYNOSO. Then I'd have a question for Mr. Lynn. I rather agree with your quick legal response that title VII probably doesn't have much to do with this analysis and that it probably is an exemption. But in this area, doesn't it make sense to have an exemption? I mean, it just doesn't—to me, it doesn't quite jive to have a Christian group led by a non-Christian if its purposes are to teach and to enhance the beliefs of that group. There's just an incongruity to it.

MR. LYNN. Well, there may be an incongruity, but the issue that I think this is being fought about now is whether it is discriminatory to allow this exemption in the absence of one now. And I think it is not. Because in the abortion case—

VICE CHAIRPERSON REYNOSO. Let me agree that it's not discriminatory. I'm asking whether as a matter of public policy it might not make sense to have the exemption.

MR. LYNN. I think not on balance because I do think that we're talking here about public resources at public schools or public universities. And I don't think that—and again, Steve knows me well enough to know that he should not take this the wrong way. There are groups, not the chess club perhaps, but the Ku Klux Klan that claims to be a religious group that has an idea about who ought to be the leader. It's not only in matters of religion but also in race. If they are forming and they have tried to form on high school—even high school campuses—I don't think we should be encouraging an exemption that permits them under the real or the guise of religious commitment—and I'll leave that up to them to decide—to get an exemption that permits them to do what others cannot do on that same college campus. That strikes me as a special right in the worse sense of the term.

VICE CHAIRPERSON REYNOSO. The issue obviously would come up of what do you do with religious groups, particularly in a public university, whose teachings may have an effect on the 14th amendment, i.e., equal protection. You brought up Ku Klux Klan in terms of race, but it can come up in other contexts. Did you have a comment on that?

MR. MCFARLAND. I just wanted to comment that the same arguments that Mr. Lynn is making were made in 1984 in opposition to the Equal Access Act. And 14 years later most of those individuals with the exception of Mr. Lynn have indicated that those were red herrings. In hindsight, 14 years, there is not a single reported case of Nazis goose-stepping down a high school corridor at 7:00 in the morning or a Ku Klux Klan club in northern Idaho. And equal access has been the law for 14 years. So that's just a red herring. It doesn't happen. And that is noted in the fact—and the act specifically provides that any group that would have a materially disruptive impact on the educational mission of—you know, intimidating people from coming to school, disrupting, becoming the topic of conversation in classroom time, those folks can be banned. This is just a red herring. And that's not a basis for suppressing voluntary private student speech.

VICE CHAIRPERSON REYNOSO. Thank you very much.

CHAIRPERSON BERRY. Does any other Commissioner have a question for the witnesses? Yes, Commissioner George.

COMMISSIONER GEORGE. Yes. Let me begin simply by adding my voice to those who've been congratulating Mr. Haynes for his efforts really to find common ground across the ideological spectrum and across the great pluralism of religious groups in our nation. I think you've done public service at a very high level for someone who's not on the public payroll. I know that many public officials would do very well to accomplish half of what you've accomplished as a matter of private initiative, and it really is a lesson to us all. I want to pick up on a very important point that you raised, and I noticed, did so with some emphasis. I'll begin by recalling that quip of Peter Berger's that I'm sure you know. He mentioned that sociologists tell us that the nation of India is the most religious nation in the world and the nation of Sweden is probably the most secular or least religious nation in the world. And given what polling data always show about the differences between elite and popular opinion in this country, we seem to be very much a nation of Indians governed by Swedes.

Your comments on the situation in the schools, and especially the sort of inattentiveness even to the possibility of religious worldviews, even to what they mean as alternatives to other worldviews, and your view that this actually reflects problems in the universities is what's prompting my question. Particularly, you mentioned schools of education. And you laid some emphasis on the idea that many people even of good will, no not merely the left-wing ideologues and secularists who often deny that there's any discrimination going on against believers and so forth, but really people who are honest mistake neutrality for their nonreligious worldview. And you're proposing that something be done about that.

But isn't doing something about that especially difficult in view of the fact that we can't reach into the university culture in any sort of decisive way like the way we can reach into the vast public education system at the primary and secondary school level? There's far too much institutional—I'm not saying too much—for other reasons we might want it, want this institutional autonomy, but too much for the purposes of reaching in to affect the situation; institutional autonomy, too large a degree of private ownership and sponsorship and control of universities. How would you address the problem of how we are to reach into those institutions and particu-

larly to schools of education to begin educating people about what is in fact and isn't neutrality?

DR. HAYNES. I think that our strategy has been to go from the bottom up. That is to say, if we can get public education to take religion more serious in the curriculum, focus on that issue, then it seems to me the colleges and universities are going to have to do it as well. And I think we're seeing that that is beginning to happen in the textbook industry a little bit, and in some places, in teacher education. In California, for example, in our California project, when we worked region to region, we link local school districts with academics in the various studies of religion, whether it's Native American religion, Christianity, Judaism, Islam, so forth, because those academics in the various departments of religion in colleges and universities often are willing to help teachers and to give workshops and programs. They've never been put in contact with schools. And in California the push for this came because the social science history framework called for more substantive teaching about religion in many of the areas of the social studies curriculum. Not enough, but more than other States. Not enough in my opinion. But at least in the world religions area there was suddenly a demand that teachers know something about Hinduism and Buddhism and Christianity and so forth and were thrown into a situation where they had to talk about things they knew little or nothing about.

Our project therefore was welcomed by the county superintendents across the State who are our partners in California because they had all these teachers saying what are we going to do. Academics then get into the picture because we try to link the institutions, the secondary schools particularly, with these folks, and that I think is the way to begin to change the culture in colleges and universities. There are teacher-educators around the country who would like to see more happen to prepare administrators and teachers. I mean, after all, most of the issues in public education today that are contentious, whether it's sex education, multiculturalism, school reform, if you dig deeply enough there are religious worldviews clashing. And so it's odd indeed if teacher education doesn't prepare an administrator to deal with these, because those are the issues underneath many that he or she is going to face in the public school. And the teacher, if the California trend continues and

deepens, which we hope it will, is going to require more talk about religion in the classroom, so that we are making the case now with teacher-educators.

We have a new book coming out this summer that Professor Nord and I have written, to say this is how you can take religion seriously. We hope to get teacher-educators to read it and think about it. But it has to be, I think, a demand. And that's more true in the textbook industry than it is even in colleges and universities. There I think in religious studies departments and in many places there are lots of folks ready and willing if we tap them and get them excited and show them that public schools really want to take religion serious. I think they will respond. The textbook industry is only going to do it if there is a demand from the bottom up, from the States or from the communities that adopt textbooks. In some States it's statewide; in others, it's not. When the textbooks in California did improve, particularly the Houghton Mifflin textbooks in the treatment of religion in recent years, it was only because the State said show us textbooks that deal with religion more seriously or we're not going to buy your textbooks. And that's some 12 percent of the textbook market. And textbook publishers began to respond.

So that's been our strategy. It has not yet gotten us the distance we think we need to go. But I do think the public schools are going to have to give the message: We are now confident and we feel prepared and free to deal with religion. Help us by giving us teachers. For example, if more electives in religious studies were proposed and taught. Now, there are going to be some rough spots in there because there are not a lot of qualified teachers to teach them. But if school said we want more electives in religious studies—world religions, Bible, and so forth—colleges and universities and teacher education is going to have to respond because the demand will be there.

COMMISSIONER GEORGE. What do you say to the argument that says as noble as your cause it, it's bound to fail for the following reason. It's one thing to teach about a religion from a sort of internal point of view and attempt to make available to students an understanding of what this religious viewpoint is like—whether it is Confucianism, Judaism, Christianity, Islam, whatever it is—it's quite another thing to do what, the argument goes, is taught in most programs in re-

religious studies in universities, and that is to teach the anthropology or sociology of religion.

Here's an interesting phenomenon. We, of course, have to observe it from the outside, not from an internal point of view. We can tell you about it, but of course we're telling you about it from a standpoint, and that standpoint is not internal to the religion. Now, no teacher is going to be a member of the whole set of religions. It's hard enough to be a member of one. Some people try to be a member of at least two. But there's a problem in that. So we're inviting a person to teach sympathetically in such a way as not only to layout again, from an external viewpoint, what this religion is about, but from an internal viewpoint how from this religious viewpoint one encounters the world. What do you say to the argument that that is simply impossible—that's asking too much—and the net effect of this will be simply to transfer what passes for religious studies in the universities, this kind of sociology of religion, from what will end up being a secularist standpoint to the public schools where we will have done nothing to accomplish a real and noble goal of providing an alternative to the dominant secularist viewpoint?

DR. HAYNES. I come out of a religious studies background, and I taught religious studies in a college. And fortunately there is a good track record in religious studies of taking the first task of religious studies, which is to help students understand what that religion itself believes and practices, to see it from the inside. I think that the first goal of educating about religions is to help students get inside and teach, not with sympathy which would be kind of a judgment, but with empathy, a way of helping students to see how it would be to see the world as a Muslim sees the world and understands it. And the good news is that public school teachers, with some help and support, there are many that I could name who are actually beginning to do this and do it well. It's not so difficult once they understand that that's their first task.

Now, are there going to be critiques of that religion from other religions, within the religion itself, from a secular point of view, and should that be a part of the conversation? Yes. But that's the second part of the equation. The first is to prepare that teacher to really have enough of an understanding of the tradition to be able to give an empathetic presentation and help students to see it. New resources are now coming on

the market. Dyanec at Harvard did a wonderful CD-ROM where students can actually interact with people of the various faiths and hear from them themselves and see their practices. And that's the kind of resource we need in the public school where kids can actually experience.

We can't in public school, obviously, give them a religious experience. That's not our job. That's the faith community and the family's job. We can, however, expose them to how religious people understand and see things, not just years and years ago or from a sociological/anthropological perspective, but today. And we can do that well.

Oxford University Press will be publishing 17 volumes beginning this fall. We're going to do the teacher's guide to go with it. Seventeen volumes for kids by some of the best scholars in the United States on the various religions in America. And again, they're going to be by scholars who understand that the task in this project is to have something where kids read about Judaism and they really get a sense of how Jews understand and see the world and what they practice. And then we can go on to the historical and literary critical discussion that takes us the next level.

In secondary school, though, we have not enough time to do all of it nor is it age appropriate. But I think teaching about religions is a 1st-grade to 12th-grade issue. And age appropriate, we can introduce kids to religions in a way that is authentic to the religions that are being presented and is empathetic to their worldview. And then at secondary school before they graduate, they can begin to get those critical skills to say where are the differences, what are the debates between religions, between secularists and religion and within the religions themselves.

COMMISSIONER GEORGE. Can I ask one more?

CHAIRPERSON BERRY. Yes. One more.

COMMISSIONER GEORGE. Mr. McFarland, we are charged as a Commission to make recommendations to Congress and the President about reform of the civil rights laws, in addition to our monitoring and clearinghouse roles. And I wonder whether you think that any changes in the laws would be warranted or desirable to grant to the Department of Education any enforcement powers in this area or to authorize or mandate the Department to collect data that would be relevant to the situation around the country so that there would be a reliable database of information about the kinds of cases that you litigate

in the religious freedom area. Have you thought about what—I know you litigate on the basis of what the law actually is, not what it should be. But as a policy matter are there any recommendations that you would make for reform of civil rights laws?

MR. MCFARLAND. Well, I think both of those would be helpful. Secretary Riley has certainly manifested a desire to promote religious liberty. It would be helpful if his Department—indeed, CLS has spoken to his office about this—desirable to have more than anecdotal understanding of whether the laws are being enforced at the culture-shaping institution of our country, which is the public schools. That would be very helpful. And it also would be helpful if they had some bite as well.

COMMISSIONER GEORGE. What about the Justice Department?

MR. MCFARLAND. And part of it—in fact, frankly one of the recommendations we made was that if the Department of Education is unable to persuade a school district to enforce, for example, the Equal Access Act, then they would have certain perhaps mediation opportunities. And failing that, then it would be referred to the Justice Department for enforcement of that law. I would think that we've shown great vigor in this country to enforce other implicit constitutional rights, for example, reproductive choice. I would like to see at least the same enforcement commitment by the Justice Department to the enforcement of our first freedom, religious exercise.

COMMISSIONER GEORGE. Do you agree that these Departments have done as much as they can under current law, or could they do more even as things stand?

MR. MCFARLAND. To be honest, I do not know what they're doing. I don't know if they have an office that is familiar with the Equal Access Act. I'd like to believe they do. I'd like to know what they are doing to promote the guidelines other than distributing. We're certainly grateful that they did distribute them 3 years ago. It frankly wouldn't be fair for me to say they're not doing enough. I don't know what they're doing. But I know that they could do more if given some enforcement teeth and some investigative and statistical information gathering.

COMMISSIONER GEORGE. Thank you, Madam Chair.

CHAIRPERSON BERRY. I have three questions myself. I get to always come at the end. First, let me just say in the way that my colleague, Commissioner George, likes to lay a foundation for his questions—and I'll try to make my foundation very brief.

VICE CHAIRPERSON REYNOSO. That's what I was going to ask. Are you going to be extensive? [Laughter.]

CHAIRPERSON BERRY. I will just say that at a very visceral level most of what has been said here I find very appealing, as do most people, I'm sure, who are deeply religious in a personal sense. But at an intellectual level I find some of it very confusing, so my questions are based on my intellectual confusion, not on my religious faith or lack thereof.

The first question is, Is there some sort of privileging going on here of the idea of religion above all else in the public schools and in curriculum? For example—and in student leadership. In many colleges and universities [those] who belong to a women's organization or a black student union or organizations like that who have insisted that only people who are like them can be members—same gender, same race. And that they can only have people like them to be leaders. And in most instances they've been told that if it's a student organization and it's getting money from the student government, then students have a right to access to it if [they] believe in the principles or will support the principles of the organization. They don't necessarily have to be black or female or whatever. And otherwise, they will not be getting dollars from the university, which is a public supported one, for their particular view. So that's one problem.

The second problem is that—and I'm wondering why religion and why one's religion should have a preferred position in your view in that regard. And the second aspect of that in this privileging of religion in the curriculum. If we were to have religious studies or religious education, would this include all religions, number one—Buddhism, Shintoism, all religions? Is that what you perceive? And also, would the worldview of atheists and agnostics also be included in this religious studies proposal that one is making for the public schools, or is there some sort of privileging going on here? I ask this question because, Mr. Haynes, you said it's not enough to teach that Martin Luther King, for example, was deeply religious and was a minister, as are most

of the people in the civil rights movement, but that one should talk about the worldview of such persons. Why is it any more important in the curriculum to have the worldview of people from various religions than it is to, for example, teach the worldview of fascists to students or the worldview of socialists or the worldview of people who believe in cannibalism to students so that they can understand all of these different worldviews? So what is it about religion?

And then, finally, if you can remember all these questions, what about proselytizing? If indeed one belongs to a religion and one of your beliefs is that you should proselytize, why if you're going to have religions in the schools and teaching, why should one be prohibited from it? And then how is one to restrain oneself from doing it if this is indeed part of one's religious faith? I mean, where do you draw the line here, and how do you tell when somebody is proselytizing or when they're just trying to educate people about religion or so on?

So, Mr. Haynes, I'll ask you first. Would you mind educating me about these matters? I'd appreciate it.

DR. HAYNES. Well, teachers need education in this area. There's no doubt that a good professional can teach about a great many things. A Democrat can teach about the Republican Party barely and so forth and so on. We ask them to do that every day. It's not easy to be a teacher and prejudices creep in. But we trust teachers, and we should, to teach about various perspectives on political and other issues.

Religious issues are more difficult to get right. I will grant that. And I think without good education and preparation and good materials it is probably not a good idea. If it's done superficially or if we just dump it on teachers, yes, many of their prejudices will come through, often unwittingly and sometimes because they have an agenda. I have just as many examples of teachers who are hostile to religion, and let that be known, as I do teachers who are promoting their religion, because I get these calls every day. So I know that there are violations on both sides.

What I'm proposing is that we have no choice but to try if we want to offer a good liberal education to our students. That is to say, if we want education to be about learning different perspectives and understandings of the world, we need to prepare teachers to do more than teach one

worldview because that goes to your other part of your question. And I think we can do that. I think religious studies has a track record. We have many teachers now who are doing a pretty good job and some who are doing an excellent job. We actually have world religion courses in some school districts that have been going on for years without any controversy. And the teacher may be of a particular faith, but the students cannot tell because the teacher is fair and even-handed. So it can be done. It takes work. This is a labor-intensive proposal.

The other piece though is—you know, concerning can we in fact indeed be fair to all the various religions and worldviews. Well, there are going to be choices made educationally. But if the choices are made on what is important educationally, I think that it's fair under the first amendment. And that's all we can do is to work towards a curriculum that makes decisions about what students need to know to be an educated person, to walk into a museum and understand what they see, to read a modern novel and understand all the biblical allusions and other religious content and so forth. What is it that an educated person needs to know. And there are going to be some choices made. Some of the religions that get more time and space are going to be because we need to educate people about the religions that have most shaped the civilizations that we learn about and live in, the world we live in.

So there are going to be choices. I don't think the first amendment requires equal time. I do think it requires an effort to be fair in the curriculum to a variety of perspectives. And though the major voices are going to be heard mostly, I think we should also be sure that some of the minor voices get in there as well so that we don't overlook the fact that the diversity is greater than even our educational choices allow. It takes work again to make those choices based not on what my particular philosophical or religious bent is but what is a good academic program. Why should kids learn about religion and so forth.

I think the secular perspectives and others should be alongside, but my argument is that now it is the only perspective. If you study history, you study it within secular categories defined by the academy and history is understood only in secular terms. Nowhere do you talk about the fact that for many Jews, Muslims, and

Christians, for example, the current situation in the Middle East has to do with God and contending views about what God requires. Well, that's a fascinating and important discussion to have with students, but you won't hear it anywhere in public schools because teachers are not prepared to talk about the fact that in that part of the world there are various worldviews clashing, various ways of seeing events, because there's only one way of understanding these historical events and it has nothing to do with divine action. But for millions and millions of people, it does.

So there is a kind of weight that we have to give to the fact that for many of our citizens understanding the world in religious terms is deeply important and significant. And they don't want their kids educated for 12 years with no reference to that because marginalizing how religions see the world to the point of almost not mentioning it is in fact to be hostile. And I think that's the challenge.

Yes, if we have a course that teaches various ways of seeing the world in public schools, atheists certainly have to be also included in that conversation. But in an effort to be fair, we have to be careful to look at again what is a good complete education that we're offering people. Can we put in front of those kids the best teacher who's best prepared to be fair to various perspectives. I should think that today if a textbook were to be adopted in a State and there were no African Americans in that textbook or maybe one or two mentions, and no women—yes, that's right. And if that were to come before the textbook adoption group today, I would think they should and they would say no, we're not going to adopt that textbook. But every day they adopt textbooks that virtually ignore religious people. And no one can look at the history of the United States, much less the contemporary United States, and say that religion isn't important to millions and millions and millions of people. So we need to find a way to take seriously inclusion of religious ways of seeing as we have including other voices in the conversation.

CHAIRPERSON BERRY. In order to adhere to my own statement about the time limit, Mr. Lynn, I'm only going to let you speak for no more than 45 seconds, and then I'm going to call this panel to a close.

MR. LYNN. All right. I appreciate this. I think that what's missing from the foundation and

from the answer is this. Every other subject we assume will be taught critically. That is to say, we will raise legitimate questions about history. The excitement that comes out of my son's eighth-grade education in the public school is that they are wrestling with issues. And I think to fail to be willing to talk critically about religious issues, which means the atheist doesn't simply get mentioned but gets allowed to challenge the worldview of the Christian, the Muslim, the Buddhist, and everyone else that is discussed, would put religion in a privileged place, a place without criticism in an objective and academic sense. To that extent, I think your challenge is the right one, the right question. Isn't this just privileging one worldview over many others? I'm afraid, the more I listen to this conversation, that the answer is yes. And it should trouble us before we start compelling school districts or encouraging them to spend more time on this subject instead of more time dealing with other real problems.

CHAIRPERSON BERRY. I only asked the question. I didn't answer it. And we'll hear further discussion about it as the day proceeds. But I want to thank each of you for taking the time to be with us today. You are now excused. We have some sign-out procedures. A member of our staff will assist you through them. We stand at a break until 11:45 promptly. We will reconvene at 11:45.

[Whereupon, a recess was taken.]

Panel 2: Curriculum

CHAIRPERSON BERRY. Would everyone please take their seats. We're ready to reconvene the hearing. Could we have the sign interpreter ask if anyone is in need of sign interpretation. [No response.] Thank you very much.

We will now have our second panel under the topic of curriculum. This panel will address discrimination issues related to the exclusion or inclusion of religion in classroom lesson plans and school textbooks under current laws and court opinion. Please go ahead and call the witnesses.

MR. HAILES. At this time, Madam Chair, I'd like to call forward the following people: Mr. Oliver Thomas, Mr. Warren A. Nord, and Mr. Elliot Minberg.

CHAIRPERSON BERRY. Could the three witnesses please stand and raise your right hand while you take the oath.

[Whereupon, an oath was administered.]

CHAIRPERSON BERRY. Counsel, you may begin.

MR. HAILES. At this time we would like each of you to identify yourself for the record and to proceed with a brief opening statement, beginning with you, Mr. Nord.

DR. NORD. Warren A. Nord. I am the director of the Program in the Humanities and Human Values at the University of North Carolina-Chapel Hill.

REV. THOMAS. I am Oliver Thomas. I am both a minister and a lawyer and serve as special counsel to the National Council of the Churches of Christ in the U.S.A. The National Council of Churches is the oldest and largest ecumenical body in the United States, with 34 member communions and an aggregate membership of about 52 million. I'm also the chairman of my local board of education.

CHAIRPERSON BERRY. Where is that, Mr. Thomas?

REV. THOMAS. In Maryville, Tennessee.

MR. MINCBERG. My name is Elliot Mincberg and I'm vice president and general counsel and legal director of People for the American Way Foundation, which is a 300,000 member nonpartisan civil liberties and constitutional rights organization.

MR. HAILES. Before you proceed with your statements, I'd just ask if you have any documents you would like to submit to the Commission at this time? Please identify the document so that we may accept it into the record.

MR. MINCBERG. Mr. Hailes, I sent to you yesterday and gave another copy this morning of a copy of my written testimony which also included a copy of a document entitled *Religion in the Public Schools: A Joint Statement of Current Law*. That was an organization that several of us were privileged to be on the drafting committee of, a document that led to the guidelines that the Department of Education talked about that was put out and endorsed by a broad range of religious and civil liberties organizations. And I included a copy of that, and I would like for that to be included in the record.

CHAIRPERSON BERRY. Without objection, so ordered. Does anyone else have documents?

REV. THOMAS. Yes, I do. I have both my written testimony, which I will submit at the conclusion of our panel, and also a document that's been referred to at several occasions in the

hearing thus far, "Finding Common Ground," that Dr. Charles Haynes and I coedited together.

CHAIRPERSON BERRY. Without objection, so ordered.

DR. NORD. I do have copies of my written testimony.

CHAIRPERSON BERRY. Thank you. That will be included. Yes.

MR. HAILES. Yes, Mr. Nord.

**William A. Nord, Director of the Program
in the Humanities and Human Values,
University of North Carolina at Chapel Hill**

DR. NORD. There's a small problem in having one's coauthor precede one on the panel. Commissioners may want to take my comments as an afterward to Dr. Haynes' comments about religion in the curriculum. I agree with everything he said. I believe that public school textbooks and curricula discriminate against religion. I base my judgment in part on my reading of the national content standards in education and on reviews that I've done of 70 widely used high school textbooks, as well as the usual kinds of scholarly literature about these things.

It's widely acknowledged that students must understand something about religion to understand history. Consequently, history texts and some literature anthologies include religious references and material on religion that typically disappears from the text as students page through the 19th century, and apart from a very few notorious incidents and movements—the Scopes trial, the Holocaust, or Islamic Fundamentalism—religion is all but invisible in textbook accounts of the 20th century.

Most subjects are not taught historically, however, and there's the rub. For the national standards for these subjects have been shaped out of what has come to be the conventional wisdom of modern education: namely, that students can learn everything they need to know about whatever they study, other than history, without learning anything about religion. So, for example, in science courses students learn to understand evolution, the beginning of life in the universe, and all of nature in exclusively secular scientific categories. Although there are, of course, a variety of religious ways of interpreting creation, evolution, and nature, both liberal and conservative, that stand in tension or even overt

conflict with modern science, but they are never included in the science curriculum.

Students learn from their economic texts that people are self-interested, utility maximizers, that decisionmaking should be a matter of cost-benefit analysis, and that the economic domain is one of competition for scarce resources. Though no religious tradition accepts this view of human nature decisionmaking and economics. Elsewhere in the curriculum students learn to think about government, morality, and sexuality in secular scientific and social scientific categories that often conflict with their religious traditions. And while religion might be mentioned in history courses as Dr. Haynes himself mentioned, even there students will learn to interpret history and historical causation in secular terms that drain history of its religious meaning. Worse yet, students are not likely to learn that there are religious alternatives to the secular ways of thinking that they are taught uncritically in their coursework. As a result, public education nurtures a secular mentality that marginalizes religion, both intellectually and culturally. Students learn in effect that religion is irrelevant to the search for truth. This is problematic for a number of reasons. I'll only mention two.

First, it violates the deepest principle of education. It is ill-liberal. A good liberal education should introduce students to the major ways humankind has developed for living and thinking about the world, some of which are religious. Indeed, by teaching students to think in only secular terms, we in effect inhibit their ability to think critically and responsibly. To be able to judge the adequacy of scientific ways of thinking and secular ways of living, students must have some understanding of the religious alternatives. Withholding those alternatives borders on secular indoctrination.

Second, as the Supreme Court has interpreted the establishment clause, public schools must not only be neutral among religions, they must be neutral between religion and nonreligion. But when textbooks and the curricula systematically ignore religious ways of thinking about contested matters and teach only the secular alternatives, they are not neutral. When we disagree, the only way to be neutral is to be fair to the contending alternatives, including them in the curricular conversation. It's sometimes assumed that schools can be neutral by

ignoring religion, by not overtly attacking it, but this is naïve. Consider an analogy. We now all recognize that textbooks that ignored women's history and black literature weren't neutral in matters of race or gender but were prejudiced. True neutrality requires inclusion. In his concurring opinion in *Abington v. Schempp*, Justice Goldberg warned that "an untutored devotion to the concept of neutrality can lead to a pervasive devotion to the secular, with a passive hostility to the religious." Educators have employed a naïve, untutored conception of neutrality that has subtly but surely discredited religion. For schools to be truly neutral, the study of religion must be integrated into the curriculum.

And finally, two quick points. First, let me say clearly what I trust is evident. My arguments are secular arguments. They aren't grounded in any personal religious convictions I might have. Rather, I am arguing as a philosopher and educator who is concerned that students receive a truly liberal education that respects in a substantive way the neutrality required by the establishment clause.

Second and last, I wish to make clear that I do not believe that educators are intentionally hostile to religion or that there's any conspiracy of secular humanists at the root of our problem. Public education naïvely and uncritically reflects the dominant intellectual and cultural temper of our times, which is secular. What we must keep in mind, however, is that our times are not yet entirely secular. Religion continues to possess a measure of cultural vitality and religious intellectuals, both liberal and conservative, who continue to challenge the conventional secular wisdom. To ignore them, to ignore living religion, is on both educational and constitutional grounds, wrong. Thank you.

MR. HAILES. Thank you, Dr. Nord.

Oliver Thomas, Special Counsel, National Council of Churches of Christ in the U.S.A.

REV. THOMAS. Thank you for allowing me to appear before you today. I commend the Commission and its Chair for convening these hearings on the subject of schools and religion. No issue is more important to the future of public education in the United States. I say that first of all because despite the sophistication of the 20th century, in many ways religion is still one of the few things that people will actually kill one another over. We can look at the bloodiest conflicts

in the world today and we would discover that a majority of them have something to do with religions. There are always other factors, but religion plays an important part in these disputes. We could look at our most divisive domestic issues, whether we chose abortion or gay rights or capital punishment, and again we would discover that it has a lot to do with the clash of religious viewpoints.

Secondly, we are the most religiously diverse nation, I think, on earth at this point in our history, with every major world religion present in large numbers. Hundred, thousands, perhaps, of different sects and subgroups. Indeed, I got a letter just this month telling me that we have yet another American religious group on the scene, the Church of Princess Diana. I'm not kidding. Conservative Christians are more politically active than ever. You have one of the fastest growing groups in the United States today: the so-called religious nones. And I don't mean women in black habits. I mean people that when the sociologists ask them what is your religious association, they say none. And they are an important part of the conversation as well.

So the challenge of how we live together and public education with this religious diversity is one of the critical challenges of the 21st century. Having said that, I am pleased to report that significant progress has been made in how religion is being treated in our public school system. In fact, I think all of my copanelists and those that went before would agree with that. Some districts—there are problems with compliance on both ends. And you've heard that presented in the last panel. Some districts continue to promote religion while others persist in discriminating against it. But overall, I think the Equal Access Act, the first amendment, and related laws are being implemented and adhered to in a manner that surpasses any period in our nation's history.

Dr. Haynes briefly discussed the history of schools and religion. He talked about the sacred public school which was not always a place of peace and harmony. As you know, there were Bible wars in Cincinnati and Philadelphia over which version of the Bible we would read in the public schools. Convents and churches were burned. Blood was spilled. It was not a pretty time. And then, of course, the religion-free zone that President Clinton spoke about when his guidelines were released, where Martin Luther

King, Jr., became a political reformer, Frosty the Snowman replaced traditional Christmas carols, and students were told they could not gather around the flagpole for voluntary prayer or form Bible clubs on an equal footing with other extra-curricular groups.

At long last we do seem to be agreeing on more than we're disagreeing on. And groups ranging from People for the American Way, Elliot Minberg's organization, to the Christian Coalition, which has also been very supportive of the efforts that Dr. Haynes and I have been engaged in, are working together to try to put in place a framework of nondiscrimination that neither promotes nor inhibits religion, that seeks to accomplish fairness and respect. Three developments in particular have paved the way for that. They're set forth in my written testimony. I won't belabor that point. I want to get on to the question of curriculum.

I will stop and pay tribute to the President of the United States and his Secretary of Education who have made a personal and public commitment to make religious liberty a priority in the United States of America. And I think perhaps the greatest legacy of this Administration may be the work that they have done on religious liberty. Mark Stern at the American Jewish Congress has already been mentioned, and of course, Dr. Charles Haynes and the work that he's doing around the country. I must confess to you today I did not know until this morning that we were to talk about curriculum, and so I will just say a couple of short words.

One, we've mentioned opt out. Opt out is an important way to accommodate religious concerns in a public school where parents or students feel that their religion is being burdened. Now, if you look at the case law, and Elliot may want to comment on this also, there's not much in there to require opt outs. The case law doesn't put much of an obligation by and large on the school districts. On the other hand, I'm pleased to report that most school districts on their own are trying to accommodate requests for opt out. Some school districts are even allowing opt in on certain things when it's very controversial. If they're going to show, for example, a movie that might be R rated or controversial, they will let parents decide.

As for teaching about religion in the curriculum, there are good materials available. Warren Nord, Charles Haynes, and others are doing

that. We don't have enough of them yet. You have to search for them. One reason is because textbook publishers have not really made this a priority issue. And so, in light of that, let me just make my few recommendations and then I will conclude. The important remaining work, it seems to me, is education and not litigation. We are still litigating around the edges, but the vast majority of us have come to some agreement on this kind of third common ground neutral approach, the fair, neutral, honest broker. And although we have trained thousands of teachers—I speak here of the partnership that Dr. Haynes and I have through the Freedom Forum sponsorship—in dozens of States, in hundreds of school districts, the fact is that, number one, teacher colleges are not providing aspiring teachers with the training they need to confront these divisive issues.

As a school board chairman, I can tell you that no issue can explode more rapidly and cause more fallout for your school district than religious issues which are so deeply emotional to people. A battle over a Nativity pageant or what was said at a graduation exercise of a religious nature or what was said about a particular religious tradition, these are extremely difficult issues, particularly for young teachers. And if we don't prepare them for this—and I fear that ignorance, fear, distrust, and acrimony can continue to characterize this issue.

So my recommendation—I know that the Commission can't step in and solve some of these problems, but I do think through your encouragement both as the Commission at the national level and through your State advisory committees can make a difference. One, I think we need to encourage State legislatures and boards of education to provide training for their teachers and administrators. Most teachers really want to do the right thing. They're confused about what the right thing is. They've been listening to—I say this with due respect—the politicians and preachers tell them God has been kicked out of the public schools or the Supreme Court has fouled everything up. They're uncertain about how to handle the issue of religion, and just simple training would be a most helpful improvement.

Number two. Urge colleges and universities to provide some courses for aspiring teachers, because these are issues that teachers can actually lose their jobs over if they find themselves in

the middle of—an untenured teacher, a nontenured teacher taking the wrong approach on an issue like this in complete innocence can end up ending a career because they simply weren't given the basics about how do you teach about religion from an academic standpoint. It's not a Sunday school class. And also the basic religious liberty rights of students so they don't infringe upon those.

Three. Urging local boards of education like my own to develop policies on how religion ought to be treated in the curriculum, in particular, but also in other areas, as well.

And finally, encouraging textbook publishers to produce more study about religion in existing courses, such as history and literature, as well as in electives. I thank you and I would be happy to entertain any questions that you might have.

CHAIRPERSON BERRY. Thank you.

**Elliot M. Mincberg, General Counsel and
Legal Director, People for the American Way**

MR. MINCBERG. Thank you both for inviting us here and for holding these important hearings. I want to start out by underlining something that my good friend Buzz Thomas just said. This hearing is going to focus by definition on problems. That's how hearings are. But it shouldn't underemphasize the key point that Reverend Thomas just mentioned.

For the most part, most of our public schools do an excellent job of dealing with religion in the public schools, dealing with it in a fair and in a neutral way. And there are problems, and they clearly do go in both directions. And both those directions are critical. It's just as critical that the schools protect the right of individuals to be free from State promotion of religion as they make sure that the right to be free to do free exercise of religion is protected. There are problems sometimes on both sides, but for the most part the schools do a very good job.

I want to mention something that Vice Chair Reynoso mentioned last time, which is why is it sometimes that even though the Supreme Court is clear, people get it wrong. I think ironically that one of the most important reasons for that is because of the efforts, usually of politicians, who for their own reasons are trying to use religion to promote their own causes. For example, in 1995 Speaker Newt Gingrich said on *Meet the Press*—I heard it on Sunday morning, that it is currently illegal for a child to say grace over a

meal in a school cafeteria. Now, everyone in this room knows that's wrong. But if you're a teacher and you're a principal and you heard it on Sunday morning, it's no wonder that you might get a little confused. And in fact, it was that very kind of statement that led this broad coalition that I mentioned before to put out those religions' and the public schools' guidelines, which then led to the Administration's work, which then has led to the Freedom Forum work. And I think it's the best we can do in terms of education and information for people.

Even today we hear that God has been kicked out of the public schools, that kids can't pray. It's not so. And to the extent this Commission can help correct those misimpressions and make clear what the laws really are, that will be the best service that it can perform.

Now let me turn specifically to the subject of religion and public school curricula. The general principles in this area are pretty clear and pretty well agreed on: that schools shouldn't teach religion, shouldn't promote religion, but they can and should teach about religion. But as the old saying goes, the devil is often in the details. And that's, I think, what we have to take at least a quick look at. It is absolutely true that particularly in the '70s and '80s, some public schools and textbooks really did seek to avoid controversy by totally excluding any mention of religion. My organization, People for the American Way, was one of the first to conduct a textbook study. And we criticized textbooks for talking about the Pilgrims as a group of wanderers without ever explaining why they were wandering. Of course, they can and you should do that. And in fact, there has been great progress. I think even my friend Charles Haynes has underestimated how successful he and others have been at encouraging textbooks, encouraging schools to do a much better job in this area. And again, I single out the work of Buzz Thomas and Charles Haynes in this area. And again, I think encouraging and promoting it would be good.

But unfortunately we continue to find too many instances in which some advocates and some school districts seek to cross the line and promote religion rather than and sometimes in the guise of teaching about religion. For example, we were involved in the *Lisa Hurdall* case in 1996. That was the case of a family in Mississippi that found that the school district was continuing to have captive audience prayer over the

loudspeaker in classrooms and doing religious Bible instruction in which the teacher was selected and paid for by a local church committee which had been going on for about 30 or 40 years. Now, they tried to defend that in exactly the same terms that we've heard today. They said, "This isn't a religion course. We're just teaching Middle Eastern history. We're teaching the Bible as history." Now, of course, that misses the point. You can't properly teach the stories and precepts of the Bible as literal history without teaching and promoting a religious point of view. You can't treat the Resurrection like it was the Gettysburg Address. It just doesn't work. And it's important because to do that is to promote religious beliefs and to denigrate the religious beliefs of everybody else.

Now, the Court came out the right way in the *Hurdall* case, and in fact, that school district is revising its curriculum. But then again, just last year we had to file another lawsuit in Lee County, Florida, where the National Council that Barry Lynn had mentioned had been promoting a supposedly "Bible as history" curriculum. But in fact, again, tried to teach the Resurrection like it was the Gettysburg Address. That was wrong. A judge issued a preliminary injunction against the New Testament part of the curriculum, ordered careful monitoring of the Old Testament part of the curriculum, and in fact we were able to reach an agreement. We actually settled the case. And the school district has now put in a curriculum based upon a college curriculum that really does teach about the Bible and about religion rather than promoting religion. So we clearly need a lot of work not only in helping schools to include religion where it's appropriate but making sure they don't err on the other side.

A brief word about the subject of creationism. I think Mr. Nord and I may actually disagree on this one because I think the Supreme Court has made clear that religion-based views of origin certainly can be talked about. They can be talked about in history, in comparative religion courses. And indeed, in science class people should be treated with respect, and the views of those who have disagreements with evolution on religious grounds can and must be treated with respect. But I think the courts have made clear that it isn't appropriate to teach creationism in the same way that one teaches evolution. And indeed, we see many instances that again go the

other way around. I'll mention briefly. There was a school district in Kentucky just 2 years ago where the principal took every copy of a fifth-grade science book and glued together two pages because they talked about the Big Bang theory and didn't talk about divine creation. That's wrong, and it shouldn't happen. And we need to take steps to make sure that it doesn't.

Finally, I would make one other plea. I don't think this is the right time for any changes or any recommended changes certainly in the Constitution or for that matter in the laws because there is serious risks when that occurs. The effort that Buzz and Charles and myself and others have been involved in to reach common ground and to promote better understanding about religion is frankly only about 4 or 5 years old. It's only been about that length of time that this concerted effort has been made to try to get people to reach common ground and see both sides of the situation. I think changes in the laws now are not appropriate, but encouraging better education, encouraging all school districts to adopt policies as has been mentioned before, encouraging better training, those are the best things that can be done in the area of schools and religion. Thank you very much.

CHAIRPERSON BERRY. Thank you, Mr. Mincberg. Counsel.

Discussion

MR. HAILES. Yes. Dr. Nord, let me ask you this question. Is it true that the exclusion of religion in public school textbooks only exists with regard to outdated books that are still in use, as our staff was told by one person in interviews, or is this also an ongoing and current problem?

DR. NORD. It's an ongoing and current problem. I think it is the case that there has been small, incremental improvement in history and social studies texts over the last decade and partly in response to the textbook studies of the late '80s and an increasing appreciation of the groundrules, the common ground groundrules regarding teaching about religion and Supreme Court opinions. I think the history and social studies textbooks still have a long way to go. And there's been virtually—no. I'd say there's been no effort to deal with other subjects than history and social studies so far as taking religion seriously and understanding what a proper role for religion might be, a study about religion might be in dealing with say literature or eco-

nomics or home economics or biology or physics or sex education or moral education or health. There's been no improvement. The textbooks reflect no understanding of what the relationship of religion might be to the subject matter being discussed. Scenarios I can tell. There's no discussion in the professional organizations. There's no movement among textbook publishers to improve the textbook. I think the situation is abysmal.

MR. HAILES. And do you have any response to Mr. Mincberg, who in his testimony mentioned creationism as a subject matter in public schools?

DR. NORD. I'm not sure if Elliot and I disagree or not.

MR. HAILES. What is your view?

DR. NORD. Well, should I disagree? [Laughter.] Sure, part of what students should learn is the controversy. If students are to be liberally educated, they should understand what the different points of view are. We disagree deeply about evolution and creation, and students should, as part of a good education, come to understand what the nature of that disagreement is. The question is, Just what is the disagreement and where is the best place to initiate students into an understanding of the disagreement? I'm concerned that the nature of the discussion about evolution and creationism is hopelessly simple minded because of the way our cultural politics work. Positions become polarized given the needs of fundraising and court cases and journalism so that we're inclined to think there are two positions. There is the position of modern science and then there's the creationist position, when in fact there are 3 or 4 or 5 or 6 or probably 17 or 18 somewhat different positions, and we lose sight of that.

There are an awful lot of religious liberals and moderates who believe that evolution has happened, but unlike the neo-Darwinian biology that we teach in biology classes, they believe that evolution is purposeful, that it is divinely guided. Well, of course, one of the things that you believe if you accept the neo-Darwinian account of evolution is that it isn't guided. It isn't purposeful. So here we've got three major positions right now. We've got divinely guided, purposeful education. We've got neo-Darwinian, neo-selection acting on random mutation of genes. And then we've got a kind of creationism based on a literal reading of the first chapter of

Genesis. Well, it gets even more complicated than that. There are intelligent design theorists. There are various kinds of theological positions. I mean, after all, there are eco-feminists. There are process theologians. There are various kinds of theological positions, ways of interpreting evolution that themselves never get into the science books even though theologians working within those traditions accept evolution. So that there are a wide variety of positions one can take on evolution and creation. What does creation mean? Does it mean God created the world in six 24-hour periods, or does it mean that God is somehow or another shaping the process of evolution? All of these distinctions get fudged. The result is that we almost guarantee that we're going to turn out students who are absolutely ignorant about the range of alternatives that are available in the culture, and as things are now, students will only learn the conventional scientific account, although it's certainly true that in various school districts creationist accounts—and it's usually the kind of Protestant fundamentalist creation accounts—get bootlegged in by some biology teachers even though they're not part of the official curriculum.

Well, then the question is, How do you deal with evolution and creationism and where should it be done? My reading of *Aguillard* is that Justice Brennan said that Louisiana's creation science law was unconstitutional because it had the purpose of promoting religion. It violated the first prong of the *Lemon* test. Conceivably one could have some discussion of creationist alternatives or a variety of religious alternatives to evolution, to neo-Darwinian accounts of evolution, in a science course if the purpose wasn't to promote religion but if the purpose were to provide students with a good liberal education. I think science classes should have, in an introductory chapter—science texts and classes have some obligation to map out the realm of possibilities. I don't think science texts should become religion texts, but they should alert students to the fact that what they are going to learn is controversial, and if they are to be liberally educated, they should know something about what some of the alternatives are.

I don't think most science teachers are competent to deal with religious and theological alternatives to evolution. So the best place to deal with those alternatives is not in the science class, although the science class must make stu-

dents aware of the fact that there are alternatives, but in a course in religious studies. Unfortunately, there are very, very few of those courses, and there's hardly anyone competent to teach them. So that means the de facto situation is that we end up teaching students to think about nature entirely as modern secular science and give them no sense, no informed sense, of any kind of alternatives.

MR. HAILES. Thank you. Reverend Thomas and Mr. Minberg, I'm going to address the same question to the two of you. And that is, in this whole area we're talking about, in terms of public school curricula and the integration of religion into the curricula and textbooks, do you see any proper Federal role that can be played? And I'll ask you, Reverend Thomas, first, and then Mr. Minberg.

REV. THOMAS. The proper Federal role in helping make sure religion is treated properly in the curriculums? I think there are two issues that one always has to consider when you're trying to reach an attainable goal, which is to make sure that religion is treated in a fair, neutral manner, that it's neither promoted nor inhibited. And that when we deal with it in the curriculum, we deal with it in a proper forum [in an] objectively as possible academic way.

One is curriculum materials. And there is—and I think Dr. Nord and Dr. Haynes are right on this. There's not much out there. They're fast and furiously producing what they can that's academically sound. But there are places—the First Amendment Center that the Freedom Forum has funded at Vanderbilt and other places, Dr. Nord's program at the University of North Carolina at Chapel Hill—where you can find these materials. But you almost have to seek them out, wouldn't you say?

The ASCD, the Association for Supervision of Curriculum Development, is producing some of these materials, to their credit. And that's making it much more available to public school educators. So finding those kinds of materials is, I think, more difficult for you to help us produce because your role is more limited there. I mean, what can you tell a textbook publisher? It really is—it's not a thing that you can very well do. On the other hand, the second piece of the puzzle which is the instruction, I think you have a little more influence on. Not so much by mandating anything. Because I agree with Elliot Minberg; the legal framework is pretty sound right now.

And I don't think it's the time to be tinkering with it. But the training, just the basic training, school districts are not getting it.

I go in school districts where kids are told that they can't put a piece of artwork up on a bulletin board because it has a cross or a Star of David on it. I've been in school districts where children have been told they can't sing a particular religious song because of its religious content. Other school districts you go in and you are in a December concert and you would think you are at a local church. It is that diverse. Yet when we go into school districts in the project that Dr. Haynes runs, whether it's in Alabama, Mississippi, California, Long Island, Utah, which is a whole different religious makeup from most of our States, it is warmly received. Teachers are delighted to hear about how you do it properly, and they want to learn how. So perhaps, as I suggested, if State boards of education—Commissioner Jane Walters in my own State of Tennessee has expressed a strong interest—provide some basic training for teachers and administrators. But the legislature hasn't appropriated any money for it.

So to encourage through your advisory committees that State—I believe State legislatures, if the U.S. Commission on Civil Rights said in order to avoid problems of discrimination in the area of religion, in order to avoid violations of the establishment clause and the Equal Access Act, State legislatures and local school districts are going to have to make a commitment to train their teachers and administrators properly.

As I mentioned in my introductory remarks, teaching about religion in a public school is not like teaching about religion in a Sunday school. And for many of these teachers, that's where they teach about religion, particularly in my part of the world in the deep South. So I do think that your influence could be felt in the area of training more so in the area of the actual curriculum.

MR. MINCBERG. I think my remarks would be on the same line as Reverend Thomas. We're in an era when—there was some discussion of Federal standards in things like math and there was practically outright rebellion, I can imagine what would happen if we talk about Federal standards for teaching about religion or something of that nature. Similarly, even in the area of training we can't reach agreement on Federal funds for more teachers or to fix up crumbling

school buildings. It's going to [inaudible] agreement on Federal funds for training in this area. But I do think the kind of bully pulpit role is probably the best role that the Federal Government can play. I think President Clinton had an enormous impact in 1995 with the statement that he made, and I think this Commission, which has enormous respect, can do the kinds of encouragement that we've talked about. I think, for example, on the subject of curriculum and the textbooks, have realized that maybe the big difference between Warren Nord and me is that he sees the glass half empty and I see it half full. He sees a little progress. I see a lot of progress in doing a better job.

DR. NORD. I see it about four-fifths empty. [Laughter.]

MR. MINCBERG. I think, for example, on that very subject that you put to us, it wouldn't be a bad idea for the Commission to talk to some of the textbook publishers and try to put together and promulgate information on what the textbook publishers are doing. That would be an example of this Commission performing that kind of encouraging and informative role. And I think that's probably the best that the Federal Government is likely to be able to do without creating controversies that will make the fights about vouchers and teacher training look like mere puddles.

REV. THOMAS. Mr. Hailes, I'm sorry. I also failed to mention local districts, not just on training. But local districts need policies. School boards should have sound policies. And we have lots of model policies now. We have good consensus guidelines. People at the local district level where I am, if they see Elliot Mincberg and then someone—Steve McFarland from the Christian Legal Society, who are sort of on different ends of the political spectrum, then they feel secure. They take some comfort in that and they are willing to step out. So you have a great political moment in terms of the Nation's life where there is such agreement that it would be a real shame for local districts to miss that opportunity.

MR. HAILES. Thank you all very much. Madam Chair.

CHAIRPERSON BERRY. Does any Commissioner have questions for the panel? Commissioner Horner.

COMMISSIONER HORNER. Yes, I have a question for Dr. Nord. You mentioned politicians and journalists as not contributing to subtlety in this

discussion. That made me recall a front page *Washington Post* story of a year or two ago that became quite notorious in which the *Post* reporter referred to Christian evangelicals as poor, ignorant, and easily led. This was a news account. And it became a notorious quotation because it was emblematic of a point of view that many people believed they recognized among the best educated and most successful of our journalists. My question to you is, Do you see any adjustment of that attitude, if you agree that it does exist or has existed? And is there any remedy you would suggest to open the eyes of some of our smartest journalists to other realms?

DR. NORD. At the University of North Carolina, Chapel Hill, we had a program funded I think by the Rockefeller Foundation to bring in journalists for a semester and study in our department of religious studies and develop projects and work with faculty members. And I think there may be several other programs like that around the country. I don't think I'm competent to say whether I think there's been improvement in the coverage among journalists on religion over the last decade or two. I think probably there has been a little, but my judgment is very impressionistic.

COMMISSIONER HORNER. Do you think water is filling or draining out of the glass on the subject of journalism? I know you can't make a judgment, but if you looked at all the institutions where the question of the treatment of religion is problematical, you see that it's problematical in most of the opinion-creating institutions in our society, and therefore it becomes very important which direction opinion is trending in those institutions and how quickly. So I guess I'm asking you to tell me whether one should take hope from what you're telling us today to a minor degree or to a considerable extent.

DR. NORD. To a very minor degree. I must say that I'm impressed with the number of cover stories in *Newsweek* and *Time* that have dealt with religious topics over the last year or two. That's striking. I think one of the things that's amazed some people is that religion hasn't gone away. A decade or two ago I think an awful lot of social scientists would have held a kind of secularization thesis that said essentially our culture, our civilization is growing more and more secular. Religion will wither away. It's turned out that that's not the case. And I think there are some ways in which there are kind of minor renaissances

of religion here and there and the media end up covering them in some way. But I must say that overall, and particularly in regard to our intellectual life—universities, higher education, and public education—I see some small reasons for hope, but they are very small. And so, as I said, I think the glass is four-fifths empty.

COMMISSIONER HORNER. I was stunned when the Holy Father visited Denver a few years ago and huge numbers of young people came out. And the story of that—and I watched the coverage very closely on the networks. The story was almost uniformly the question of the pope's stand on highly secular, basically liberal to left issues like female priests, abortion, and sexuality. Issues that stem not from the mainstream Catholic religious life but from the secular—I would say antireligious life of the journalists. And yet the pictures we saw on the screen were telling a wildly different story about the inherent meaning of that event. So I found that quite discouraging. And I think that even though there is more writing about religion, we are still not seeing writing which is particularly sensitive to the religious questions from the point of view of the religious believer, even descriptively.

DR. NORD. Well, I think journalists like most teachers are themselves the products of educational systems that didn't take religion seriously. A lot of people think that religion disappeared from textbooks and the curriculum in the 1960s as a result of Supreme Court decisions and the counterculture, whereas in fact, religion disappeared from textbooks in the public school curriculum pretty much at the end of the 19th century. Certainly by the end of World War I, 50 years before the Supreme Court applied the establishment clause to the States. So we've had a largely secular education, although anecdotally obviously there are places that try and fudge all of that. But by and large we've had a very secular—people have received a very secular education. The more educated they are, the more secular education they get. And so it's not surprising, I think, that there's little sensitivity to or understanding of religion among many people. You've got to work I think fairly hard to become educated about religion in our culture.

CHAIRPERSON BERRY. Other Commissioners? Commissioner Lee, first, and then Vice Chair.

COMMISSIONER LEE. Mr. Minberg, you mentioned earlier about the importance of students

learning about religion and we are a country of very diverse religious beliefs. How would you propose in the area of curriculum development that students who may not be from the traditional majority religious views, that they will learn about the religion that their families may share or they would not feel like they're isolated or they're neglected from the whole process?

MR. MINCBERG. I think, Commissioner Lee, you raise a very, very important and serious question. Because the problem that we have is that while it is true that there are some places that don't teach about religion at all, the obverse of that is that there are many, many places, many, many schools unfortunately that teach purported-about religion but basically teach it only from one religious point of view because they can't even see the religious points of view. That was the case in the *Lisa Hurdall* case where this very good Christian family was harassed and called atheists and devil worshipers because they didn't want to go to a Southern Baptist style of teaching about the Bible. They happened to have been Methodists. And I've learned as a Jew there's a lot more differences among Christianity in the work that I've been doing over the last few years than I ever knew before. So I don't have an immediate answer to that question.

CHAIRPERSON BERRY. Amen.

MR. MINCBERG. In any event, I don't have an immediate answer to that question. I think that there are a number of things that can be done. I think one thing where we would all agree is it would make sense—and I think even Warren agrees that the glass is at least getting somewhat more full in this area—that in history and social studies classes it makes sense to teach about religion in a critical way as it has played a role in human events, as religion has played a role in the wandering of the Pilgrims and the civil rights movement and many other areas. And I think that's happening more and more. I think what's critical is that—what I would recommend in high schools is the whole idea of a history of the Bible course is fraught with problems. Much better to focus on comparative religion courses for high schools so that by definition in the course you're not going to talk about just one religion but a series of religions so that they can kind of get different points of view. Those are just a couple of thoughts that I have, but there are others as well.

I should also say that I think it's very important to keep in mind—and I say this with the greatest of respect to Commissioner Horner and to my friend Warren Nord. America is perhaps the most religious country on the entire earth. There are more religions and more people practicing religion in this country than any other place on earth. And I think the reason for that is because of the way we've structured how we deal with religion in this country. That is, you don't inhibit religion. You don't prohibit the free exercise. But you also do everything you can to make sure that a child in class doesn't feel like an outsider because everybody else's religion is being taught in class but their religion isn't. And so we need to continue to do those things in a careful and sensitive way to do as good a job as we can in that important area.

CHAIRPERSON BERRY. I don't know what the "with all due respect" was about, Elliot. I was just confused because I didn't think that Commissioner Horner and Mr. Nord thought that Americans weren't religious. So I don't know what the "all due respect" was about.

MR. MINCBERG. I apologize. I had the sense that what they were suggesting is, oh, there's this kind of bias against religion in our culture.

COMMISSIONER HORNER. I can clarify that. Because as Professor Nord said, the more highly educated people, especially those who are educated in the humanities and the arts and in the social sciences, the more likely you are to feel that religion has a certain taint to it. That you aren't a certified intellectual leader if you aren't at least highly skeptical of religious beliefs. And there's a certain sense that to be a believer is to have not quite gotten sufficiently well educated yet. And so it is the case that I do think that in places where it counts a lot, religion is socially unacceptable.

MR. MINCBERG. Again, it just depends I think on your perspectives in these ways. I mean, I consider myself a reasonable intellectual leader. I don't drive on Saturdays because I'm that religious about my beliefs. My boss, Carol Shields, is the daughter of a Southern Baptist minister and is one of the most religious people I know and heads People for the American Way, which is consistently attacked by many on the right as being an intellectual leader that doesn't care about religion. I can go up and down. Look at the President of the United States who I think has embraced religion in ways that others haven't. I

think we see things in different ways depending on our perspectives. And I guess while I don't disagree that the statement made in that *Washington Post* article was not an appropriate one, and I think they've recognized that, and I don't disagree that you can find other examples of coverage of religious events and occurrences that is not appropriate, I can also point to a lot of very good articles in national press and elsewhere that talk about religion in a serious way. And I therefore just kind of bristle a little bit. It sounds sort of like there's a suggestion of antireligious bigotry in our culture, and I guess I just don't believe that. I just don't believe that people who are religious are discriminated against in a significant way in a culture where no candidate for office would dare to suggest, for example, that they were an atheist.

COMMISSIONER HORNER. Nor would they dare to suggest a deep irreducible commitment to religious beliefs and to moral conclusions stemming from that belief.

CHAIRPERSON BERRY. This disagreement is very interesting. I shouldn't have asked the question. Did you have any questions, Commissioner?

COMMISSIONER GEORGE. Yes, I did, Madam Chairman.

CHAIRPERSON BERRY. Why don't you go before the Vice Chair.

COMMISSIONER GEORGE. I guess I want to begin by disagreeing with Mr. Mincberg on—

MR. MINCBERG. I had the feeling you might.

COMMISSIONER GEORGE. I don't think it's a matter of perspective. I mean, on these questions we do have data. If you look at the Lipter and Rothman data, if you look at the Gallup data—Gallup's done wonderful work on the religious views and sensibilities of different sectors of the culture. And the facts are just there. There is a wide divergence between popular and elite opinion, no matter how you carve up those categories. Now, I don't think you have to—I mean, you're entitled to your view and we can look at the data, but I don't think, just to draw an implication, that you're recognizing this, the pervasiveness in elite culture of secularism and indeed, as I'm going to suggest in a moment, discrimination against people of faith, Protestant, Catholic, and Jewish. You don't need to deny any of that in order to make your case. Your case doesn't depend on whether there's that kind of discrimination or that kind of secularism or not.

So I guess I'd just invite you to really look hard at the data. It's not just perspective.

MR. MINCBERG. No. And I appreciate that. And I would say the same to you. That is to say that I think the argument that religion should be treated fairly and should be talked about in an appropriate way in public schools doesn't depend on a notion of antireligious hostility. It ought to happen, as Warren said, not out of a commitment to proselytize religion but of a commitment to have an appropriate and effective education.

COMMISSIONER GEORGE. Well, let's look at the facts. I'm tempted to make one of those Julian Simon-Paul Ehrlich bets with you. Professor Nord, you've called attention to the problem in the schools of education in the teachers college, as did people in the previous panel. You've also called attention to the pervasive secularism that creates the problem in the public schools and to the idea of the phoniness of a view of neutrality that really just is secularism without being neutral as between secularism and competing views. But my question to you is, realistically what can be done about that? I mean, if secularism and secularist outlooks are pervasive in the institutions that provide schoolteachers and administrators for our public school system, really what hope is there of solving this problem? How is your message going to get through?

DR. NORD. I'm not overly optimistic.

COMMISSIONER GEORGE. Oh, I'm glad.

DR. NORD. Let me say a couple of things nonetheless. Well, first of all, I think it's important to keep in mind the distinction between secularism and secularity. Secularism is the view that secular answers are final answers, and it's a strong ideological position. And I don't think most educators are secularists. I think most educators do believe that it's their job to teach secular ways of thinking. And my argument then is that when those secular ways of thinking are the only ways of thinking that are taught, we end up having a kind of de facto secularism because they become normative. So I'd want to draw that distinction. I think Charles gave the best answer to the hope for progress, and that is that if in local schools and in States there can be greater appreciation of the importance of religion in the curriculum, then that can force some changes in schools of education. So it's what he called a kind of bottom up policy.

I think there's maybe a little hope for change given the influence of postmodernism in the academy. A lot of the old certainties have broken down in some ways. The postmodernist movement hasn't been particularly warm and receptive to religions, but nonetheless, it has served some purpose I think in making clear that the old emphasis on a kind of scientific way of understanding the world is somewhat naïve. So I think there's maybe some reason for hope there.

But no, I suppose—since I do think the glass is four-fifths empty, I think there's an awful long way to go. And that makes my optimism limited. But I think it's tremendously important to realize how far we are from where we should be. And that can have a strong chastening effect, too.

COMMISSIONER GEORGE. Do you think that discrimination against people of faith in the academy when it comes to hiring and promotion has anything to do with the pervasiveness of secular outlooks or the indifference or—in the worst case, hostility to religious viewpoints in the schools?

DR. NORD. Yes, although I'm a little worried about calling it hostility to religious folk. I mean, certainly the kind of prevailing understandings of how one practices the disciplines leaves little room for religion or theological outlooks. And so people who have various kinds of religious outlooks on whatever their subject happens to be are not likely to go out and get a Ph.D. knowing that their way of understanding the world isn't going to be taken seriously. And oftentimes when they do end up getting their Ph.D., they end up having to compartmentalize their religion as a process, and they end up feeling more comfortable teaching in a small religious school rather than a research university where they really wouldn't be free to pursue their own ways of understanding their discipline.

I think also there's a tremendous amount of ignorance within higher education about what academic freedom means in the university. I think that academic freedom does give scholars at universities the right to take positions on religious issues that say high school teachers doesn't. I don't think that's appreciated much. So there's a fair amount of consciousness raising that has to be done in universities, as well as in public schools. But again, there's just a tremendously long way to go.

COMMISSIONER GEORGE. A quick last question for the group. One alternative that's been can-

vassed when it comes to the controversy over human origins and the origins of the universe is to expand the number of options so you in effect, as Reverend Thomas said, teach the controversy. What would you think of the alternative possibility that strikes me: Instead of bringing religious viewpoints in, you in effect exclude religious viewpoints that masquerade as scientific ones?

The argument would go—look, the problem is not that we don't teach alternatives to the blind watchmaker thesis, let's say. The trouble is we teach the blind watchmaker thesis, and the blind watchmaker thesis cannot itself be vindicated on scientific grounds but presupposes certain metaphysical propositions. There's metaphysical presuppositions which are not themselves amenable to scientific inquiry. So that in effect what we're doing is teaching a worldview, an alternative to religion, a religion, if you will, under the guise of science. And the solution is not to try to bring other voices in but to clear our scientific programs of that kind of nonscientific metaphysical teaching. I'm not proposing this myself. I'm more inclined to the view that has been articulated, to expand the number of voices and teach the controversy. But I think we should soberly consider whether the quest for neutrality might lead us in the other direction, to actually narrowing what counts as scientific in these curricula. Perhaps Mr. Mincberg would be entitled to go first on that.

MR. MINCBERG. Well, I'm happy to try. I think it's a very interesting thought. I mean, I guess I'd put it in a somewhat simpler way, which is that it seems to me that science ought to teach how, not why and who. That in order to get what you need to know on your SATs in high school, you need to know enough about the mechanics of evolution, not necessarily whether it was guided by a spiritual force or not, in order to pass your SAT exam. So I think it makes sense for science to try to focus on the how. After all, the pope indicated that he didn't think that teaching evolution in the right way was necessarily inconsistent with religious points of view, and I think it can be done in an appropriate and sensitive way. I think teaching about the controversy is not a bad idea also, and it just needs to be done that distinguishes that, whether it's done in social studies class or in the introductory part of the science class, from the actual learning the stuff that you need to know to get into

college kind of stuff, which I think again ought to be more the how than the why and the who.

REV. THOMAS. There needs to be a discussion up front about the limits of science. And science can easily become scientism. When Carl Sagan would say the cosmos is all there was, is, or ever will be, that's hardly science. I mean, you can't very well subject that statement to the scientific method. On the other hand, he was a great scientist. I think there needs to be an honest conversation about the relationship of religion and science and the limits of science, as Warren said, in some sort of introductory conversation. I really would want a richer curriculum than to shrink it even further. I think a liberal education requires that we get the voices in the conversation rather than just shut out one more voice.

DR. NORD. I was just going to say I agree with Reverend Thomas. The distinction between science and scientism is itself controversial. I don't think you can appeal to that and assume that's going to solve anything. But I think the most important question is, Why don't we want to have a richer number of voices included in the conversation? I think if people are to be well educated, liberally educated, they should understand religious as well as scientific ways of making sense of nature and all other aspects of life. That's inherent in the idea of education, and we shouldn't shrink from it. We should figure out how to approximate it in the fairest and the most thoughtful and reflective way.

CHAIRPERSON BERRY. Vice Chair?

VICE CHAIRPERSON REYNOSO. I waive.

CHAIRPERSON BERRY. Any other Commissioner have a question? [No response.] I have just a half a question. My half a question, which I'm not even sure whether it's really a question, is to say that it seems to me that on this matter of curriculum and religion that we've been fairly successful, more successful than in some of the other culture wars that are going on, with reference to your testimony, Professor Nord. For example, we may agree that we should include African Americans and Native Americans and women and so on in the curricula, but we still have big fights about what that means, how to include them, whether it just means naming somebody here and there or whatever. There are big fights about that going on all across this country, and there have been for quite some time. And I think in this area, of course, there are still fights going on, but there's been enor-

mous success as described by the witnesses. And we also have in this area a statement of principles issued by the Secretary of Education. We don't have one in the area of the culture wars over gender or race and all the rest. So don't you think that there may be more pessimism about this than compared to some of these other issues than the subject is due? I'm asking you, Professor Nord.

DR. NORD. I think that there has been some significant progress. I think that we do agree on—that there's wide agreement on the principles that it is important to include religion in the curricula, that religion should be included, should be taught neutrally. There's agreement about that. The devil isn't quite so much in the details. The devil is in the concept. What does it mean to be neutral? My sense of it is that in dealing with gender issues and race issues we've gotten beyond the point that you can be neutral by leaving minorities and women out of the discussion. Obviously, they've got to be included in some way.

In the case of religion, I think pretty much everybody agrees you can't teach history without including some discussion of religion. But virtually all of the discussion to this point has been about how can you improve the history and social studies textbooks. And the answer has been you do it incrementally. You mention religious traditions and ideas a little bit more here and there. I think there has been improvement. There hasn't been much. My argument is that in other areas of the curriculum that deal with contemporary ways of making sense of the world, there's been virtually no discussion. There's been no improvement. And there's not much interest in talking about how religion relates to science, moral education, sex education, economic education. So there there's just a tremendous long way to go.

CHAIRPERSON BERRY. One of the major issues that of course has consumed public time over the last few years has been about history textbooks and race, in particular, and how much of what should be included. There have been major battles going on on this subject that have gained public notice. I mean, I think that we've got to make enormous progress, and there are a lot of issues that people fight about in all of these areas. I just wanted to point that out. I think it is time to close this discussion. It is past time. So I simply have to say that I appreciate your being

here with us today, and the witnesses are now excused. And a member of our staff will escort you from your seat and through our sign-out procedures. And then I want to say to the Commissioners that we will take a lunch break until 1:30 sharp; 1:30 sharp we will back here. And lunches for those who ordered them are upstairs in the Commissioners' room on the seventh floor.

[Whereupon, the luncheon recess was taken at 12:50 p.m.]

Panel 3: Individual Students' and Teachers' Religious Freedom, Part I

CHAIRPERSON BERRY. May I have your attention, please. Our lunch break is over and we will now reconvene the hearing. Are there any staff people, interpreters, clerks, court reporters, signers who were not here this morning and who need to be sworn in? [No response.] No one new. Okay. Could the signer ask if anyone in the audience needs to have interpretation, please. [No response.] Thank you. Thank you very much. Have you already called the witnesses?

MR. HAILES. No.

CHAIRPERSON BERRY. Oh, they walked up on their own. Okay. Thank you very much. Would you please stand and raise your right hand. Welcome.

[Whereupon, an oath was administered.]

CHAIRPERSON BERRY. Please, be seated. This afternoon we have two panels on the topic of individual students' and teachers' religious freedom. These panels will address how well schools are both accommodating students' and teachers' religious practices and protecting their freedom from harassment and coercion. Mr. Hailes, could you please proceed.

MR. HAILES. Yes. At this time, we will ask each panelist to identify themselves, after which we will ask you to present a brief opening statement, beginning with Mr. Stern.

Marc D. Stern, Legal Director, American Jewish Congress

MR. STERN. My name is Marc Stern. I'm a legal director at the American Jewish Congress. And among—I guess one of the credentials that brings me here is that I was the chief author of a document called *A Joint Statement on Religion in the Public Schools, a Summary of Current Law*, which I have copies of in my bag. And I'll be happy to provide them to the Commission.

CHAIRPERSON BERRY. Thank you.

MR. STERN. I'm pleased to be here today to discuss the rights of teachers and students to speak freely in the public schools with regard to religion. I find myself with an unpleasant beginning task, however. I learned only at the close of business yesterday that I would appear on a panel with a representative of the Committee for American-Islamic Relations [CAIR]. And in our view, CAIR is an organization which condones the terrorism of Hamas, which uses terrorism—indiscriminate terrorism as an instrument of policy.

We are perfectly prepared to work with groups with which we have the most fundamental political and theological disagreements. There's people in the room who are the subjects of those fundamental disagreements and they can tell you that. And we have as well worked with Islamic groups, both on the joint statement, another statement I drafted on religion in the workplace, and just a couple of weeks ago I testified on a panel without any comment, knowing full well that I would do so, with a representative of an Islamic organization, in support of legislation for religious liberty.

The American Jewish Congress has also joined with Islamic groups in opposing genocide in Bosnia. But we draw the line on cooperation and joint appearances with those who provide and condone terrorism. CAIR is in our view such an organization, and we don't want to be understood as lending legitimacy to them by sharing a panel.

CHAIRPERSON BERRY. Just a moment. Could we be in recess just for a moment, because, Commissioners, there's some conversation going on here which I can't focus on what you're saying. Could you just hold on just for a minute, Mr. Stern.

MR. STERN. Sure.

CHAIRPERSON BERRY. Let me see if I can sort out.

[Whereupon, a recess was taken.]

CHAIRPERSON BERRY. Back on the record. I apologize to you, Mr. Stern. I just had to sort out a bit of confusion. Please, go right ahead.

MR. STERN. Let me plunge now into the merits of what brings us all here today. We can approach this subject either empirically or theoretically. The difficulty with approaching it empirically is that everybody tells anecdotes and war stories. Nobody has ever done a systematic study, to the best of my knowledge—I think I

would have stumbled across it—that tells us how often there are conflicts about religious speech by students and teachers and school administrators or other students. So we don't really know. What we know is the stories that we hear, the calls that we get, the complaints that we get, the lawsuits we read about or participate in.

We have done a study with the National Association of School Boards [NASB], whose general counsel designate is here and I understand will be speaking to you later. Some years ago the American Jewish Congress and the NASB did a study about equal access, which I know you've talked about already. And we found in our informal study, which got lost in the maws of some bureaucracy—we never published it—but something like 80 to 90 percent of the schools that responded to our survey—once again, unscientific—had rules in place to deal with equal access and were implementing it. And in fact, in the 14 years since the Equal Access Act was passed, there may be a dozen lawsuits. You can double or triple that for unreported lawsuits that nobody's ever heard about. In a country with 15,000 school districts, that's not a whole lot. It does not suggest to me a major problem. That's not to say that occasionally school districts don't avoid the law, don't ignore the law, don't violate the law one way or the other. It does not seem to be a major problem. Again, this is all anecdotal, but that's the best we can do.

Let me just say as well, because I think it will help understand some of the conflicts I will talk about, that at the time, 1983 and '84, the American Jewish community pretty much alone at the end opposed the Equal Access Act. And we were concerned that the permission for student religious clubs to function in the schools would serve as an opportunity for adults to use children to proselytize other children. And that has not happened. That has, I think, tempered the opposition of the American Jewish community. We predicted something. It did not happen.

Let me reiterate again that there's something like 15,000 school districts in the country. Who knows how many thousands of teachers and other personnel. It does happen either out of an abundance of zeal, ignorance of the law, sometimes outright bigotry, or circumstances which are sometimes not reported in the horror stories that appear in the press, sometimes debatable educational policy considerations that religious speech by students in a purely private capacity

is suppressed. And those are regrettable. Sometimes teachers use their positions to further particular religious points of view. And those are illegal and regrettable, but they don't seem to me to be a crisis on either end. We have problems. They need to be worked out. But I don't think we have a crisis with regard to religious speech in the community.

Turning now to the more theoretical aspects of this, it seems to me that there are three principles or four principles at stake. The first, as the Commission well knows from most of its work, that the Constitution speaks only to public activity. And so the activity of private students where it does not enjoy special status or power from government is outside the scope of the establishment clause. It's protected from government regulation theoretically because the government action is government action, State action, and therefore covered by the Constitution. But the private speech itself cannot violate the Constitution. That's one principle that's at stake.

A second principle at stake is the right which the Supreme Court has emphasized, and I think overemphasized in recent years, is the authority of school officials to control what goes on in their premises. Those of us who went to law school in the early '70s, in the wake of the '60s, remember *Tinker* as if it were the Supreme Court's last word, but it is not. The Court has increasingly recognized the authority of school officials. I must say—probably has something to do with the fact that my wife is now a school administrator—I am now somewhat more suspicious than I used to be of claims that you can do this without harming discipline. That you can allow free and unfettered juvenile speech that challenges everything without endangering the atmosphere of learning. The Court has emphasized that. And that's the second aspect.

Schools have increasingly, for example, barred all T-shirts with slogans. And in the course of doing that, they bar relatively harmless religious slogans from T-shirts. And of course, what you read about in the newspaper, they won't let me wear a T-shirt that says "Jesus saves." But what they're concerned about is the gang T-shirt or the hard metal rock T-shirt which will have somewhat less felicitous slogans, because the first amendment requires equal regulation. The easiest way to do it is to ban all of it. Some of this is just power hunger on the part of school administrators, other than my

wife, of course. [Laughter.] But that's the second element that comes in. And that, I think—I confess now in my middle ages is a harder issue for me than it once was.

And thirdly, and this I think is the crux of where we are in litigation now, are the rights of third parties. The Supreme Court has never—and this I think is really where my good friend Steve McFarland and I debate all the time. In my view, since I'm speaking, I get to tilt the field first. In my view, the Supreme Court has never upheld a freedom of speech claim where the right is not a right to speak my mind but the right to capture someone else's mind. Other people are in school. They have no choice but to be there. Can't even go to the bathroom without a teacher's permission. So they're a captive audience. And the Supreme Court has emphasized that captive audiences—and the government can act to protect captive audiences. And my friend, Mr. McFarland, will tell you if you would ask him that, listen, we have to listen to a lot of stuff we don't like. Everybody is a captive audience in a school. *Tinker* has no meaning if you yield to captive audience. That is precisely what we litigate today, those differing views of captive audience versus noncaptive audience: how do you preserve *Tinker* when everybody is a captive audience.

In my written testimony—I see the light is blinking. I get the hint—details where these rules lead us. My views are embodied in the joint statement. I think there is a lot of room for private speech. I think there's no room for officially sponsored speech or where really you have a captive audience at school assemblies and the like. The hard questions are in a classroom where there's a lot of discretion for students to speak about subjects. In a speech class, for example, you have to give a speech on any subject that's dear to you, a persuasive speech. Are you allowed to give an altar call? Because everybody can speak about anything they want. Can the teacher intervene and say, "No, you can't have an altar call, but if you want to tell everybody that you're in favor of free love, that you can do"? It's a hard question. But that's where we're at. That, I say to you, is not an easy question because all three of the principles that I outlined merge and make a mess of that. Thank you.

CHAIRPERSON BERRY. Thank you, Mr. Stern.

MR. HAILES. Mr. Nimer.

**Mohamed A. Nimer, Research Director,
Council on American-Islamic Relations**

MR. NIMER. Ladies and gentlemen, my name is Mohamed Nimer. I'm research director with the Council on American-Islamic Relations. I would like to begin thanking the United States Commission on Civil Rights for the opportunity to participate in this panel. The subject of today's hearing, schools and religion, is a most significant issue facing the increasingly pluralistic American society. It is also a concern of utmost importance to the rising Muslim population in the school system. This growing segment of society has added a new dimension to be considered as the Commission on Civil Rights starts hearings on religious freedom of students and teachers. And Mr. Stern, you are completely misinformed on CAIR. And I don't wish to engage you in any debate because I think that will just divert the discussion here.

As a director of research with the Council on American-Islamic Relations, I have become familiar with the difficulties that Muslim students and teachers encounter as they demand inclusion of their religious heritage in the educational system. I have researched Muslim concerns regarding religious accommodation and schools and the treatment of religion in curricula as part of my work on CAIR's annual report, *The Status of Muslim Civil Rights in the United States*. Also, I have written an educator's guide to Islamic religious practices and an employer's guide to Islamic religious practices. I have included copies of these publications with my statement that I submitted to the Commission. In addition, I have attached to that experiences reported to our office by teachers, students, and parents concerning the very issue of today's hearing. I also should mention that I'm a parent of three children who attend school in Fairfax County, Virginia, so I speak to you from professional as well as personal experience. Now, allow me to touch on some of these concerns.

Muslims regard prayer as the most important element of the faith. Muslims are obliged to perform certain prayer rituals five times a day, one of which must be offered at midday when students and teachers are at school. No wonder that in the 1996 poll of members of the Islamic Society of North America, the majority of respondents favored allowing prayer in public schools. However, demonstrating the sensitivity to the diverse nature of prayer expression among

teachers and students of different faiths, a majority of the respondents in this Muslim group did not opt for teacher-led prayer. In addition to daily prayer, Muslims who have reached the age of puberty must attend congregational prayer on Fridays, also in midday. In some instances, accommodations have been extended to Muslim students and teachers. In other cases, requests of this nature have been denied. In a case in Columbia, Missouri, the principal cited the establishment clause of the Constitution to deny students early release on Friday to attend prayer. In another case in Maryland, a parent was told that his son cannot be allowed to pray in a quiet corner because students must be supervised at all times and his removal from the classroom would deny him instructional time and because it is difficult to find an isolated place for him to pray.

Many Muslims feel that there is no contradiction between allowing children and teachers to pray and maintaining State neutrality on religion. They also feel that arrangements can be made so that children do not miss any significant instructional time or leave classrooms unsupervised or disturb the use of school space.

Another concern that worries Muslims is the way the Islamic faith is covered in social studies curricula. A recent book, a world history for sixth graders, describes the Prophet Mohammed as a man who, and I quote, "took pleasure in seeing the heads of his enemies torn from their bodies by the swords of his soldiers. He hated Christians and Jews, poets and painters, and everyone who criticized him. Once he had a Jewish person tortured in order to learn the location of the man's hidden treasure. Then having uncovered the secret, he had his victim murdered and added the dead man's wife to the collection of women in his harem." Simon & Schuster, which published this book, following protest from Muslim parents and activists recently recalled the book.

Most instructional materials at schools are not as vulgar as the book I just cited. Still, textbooks are rife with misinformation and religious bias that are not suitable to educate children in a pluralistic society. The hostile depiction of Islam has had influence on even education policy-makers. For example, the Board of Education in the State of Virginia has issued standards of learning for Virginia public schools in 1995.

CHAIRPERSON BERRY. Could you wrap it up, please. Your time is ending.

MR. NIMER. Yes. The document suggests that eighth graders should learn about Islam from the vantage point of differences between Islam and Christianity. No other religion was supposed to be presented this way. This is outright discrimination that Muslims have struggled with. Just to wrap up, I thank you very much again for this opportunity. I'm sure you'll ask a lot of questions also.

CHAIRPERSON BERRY. Thank you, Mr. Nimer.

MR. HAILES. Mr. Rissler.

**Ronald D. Rissler, Legal Coordinator,
the Rutherford Institute**

MR. RISSLER. First, let me say that I'd greatly appreciate it if you could have those parents whose children are not allowed to pray in the public schools that are not being accommodated contact our institute. I appreciate the opportunity to address the Commission regarding religious expression in our public schools. I am presently legal coordinator for the Rutherford Institute, located in Charlottesville, Virginia.

The Rutherford Institute is a nonprofit civil liberties legal defense organization that is dedicated to protecting the rights of all religious persons in the public arena, including the public schools. Prior to holding this position, I was a paralegal in the legal department for 4½ years. As legal coordinator, I am responsible for monitoring legal intake requests and am therefore knowledgeable regarding incidents of religious discrimination, including those that take place in our public schools.

I would like to bring to your attention some of the incidents that have taken place that I've personally been involved with. In Alabama a State school for the deaf and blind issued a policy recently that would restrict any student-initiated religious speech or prayer from the graduation ceremonies. In Arizona a high school student was taken to the principal's office when she was caught sharing her faith with her friends during lunch period. The principal told the student that she could not preach during school time because if she did so, other groups would have to be allowed to do the same. The school administration threatened the student with suspension if she was observed witnessing again on school-grounds.

In California an elementary school put on a talent show with student participation. The kindergarten teacher told one of her students that singing the song, "Jesus Loves Me," would be against the law. Also in California, a public school teacher was disciplined for giving her elementary school class an assignment that required them to write about Easter. Now, that could have been anything about Easter, Easter eggs or the Resurrection. In Colorado an eighth-grade student is prohibited from wearing a T-shirt with a religious content and reading your Bible on school property. Other students are allowed to wear T-shirts with slogans. In Florida we had two cases of two different high schools prohibiting a Bible club from meeting during noninstructional time as permitted other non-curriculum-related clubs.

In Georgia, part of the Bible Belt, a first grader was prohibited from reading her Bible during the classroom period of show and tell. The teacher had in the past permitted students to read their books which are brought from home without interference. When the student brought to school her new Bible, she was prohibited from reading the book because of its religious nature. A first grader, again in Georgia, brought Christmas cards to school to be distributed to her classmates. The 6-year-old girl had made the cards herself, depicting the Nativity scene. After examining the cards, her teacher determined that they were too religious and trashed them without telling the student because she did not want to hurt her feelings. Again in Georgia, a fourth grader prohibited from bringing his Bible to school. Student asked his teacher if he could have a Bible on school campus. Teacher replied that she believed it was against the law to have a Bible on school campuses.

In Illinois a 14-year-old student at another school was prohibited along with three of her friends from discussing religion during their free time by their teacher. In Louisiana another fourth-grade teacher had her students write a story about Easter. One of the students, named Jennie, wrote about the death and Resurrection of Jesus Christ. And when she took her paper to the teacher for spellcheck, the teacher marked through every reference to God and Jesus and wrote in the word "Peter Rabbit." The teacher would not display Jennie's story unless she made these changes. Jennie refused. In Maryland seventh graders in a middle school English class

were given an assignment by their teacher to act out a scene from a book that the class read. The book, *The Summer of My German Soldier*, took place during World War II. The scene chosen was a court scene. Before one of the students took the stand, they had the swearing in. "Do you promise to tell the truth, the whole truth, so help you God?" The teacher walked over to the girl and whispered in her ear, "You can't say God aloud in school." The teacher suggested that the student replace God with the name of a rock star. The student refused.

Again, in Massachusetts, elementary school student prohibited from distributing religious tracts to his classmates during lunch period on school campus. Principal confiscated some of the tracts that had been handed out and reprimanded the student in front of his classmates for doing so. In Michigan an 8-year-old third grader wanted to sing the song, "Lord, I Sing Your Name On High," in the school talent show. The teacher, principal, and superintendent said no. In Minnesota elementary school students were told by school officials that they could perform a skit or song for the upcoming talent show. An 8-year-old third grader auditioned with his 5-year-old brother and father. They sang the Christian song, "Still Listening," by Stephen Chapman. The following day the principal called the father and told him that they would have to change the song because of its religious content. I personally called the principal at home 3 days before the talent show requesting that he reconsider his decision to avoid any legal action. The principal refused to address the issue, so we had to get a Minnesota attorney to threaten a lawsuit. The family was allowed to sing their song. I see the light blinking. I have scores of other cases I could address.

We have presently 20 lawsuits, school-related lawsuits in litigation. The reason we don't have more, and the reason is simple: these involve young students in our public schools. Parents don't want to risk any action that might be taken against these students in the future. And most of these are elementary school situations, and they opt not for us to get involved in any legal action. I appreciate this opportunity to speak.

CHAIRPERSON BERRY. Thank you very much.

Discussion

MR. HAILES. Thank you very much. Madam Chair, I just have a few questions for the panelists.

CHAIRPERSON BERRY. Go right ahead.

MR. HAILES. And I'll be with you, Mr. Stern. Are you familiar with the "See you at the pole" activities?

MR. STERN. Sure.

MR. HAILES. Is it appropriate for teachers to be invited to those activities? What is your view?

MR. STERN. There are two questions. One, is it constitutional and one, is it appropriate. And I don't think they're the same question. It may not be unconstitutional for a teacher just to show up, provided the teacher doesn't call the group into being. The teacher simply participates on his or her own. Whether that's wise as a matter of educational policy, whether teachers in the immediate environs in the school ought to indicate views on subjects that are controversial and necessarily divisive is a matter I think for educational authorities.

I am reminded of the time I was taking high school art, which was not my strongest subject. In fact, I thought I would retire before I finished passing high school art. And we had a rule in our high school that we had to wear ties to school, and it was suspended this time of year by the principal but not by my art teacher. Well, all of my colleagues showed up without ties and were promptly suspended. And I who was hovering on the border of a 65 or art forever showed up with a tie. And I think that's the problem with me. I don't doubt that most teachers show up not intending to influence anybody else but simply to participate. If you're me and you're on the border of failing, you may see that participation a little bit differently and you may think about your own participation in those terms. I don't think that's unconstitutional. I think it's unwise.

MR. HAILES. Thank you. Mr. Rissler, in your presentation you mentioned a number of cases that the Rutherford Institute has been involved in. Without telling us exactly how those matters were resolved, can you tell us whether the judicial intervention was required in most of these instances you mentioned, or how were those matters resolved?

MR. RISSLER. Let me first iterate that I think we got an estimate of 2,600 similar calls into the institute over the past year. These are just a few. Most are handled just by giving to the parents that contact us educational material to share with themselves and the school systems. The ones that I mentioned today, they went a step farther. We had to intervene to the point of a

legal opinion letter given to the parents to take to the school administration or directly we intervened to the school. Most of the cases were handled by that. Some did not. We had to go further with a legal demand to the school to change their policy. Out of the situations I've just described, I'd say a quarter of those are now in prelit or in litigation form, so we have had to go to litigation.

MR. STERN. If I might address that. If you look at the joint statement, you will see that almost all of the cases that involve purely private activity by students vis-à-vis either themselves or only the teacher, more specifically stated in those guidelines and in the President's guidelines and the PTA guidelines which Charles Haynes had a hand in and Oliver Thomas, who was sitting here, you'll see that most of those are real easy cases, and it reflects just ignorance on the part of school officials. But lumped into that category is a different category of cases which are much harder and are not so easily quantified as simple discrimination against religion.

If I handed in an assignment to the teacher and the teacher says you've got to cross out God and write in Peter Rabbit, that's outrageous, it's illegal, and it's stupid. But it doesn't involve anybody else's rights. When I want to go to an assembly where everybody else is there or I want to read to a class who's forced to listen to me about religious subjects, that raises the question of third parties. Now, are school officials sometimes predicting greater sensitivity than exists? Maybe. But not always. And some of these students are in fact asserting what amounts to proselytizing their peers, sometimes at the behest of other adults. This is not all bright-eyed and dewy-eyed people moving spontaneously.

Those are hard cases. I don't know how they all ought to be resolved. I'm reluctant to express a general view about it. But they're much harder and they stand in a different capacity. I can tell you that the last category of cases when we drafted the joint statement were the very hardest to reconcile. And we punted a little bit on the language because it's not easy to resolve those competing claims.

MR. HAILES. Thank you very much.

MR. RISSLER. Could I address—

MR. HAILES. Sure, since I asked you the question. Go right ahead.

MR. RISSLER. Yes. You also mentioned "See you at the pole."

MR. HAILES. Yes.

MR. RISSLER. That is an event that is held once a year. It's student initiated. It's done before school officially starts. Now, the Rutherford Institute's position is that a schoolteacher can indeed participate if invited and does not lead that event. I think that's a simple statement to make. Now, if they initiate it and lead it, then we've got a problem. But they're not on the clock. I don't see any argument on the "See you at the pole," at all. And these incidents—yes, they're easy, as far as the law is concerned. The case law is out there to protect these young people. But once they're told by someone in authority you've broken the law, if we intervene and get that corrected, the damage has already been done to 5-, 6-, 7-year-olds. I've talked to these parents. It is so difficult once a student has been told by someone in authority you've done something wrong, and the parents say, no, you can do that now. It is so hard for them to realize that someone in authority has told them not to do it that now they can. There's the problem.

MR. STERN. My experience with five children is that if somebody in authority tells children not to do something it only increases their desire to do it.

COMMISSIONER HORNER. I don't think that's really true. I know we all laugh about it because we've all had rebellious children from time to time. But in fact—

MR. STERN. All the time.

COMMISSIONER HORNER. Well, then, perhaps you need some professional assistance. Because in fact, children look to their parents. They listen to their parents. They look to their teachers and listen to them. And I think we all have memories of acute bad feelings coming from a time in our lives when young, when we've think we've disappointed a grownup we look up to. So I think we shouldn't be too flip about this.

MR. STERN. I'm not being flip. I do think it is possible—one of the things that happens in this field is that adults play games with children. I feel strongly about that. I will not represent somebody until I've warned the parents about that, until I speak to the child on my own.

COMMISSIONER HORNER. You're absolutely right about that.

MR. STERN. But let me finish. Sometimes a minor misunderstanding or uncertainty on the part of the teacher or principal about what the Constitution is—I know this stuff because I've

done it for 20 years. The teacher doesn't know it or doesn't know it in detail. And they say, wait a minute; I've got to think about that. I mean, there's a lawsuit now pending in New Jersey where somebody completed an assignment, a picture of Jesus. It was hung up by the regular kindergarten teacher. The teacher was out for a day. The substitute said, hey, wait a minute. I don't know if that's constitutional. I'm going to take it down. The next day the regular teacher comes back, hangs it back up. That's now ripened into a Federal lawsuit.

I suggest to you that there are ways of handling those damages for a day without making it a Federal lawsuit. Let me suggest as well that there's damage done the other way. You have the Governor of Alabama, such as he is, loudly announcing that he doesn't have to pay any attention at all to the Supreme Court of the United States. That's in papers he filed in of all places, the Supreme Court of the United States. It's not going to get him any votes, I think. Where a public school system for 35 years has simply ignored the Supreme Court's decisions in this area. And there's two generations of schoolchildren who've been disadvantaged. And there are a dozen or two dozen cases in which teachers take opportunity of the fact that they are in a classroom and they are in control and they proselytize. And the same damage that you speak so eloquently about exists there as well.

My overriding concern though is that a lot of these incidents are incidents. You make a phone call, you clear it up. If a Muslim child was told they can't have a corner to pray, what that really needs is a phone call to the principal from somebody who will say, look, here's the joint statement, here's the case law. You can do that. And we don't have to make an adult case of it. It's wonderful for fundraising for all of us. That's how we make a living. But it doesn't have to be that way. And again, not to be flip, kids are a lot more resilient than we make them out to be. They recover a week later. They've moved on, even from being told—my kids have been suspended from school and somehow it doesn't seem to have affected them permanently. They get over it.

COMMISSIONER HORNER. Would they also be equally resilient then if exposed to a prayer—

MR. STERN. My kids go to parochial school.

COMMISSIONER HORNER. What I'm trying to say is it cuts both way. Either they're affected or

they're not affected. And I agree with you. We shouldn't exaggerate the degree to which they're affected, but we also should not exaggerate the degree to which they're not affected.

MR. STERN. Okay.

MR. HAILES. Madam Chair, I just want to bring Mr. Nimer into this discussion with one question.

CHAIRPERSON BERRY. Go right ahead.

MR. HAILES. And that is, in your interview with our staff, you mentioned that the policies of school districts with regard to excused absences for religious holidays may have a discriminatory impact on Muslim students and teachers. Can you discuss that now?

MR. NIMER. Well, Muslims are not easily allowed to take off on Friday for Friday prayer. And Muslim holidays are usually, in so many districts, are not accounted for when school systems, local school systems do the scheduling of major events, sporting, and testing events. And when that conflicts with major Muslim holidays, that affects Muslim students as well as Muslim teachers.

But I just want to make a statement on the issue that the Constitution is there, but the Constitution and the laws are to serve human needs. And there is a need for a person to do their prayer and that's constitutionally protected, too. In the cases where Muslims were told by principals that they cannot do their prayer, principals cited legal opinion. In the case of Missouri, we've got a lawyer for the parents and a lawyer for the school, and then the case was not taken any further because Muslims in that locality didn't have the resources to take the case to the court. So especially for people who have less resources, this issue becomes a matter of urgency. And for Muslims, I believe—I think most of the Muslims that we polled would have no objection to kids standing at the pole, even teachers joining them out of school time to do a prayer. I think most Muslims would have no problem with that.

MR. HAILES. Madam Chair, I have no further questions.

CHAIRPERSON BERRY. All right. Does any Commissioner have any questions for the panel? Yes, Vice Chair.

VICE CHAIRPERSON REYNOSO. A question for Mr. Nimer. In the last say 5 years, have you seen any greater sensitivity both in terms of accommodation in the textbooks, or do you see about the same? Do you have the same concerns

now that you had 5 years ago? Are things getting better? Are they getting worse? Are they about the same?

MR. NIMER. To tell you the truth, we're just starting the process of gathering information and documenting these things. The Council on Islamic Education reports that they witness an improvement in textbooks although there is a lot of work that needs to be done.

VICE CHAIRPERSON REYNOSO. Well, then, I should ask both you and Mr. Stern the following question. Mr. Stern mentioned that so much of what we hear is anecdotal; there have been no systematic studies. And on an issue quite this important, it seems to me that there would be nonprofit organizations, foundations, that would do those sorts of systematic studies. So I guess I have a question maybe for all of the panelists. How come? Why has there not been a more systematic study and we just depend on these anecdotes?

MR. STERN. Well, as to textbooks, about a dozen years ago there were three studies about the treatment of religion generally. There was the study at NYU. People for the American Way did a study, and I've forgotten who did the third. But they all came out at the same time, and they pretty much documented that American history textbooks and other textbooks did a very poor job of representing religion. Textbook publishers whose chief rule is avoid controversy decided that religion was controversial and the way to handle it was to ignore it. And given the life cycle of textbooks that's now much better a dozen years later. I mean, you don't throw out textbooks every day. They can be around for 10 years. So that study was done. The difficulty with a larger study—in equal access, we did a small study, as we reported. Foundations are generally not interested in funding studies. The trend in funding nowadays is let's do something in the real world; we don't want to study it. That's the way it goes outside the academic world.

But thirdly, it would be very difficult to define terms. For example, Mr. Rissler thinks that if you don't allow a kid to read a story to the class or to sing a religious song at a show and tell or to say a prayer at graduation, you've denied somebody freedom of speech. Steve and I are litigating who's right—actually, the ninth circuit has now mooted it by just sitting on it so long. We have a graduation prayer case in Idaho.

He thinks they've denied somebody freedom of speech by refusing to allow students to decide whether they're going to have a prayer or not. I think they'd be impinging on the right of the audience that doesn't want to hear the prayer to do it.

Now, you're going to do a study, judge, that's going to report on whether this is a real problem or not and we can't agree on defining terms. And as soon as somebody did a study, I guarantee that the other side would come out with a broadside saying the study is flawed because their definition of religious freedom and freedom of speech has flawed. That's a real problem. I'd like to do it. I'd like to know how many of these incidents [there] are. But you couldn't get the problem defined by agreement to study it and come up with a result that everybody could agree this is the baseline.

I will say that Gus Steinhelder, a retired general counsel of the National Association of School Boards, again anecdotally, said that the number of cases—the calls he got from school boards about these kinds of cases declined markedly in the last couple of years because there's been the various joint statements that we've talked about. And it doesn't solve all of Mr. Nimer's problems. It clearly doesn't solve all Mr. Rissler's problems, even the ones we agree about. But there is, we think, a drop in the number of instances.

CHAIRPERSON BERRY. I'm enjoying this. Does any other Commissioner have a question?

MR. STERN. I apologize.

CHAIRPERSON BERRY. Yes, Commissioner George.

COMMISSIONER GEORGE. Thank you, Madam Chairman. Mr. Stern, on this question of the empirical, do you think that there is anything even minimally that the Justice Department or the Department of Education could do by way of recordkeeping data generating that would at least be helpful at the margins in enabling us to have a more than merely anecdotal idea of the scope and sheer quantity of the complaints and cases out there, or do you think that would suffer from the very defects that you've talked about when you study something?

MR. STERN. You in the first place embroil any Administration in the question of definition, which is real enough. I mean, think for instance of hate crimes. There's a good deal of time spent defining what a hate crime was and a lot of energy spent on what some people thought was a

hate crime and somebody thought was free speech. So there's that problem. And that would be a very politically difficult problem for any Administration, and I'm not sure it's wise.

Secondly, there's another problem that interjects itself, and we had this when we did the joint statement on religion in the public schools and asked the Administration to participate with us. There are strong sentiments politically, both left and right, in favor of local control of public education. And as soon as you ask the Justice Department and Department of Education to keep track of these sorts of problems and necessarily to define them, you would raise at least the specter and maybe the reality down the road of Federal Government intervention at an administrative level, not in the judiciary but at the executive branch and in the Congress, of trying to resolve these questions. And that's not necessarily very helpful.

And, finally, I think, my copanelists are right. A lot of these things happen at a very local level. It's a teacher in a classroom. The teacher may not even tell the principal, "Guess what happened today." The principal is certainly not running to tell the superintendent, "Gee, I got into trouble today." It's not at all clear how accurate you could make these studies without spending a whole lot—for instance, hate crimes, every police precinct now has to have somebody. I'm not sure that we ought to have that sort of apparatus intruding into the day-to-day business of education.

One of the interesting complaints that's come out of the Alabama litigation—and there are good reasons why the district judge did this—he's appointed monitors. It's not surprising. After 35 years you ignore Supreme Court decisions that eighth graders knew about, it's not surprising that a district judge is going to say, hey, I'm not going to just issue an injunction and let them ignore it the way they ignored the Supreme Court. But it raises, at least for me personally—I'm not counsel to any of the parties—it does raise the specter of Big Brother looking in on everything that goes on in the classroom. That's a real concern. I can tell you that when the Equal Access Act came out, many of my compatriots in the Jewish community were all for setting up an elaborate system of surveying the public schools to make sure we knew about everything that went on. And I said that strikes me as Stalin having children tattle on their

teachers. I'd really have the establishment clause violated occasionally than have Stalin come to American public education. So, again, this is a rather diffuse answer, but—

COMMISSIONER GEORGE. It sounds like a no, though.

MR. STERN. It is a no, I think, at least my initial reaction. Because I think there are a lot of problems that would be very hard to solve and would create additional problems of their own that in my judgment outweigh what would be gained. Whether we know there are 2,600 or 5,000 doesn't really make all that much of a difference to the way we go about doing business, but it would create all these problems.

COMMISSIONER GEORGE. Well, you've raised very interesting and, I think, legitimate points that I want to think more about. This is a real question. I think prior to your answer I would have just said, yes, it's a good thing to keep statistics, but those are significant points. I want to follow upon another point that I think you made earlier. I might have misconstrued you. But it sounded like near the beginning of your remarks you raised the possibility that perhaps—although we need a constitutional law that is a national set of standards on the constitutional level, that there is room for some diversity in practice. There is room for a kind of federalism here because of the interestingly different situations on the ground in jurisdictions as diverse as Brooklyn, Tennessee, Salt Lake City, San Francisco, and so forth and so on. And I wonder if you could speak a little bit to that. To what extent do we need national standards when it comes to religious activities in schools and to what extent is there legitimate diversity depending on the religious makeup of particular communities?

MR. STERN. I don't think that the religious makeup of communities ought to play a large role in whether we have uniform rules or not, because that smacks to me of what I recently said: When the majority rules, the minority suffers problems in silence. It allows communities to define themselves in ways that freeze existing status quo. Having said that, it's apparent that there are going to be different attitudes towards, for example, teaching about religion, towards celebrating Christmas holidays. When you get to the area where the Constitution has nothing to say, it's permissible. Constitutional law in this area used to be very simple: either something was permitted and discretionary or it was pro-

hibited. The current state of constitutional law now is that there are three categories. There's constitutionally required to be tolerated, private religious speech if it's not disruptive. The Constitution requires it to be tolerated. At the other end you have official government speech, however you define that. It's constitutionally prescribed. You now have this middle category, discretionary activity, where schools may, but need not, tolerate or engage in certain forms of religious practice. In that area, there's probably room for federals. Schools are free to celebrate Christmas, but they're free not to celebrate Christmas. Schools are free to think that religion has been a huge factor in shaping history, and schools are likely to take a more Marxist attitude towards that. So at that level there's certainly room for federals. I'm sure that's what happens on the ground.

I think as well in university towns, and this is typically where this happens, you have avant-garde English classes, avant-garde ethics. That's what parents want for their children. In other communities you want a much more conservative effort. And this runs across the gamut of ethical public policies. I think those are fine. I think those sorts of differences which are realistically largely based in religions are fine. I don't think that whether a child goes to public school and is forced to listen to a prayer or not and whether teachers are allowed to lead a flagpole ceremony or not ought to depend on the religious traditions of the community, because that, as I say, is to freeze in status quo and to make whole groups of people unwanted.

And Christmas celebrations I think ought to vary very much from community to community within the constitutional standards laid down in cases like *Flore v. Sioux Falls Schools District*, 619 F.2d 1311, 1314 (CA8). Which leaves me to close with another wonderful anecdote. I actually got this call. A Catholic mother called me after we'd done some statement about Christmas holiday observances. It seems that she had the misfortune of being the only Catholic parent of the only Catholic child in an otherwise all Jewish school in Long Island. And her child had come home instead of with the proverbial Christmas tree or crèche story, this Catholic girl wanted to light a menorah at Hanukkah because that's what the principal did in school. That's what everybody else did in school. And she wanted to know whether I thought that was

okay. That's the difficulty with the notion of federalism. It lends itself to that sort of wonderful anecdote.

In Tulsa, where a friend of mine teaches, he attended a high school football game when his son entered high school, and the kickoff was at 7:00. And it was his first game and he didn't know how things were done in Tulsa, but exactly 1 minute until 7:00, silence descended on the crowd and the transistor radios went on and their local preacher said a prayer which, of course, went out over all the transistor radios. And that was their prayer before the game. They had, of course, been barred by a court from having the minister actually come and say the prayer. It's hard to say what could be unconstitutional about that. On the other hand, it doesn't seem to be appreciably different from having the minister say the prayer. So in a case like that, is there a clear difference? Is there a significant significance? You're not going to get a lawyer like me to denounce legal fictions. I think there's an important difference that may not help the few non-Christians in the audience. It may not make them feel better immediately. But I think it's a very important difference symbolically. Because precisely what is required by not having the school district do it and requiring it to be done by purely private initiative—and you've got to get everybody to agree on the preacher, which is probably not an easy task in Tulsa or anywhere else—is that the State is signaling we cannot do this. This cannot be us. If private people want to do it, it's fine. Now, if school officials are managing this charade, then that at this point doesn't work. But the very act of differentiating between the State supporting religion and the State not supporting religion carries that message across to students.

Robert Cole, the psychologist at Harvard, made the point a couple of years ago when he was testifying in the *Mozert* case, which is the case in which children objected to certain textbooks they were forced to read. And I think he was an expert for the State, which as you'll hear, only proves that you should talk to your witnesses before you call them. And the point he made was—the State was trying to get him to say it would be a terrible thing if children weren't—religious children would be denied the ability to think critically if they weren't exposed to ideas with which they disagreed and if parents could withhold them and prevent them from

being exposed to the ideas. And Cole's answer struck me. He said probably all you need to know about critical thinking is that there are ideas that you agree with and ideas you don't agree with. And it sufficiently makes the point for children whether you expose them in the classroom or the parent holds the kid out and said you shouldn't listen to this. The child learns what's important about critical thinking. And I think it's that same—you've made the point that there's a difference between what the State can do and what we can do. So, again, if I were in this crowd, I might feel a little bit uncomfortable. I can never keep quiet for a minute anyway. But the constitutional loss is taught very vividly. And that, for the lawyer in me goes a long way to satisfying me.

COMMISSIONER GEORGE. I've stayed with you too long, but I have another question of the last guy who is entitled to a short answer, since I asked a long question. I hope you can keep this short. It's a bit of a puzzle, and I'm not sure what the AJC [American Jewish Council]'s position was or what your personal position was on the Religious Freedom Restoration Act law, either the one that was invalidated by the Supreme Court or the new one that's bubbling up in the Congress. But it goes to this question of whether religious speech is in fact protected only equally, let's say as an expression on a T-shirt, or if a new Religious Freedom Restoration Act is enacted and is upheld, is entitled to greater protection. So it might be that if we applied the compelling interest, least restrictive means test in the school situation to the student with the religious slogan, then religious speech would be entitled to greater protection. And the analogy here might be—and I'll invite your lawyerly talents here.

MR. STERN. I'm not here to be insulted. [Laughter.]

COMMISSIONER GEORGE. I don't mean to insult the man, but I think that possibly that man is a lawyer. The analogy to just a hat, a baseball cap, or something not of religious significance or religious headgear like the yarmulke, like the turban, something like that, which under a Religious Freedom Restoration Act type statute, the unfortunate decision in the *Goldberg* case aside, that was in the military context. But under a Religious Freedom Restoration Act statute very well could get protection that secular headgear couldn't get.

MR. STERN. Several points. First, I helped draft Religious Freedom Restoration Act and I generally think the things I write are okay, so—[Laughter.] When we wrote the legislative history or when Congress took what we wrote as legislative history, we specifically said that free speech, religious speech cases, would not be governed by Religious Freedom Restoration Act but would continue to be governed by general free speech principles. That was the position we took. It's pretty much compelled by a Supreme Court decision called *Larson v. Valente*, in which—not *Larson v. Valente*, the Minnesota State Fair case, the first name of which escapes me, in which religious groups sought enhanced protection for religious speech and the Supreme Court said no, you're only entitled to speech. *Hefron*. And in *Texas Monthly Inc. v. Bullock*, a majority which no longer exists said that in fact if you prefer religious speech over nonreligious speech by government action, you may be establishing religions. So I think the short answer is it probably would not be entitled to greater protection.

The difficulty with these is that while the religious speech is almost always itself innocuous, school officials either act out of concern for neutrality—how are we going to permit this and not other speech—or a deep-seated fear of gang warfare. This is simply another instance where civil rights and civil liberties now have reached the point where everybody's rights depend on the most lawbreaking among us. And it's very hard to beat that. The school principal comes in and says, "Look, I've got gang warfare in my school and you may not be able to wear a rosary (which is the case that happened in Texas), but what do you want me to do? There are people who will use anything as a gang symbol." I think you're overreacting, but I'm not a principal. I don't know the gangs. And that's a problem.

COMMISSIONER GEORGE. Wouldn't case by case the compelling-interest standard work there? Because if they can prove that it's a serious gang concern, the compelling-interest standard would be met.

MR. STERN. Yes, but if you reduce—the difficulty is if you reduce compelling interest to those sorts of abstract fears, then compelling interest tends to lose its bite everywhere. It's a real dilemma for us, and I think because of what I described, the phenomenon of dealing with the very worst in our society and making everybody

else—holding everybody else's liberties to what you need to deal with the very worse, it really threatens to water it down for everybody.

COMMISSIONER GEORGE. To the other panelists, just quickly. I learned recently that there are now more Muslims in the United States than Episcopalians. I was just astonished by that. If one goes back to the predominance of Episcopalians—

VICE CHAIRPERSON REYNOSO. Is that because the number of Muslims has gone up, or have Episcopalians been converted to Muslimism. [Laughter.]

COMMISSIONER GEORGE. I wonder if the increasing religious diversity, increasing complexity of religious diversity of our nation, which has been remarked on not only by you, Mr. Nimer, but other panelists, really does place in jeopardy the possibilities of true neutrality in public education. Are we looking, given the pace of the increase in this complexity, with different Sabbaths, with different requirements as far as prayer is concerned, with different attitudes toward religion in the public square, because not all religions are the same—is it possible that we're looking at the demise and possibility of true neutrality so that the quest for neutrality ends up being an illusion and one would never find it, will never find something that's truly neutral as between all different groups that are vying in the public square today?

MR. NIMER. The issue of neutrality must be looked at closely. If we go back to the issue of holidays, school years scheduled around Easter and Christmas which are in a Jew's own list of holidays, of course, the majority of people in this country are Christian and there is a need for that. I don't think any Muslim would ask for neutrality to mean that schools should divorce that, should just ignore Christmas or ignore Easter.

What we're arguing here is that the argument should be taken at the local level and sometimes on a case-by-case basis. With increased interaction between communities and community organizations and individuals, I think a lot of things can be worked out. For example, when you have a particular school or district where you have—and there are some schools, for example, in New Jersey and in Dearborn. When the majority of students are Muslim there is a need to recognize that the two major Muslim holidays need to be accounted for

by that school district or that particular school. And when you're talking about accommodations need to be offered to a student here and a student there in various States and various counties, I don't think that would account for any disturbance or any burden on the functioning of the school when you have a school in Maryland releasing five kids to go to do their Friday prayer on Fridays or release a Muslim teacher to go do that prayer on Friday.

So the argument here is not to redesign the system, to reschedule everything. The argument, I guess at least at this point from the Muslim perspective, is for greater tolerance and greater awareness of the nature of this diversity.

COMMISSIONER GEORGE. Have any Muslim communities found it necessary to develop their own schools as an alternative to the public schools as in earlier times Catholic immigrants found it necessary to?

MR. NIMER. Oh, absolutely. Yes. And there are more than 200 Muslim schools functioning as of today in the United States.

COMMISSIONER GEORGE. Mr. Rissler, at the end of the day, is true neutrality in the public schools impossible?

MR. RISSLER. I don't think it's impossible. I'm concerned from what I've heard that out of the hundreds and hundreds of calls we've gotten and correspondence requesting legal assistance, I don't recall any request from a Muslim parent or a Jewish parent in the public schools. We've helped in situations in the workplace, recognizing their Sabbath and meeting in the privacy of their own homes for religious worship. But in the public schools, I don't recall. And there's got to be that same discrimination out there to these students when they want to read a book about their faith and are not allowed to do so.

COMMISSIONER GEORGE. Could that be that your complaint information is identified—I realize you're not specifically—but might be identified as a Christian organization and Jewish parents might go to Marc's organization or Islamic parents to Mr. Nimer's organization?

MR. RISSLER. Unfortunately, that may be the case. But we try our best to hold ourselves up as wanting to represent all the various parents.

CHAIRPERSON BERRY. Does any other Commissioner have a question for the panel? [No response.] I have two brief ones. The first one is, Mr. Rissler, as I listened to you listing the kinds of incidents that had given rise to complaints, it

occurred to me that isn't it the case that whenever we engage in some expression of our religion that we may in a sense be trying to proselytize, even if we're not conscious of it? I mean, most of the religious faiths that are represented in the United States have to some degree the notion that ours is the one true faith because we believe in it and that it would be great if everybody else belonged to it, too, because it's the right one. And so if I gave my child, which I don't have, a Bible to go to school or a Bible as a gift and we read some passage together and my child took the Bible to school, and when reading some thing that was very important, when asked, they read that. Aren't they in a sense saying, one, that's important to me, that's part of my religion and it ought to be important to you, too? So isn't there some element, however slight, in any kind of activity of proselytizing in a sense, or an appeal? And if that's the case, should we care about it? It may be true and we shouldn't care about it, but should we? What do you think?

MR. RISSLER. I think it depends on when that would be done. If it's done during instructional time where it would be disruptive to the educational process, then we've got a problem. If it's done before school starts, after school starts, during recess, or lunch time and therefore on that student's time, if that student chooses because of the faith they're called to witness, to give testimony, to read their Bibles, they should have the opportunity to do so. I may have a problem if a parent presses upon a student to do so against that student's role to take religious material into the public schools. But what I've seen—and again, I've talked to a lot of these parents. They have been brought up in an environment of giving testimony, of witnessing, and they're proud of what they have learned and know, and they want to share it on their own with students. And during noninstructional time, we believe they should have a right to do so, just so they're not disruptive to the educational process.

CHAIRPERSON BERRY. I guess I'm trying to figure out where the line is between proselytizing and expression, and is the plea for toleration and more toleration really a plea for those of us who want to do it to get more people to be impressed with our religion? I don't expect to get a definitive answer, but that's what's puzzling me.

MR. RISSLER. In many situations, too, are situations that the school has opened a forum,

like show and tell. They're told bring in something that means something to you. A child is going to do that. And if it's of a religious nature, so be it. That's not school initiated. That's the student bringing something that he or she is told to bring in that means something dear to him or her.

CHAIRPERSON BERRY. And my last question, Mr. Stern. Do I take your answer to Commissioner George's question about no preferred place for religious speech to mean that you would also say there should be no preferred place for a religious overview as opposed to an overview based on something else, whether it's anarchism or anything else, in the classroom?

MR. STERN. Yes. I think the answer to that is yes. I think that teachers ought not to use the classroom one way or the other. If I may, a story that has stuck with me.

CHAIRPERSON BERRY. Another story?

MR. STERN. Another story. I'm full of stories.

CHAIRPERSON BERRY. Quickly, please.

MR. STERN. When I was in eighth grade, which was at the height of the civil rights years, it was the year Congress was debating the 1964 Civil Rights Act. As an exercise, our teacher had us debate the merits of the Civil Rights Act which, as you remember, Madam Chairwoman, were not always as evident as they are today. And being mostly suburban Jewish liberals, nobody could be found who would state the case against the Civil Rights Act. And so the teacher did. And it was not until years later that I learned that I had a teacher who had been fired from the New York City Board of Education for refusing to testify before a McCarthy or a McCarthy-like commission. His politics were clearly pro-civil rights, and yet he was able to make the case against the Civil Rights Act, which was clearly not a case he believed in, so that nobody in the class had the vaguest idea. That's how I think teachers ought to be. The reality, of course, is that most times teachers fall far short of that. And the question is when they fall so far short that somebody has to intervene.

CHAIRPERSON BERRY. Thank you very much. I want to thank the panel for being here. And you are now excused. And someone from our staff will escort you through the sign-out procedures. Thank you very much for being here. We will now go to part two of this discussion.

Panel 3: Individual Students' and Teachers' Religious Freedom, Part II

MR. HAILES. At this time we will call forward Mr. Meyer Eisenberg and Mr. William A. Donohue. Will those witnesses come forward at this time, please.

CHAIRPERSON BERRY. Could you please—I hate to have you do this, but could you stand up, please. You have to take the oath.

[Whereupon, an oath was administered.]

CHAIRPERSON BERRY. Thank you very much. Please be seated. Commissioner Anderson has joined us again. Counsel, could you begin.

MR. HAILES. Yes. At this time, we would ask each of our panelists to identify themselves for the record and to present a brief opening statement. Mr. Eisenberg.

MR. EISENBERG. My name is Meyer Eisenberg. I am a national vice chair of the Anti-Defamation League of B'nai B'rith. I'm accompanied by Michael Liberman, who is our Washington counsel, who is sitting behind me, in case I say anything wrong.

MR. DONOHUE. I'm Bill Donohue. I'm president of the Catholic League for Religious and Civil Rights, the Nation's largest Catholic civil rights organization. I'm here by myself.

CHAIRPERSON BERRY. All right. All by yourself.

VICE CHAIRPERSON REYNOSO. Are you a lawyer?

MR. DONOHUE. I've been called worse. [Laughter.] Actually, I'm a sociologist who has studied constitutional law. I have the worst of both worlds.

VICE CHAIRPERSON REYNOSO. No wonder he's been called worse.

MR. HAILES. Mr. Eisenberg, would you please begin with a brief opening statement.

Meyer Eisenberg, National Vice Chair, Anti-Defamation League

MR. EISENBERG. Thank you, Dr. Berry, Judge Reynoso, members of the Commission. Judge Reynoso, I haven't seen you since my days at Bolt Hall. We're very pleased to be here and have this opportunity to present this testimony to the Commission on religion in the public schools and the enforcement of Federal law in regard to religious freedom.

As a civil rights organization, we are dedicated to the protection of religious liberty in all aspects of American life. As an organization

-serving the needs of a religious minority which we are, we recognize that the constitutional mandate of separation of church and state plays an important role in protecting the rights of Americans of every faith, majority and minority. Since many of our parents and grandparents arrived in this country in comparatively recent times, we know from our own experience the important unifying role that the public schools play in the lives of immigrant Americans as well as in the rest of the community.

Freedom of religion and the guarantee that the State shall not sponsor or advocate religious doctrine are so central to American democracy that they were enshrined in the first amendment to the Constitution, along with the other fundamental rights, such as freedom of speech and freedom of the press. Indeed, largely because of this dedication to religious freedom, religious faiths have flourished and thrived in the United States as in no other country in the industrialized world. The establishment clause is a vital component of the first amendment. It is not, as some constitutional revisionists would have us believe, an inferior clause that must yield to efforts to have the government promote religion. There are, as the Supreme Court has recognized, the religion clauses of the first amendment. Free exercise is not a green light to otherwise impermissible dismantling of the wall of separation under the establishment clause.

No child should be made to feel like an outsider in his or her own public school class whose presence at certain times of the day or certain times of the year is tolerated or ignored. In a Supreme Court precedent which some would like to ignore, the establishment clause of the first amendment requires that students not be given the impression that their school officially sanctions or prefers religion in general or a specific faith in particular.

Further, students must never feel coerced by fear of public pressure into participating in religious exercises or programs. Contrary to the sometimes overwrought claims of those who oppose the separation of church and state, public school students in fact already enjoy very broad rights to act in accordance with their religious values and practice their religious beliefs while they are at school. Still, many administrators, teachers, parents, and students sometimes acting with the encouragement of outside groups have attempted to go further and use the public

schools to promote their own religious agenda and to impose their views on others, thus undermining the religious neutrality of the public schools.

The catalog of horrors discussed by the Rutherford Institute merely demonstrates that educators make some mistakes in carrying the prohibitions too far. On the other hand, some school districts go too far in permitting christological programs that imply school sponsorship of religion. We describe a number of those in our written testimony—that type of overreaching in school settings. The Rutherford Institute does not balance its presentation by condemning the incidents on the other side of the balance.

This Commission was formed to prevent discrimination. That includes discrimination against those whose members are minority religious groups who attend public schools and includes attempts to overtly or subtly pressure these students to participate in acts or practices of any religious group, majority or minority. And that means organized prayer and other school-sponsored or supported religious observances.

Given the degree to which American schoolchildren and their teachers currently enjoy the right to freedom of religion, it is shocking to us that over 150 Members of Congress have now sponsored a proposed constitutional amendment, introduced by Representative Ishtook, that would radically alter the protections of the first amendment to religion both in schools and elsewhere. If passed, this deceptively named Religious Freedom Amendment—by the way, I'm a securities lawyer. If this was a security it would violate 10(b)(5)—could invite competing religious communities to vie for control over public school curricula and could also lead us to the use of tax dollars to support religious indoctrination. There is a broad coalition opposing the Ishtook amendment, which consists both of Jewish organizations and of Christian organizations from the mainstream and conservative. I see that my time is up. I just wanted to end, if I may, Madam Chairperson.

CHAIRPERSON BERRY. Take another few minutes.

MR. EISENBERG. The ADL support for the separation of church and state does not reflect hostility toward religion. We are a group with a religion organization, a religious civil rights organization. We deeply treasure religious freedom that Americans enjoy. That freedom encom-

passes the right to worship as we choose. It also encompasses the right to be free from religious coercion, whether subtle or overt and whether it's from the minority or a majority. And the public schools are the instrument through which many of us came to the positions we have today, and the public schools ought not be an instrument for religious inculcation. Thank you very much.

CHAIRPERSON BERRY. Thank you very much, Mr. Eisenberg.

MR. HAILES. Mr. Donohue.

William A. Donohue, President, Catholic League for Religious and Civil Rights

MR. DONOHUE. Thank you very much. I very much appreciate the opportunity to testify today on the subject of schools and religion. As president of the Nation's largest Catholic civil rights organization, I am disturbed by the extent to which religious expression is treated as second-class speech in our schools. In addition, I am disturbed by the degree of tolerance of anti-Catholicism that too many school officials exhibit. There's much talk these days about religious zealots who seek to ban books from school libraries. No doubt such persons exist. But no one seems to want to talk about the book banning that civil libertarians promote. For example, the ACLU [American Civil Liberties Union] has sued in the State of Wisconsin in an attempt to ban the book, *Sex Respect*. Why? Because the book advocates abstinence and, as such "promotes a religious perspective regarding the spiritual dimension of sexuality." Books that promote condoms and abortion, however, are acceptable to the ACLU because they do not advance a religious perspective. This is what I mean by religious expression being treated as if it were second-class speech.

Something similar happened in California when the ACLU opposed a bill that promoted monogamy in the schools. The ACLU maintained that "teaching that monogamist heterosexual intercourse within marriage as a traditional American value, is an unconstitutional establishment of a religious doctrine in public schools." But the ACLU has no problems with schools that promote a radical homosexual agenda and that treat marriage as an alternative lifestyle.

In short, sex education that advances a secular agenda is okay, but it's not okay if world re-

ligions embrace a particular teaching regarding sexuality. Just as bad are sex education seminars and workshops that disparage the Roman Catholic Church's teachings on sexual ethics. It is one thing to address homophobia in society, quite another to single out Catholicism for derision. This is a problem that is increasingly come to the attention of the Catholic League.

When books such as the *Bible in Pictures* and *The Story of Jesus* are banned from school libraries, we hear nothing either from civil libertarians or those who profess an interest in separation of church and state. But when books that show disdain for Catholicism are assigned to students, for example, the *Old Gringo* or *Anasthasia Crookneck*, we hear a chorus of free speech from the same quarters. Moreover, when courses on religion or the Bible are introduced, the guardians of liberty raise objections, as witnessed recently in Ohio and Florida.

Perhaps the most consistent complaints regarding religious expression in the public schools that come to the attention of the Catholic League involve Christmas celebrations. And I'm only going to mention a few of them here. Our phones are flooded every December here. Not only is there widespread repression of religious speech in December, it is selective in nature. Celebrations of Hanukkah are usually tolerated, but celebrations of Christmas frequently are not. We are consistently on record as saying, "Teach Hanukkah, put up the menorah, but don't give me your Christmas tree, please. That's a pagan symbol. I want a Nativity scene." And that's where we're coming from. Just last year, the Glen Cove School District on Long Island forbade the display of a crèche that was donated by the local K of C [Knights of Columbus], but it allowed the display of a menorah. The year before, at Manhattan Beach, California, a public school removed a Christmas tree, which is not even a religious symbol, from school property after a rabbi objected that the tree was a religious symbol. However, the school allowed the display of a Star of David. In Northern California, a school in Sacramento banned Christmas celebrations on the theory that Christianity "was not a world religion."

In 1996 the Catholic League threatened a lawsuit against the Mill Creek Township School District in Erie, Pennsylvania, where the school district prohibited students from creating artwork that depicted a Nativity scene for the an-

nual holiday card contest. In the same year, candy canes were confiscated from students at a public school in Scarsdale, New York, even though no one has ever alleged that such treats were in any way religious. Indeed, the same school district even took the word "Christmas" off the spelling list. They even barred green and red sprinkles on cookies and said the kids could not make cookies in the shape of a bell or a star.

In 1997 in New York, Boy Scout students were barred from selling holiday wreaths at a fundraiser, even though a wreath is a secular symbol. Hanukkah gifts, however, were allowed to be sold at the school's fundraiser. In 1997 the Hillsboro Board of Education was more equitable in its bigotry. The New Jersey school board banned class parties for Halloween, Christmas, Hanukkah, and Valentine's Day. In Albuquerque, New Mexico, Highland High School choir director Frank Ritello tried to appease the politically correct police by agreeing to remove Christian songs from the Christmas concert, and he even acceded to the demand that the concert's name be changed to a "winter concert." But nonetheless, he was suspended by the principal.

Last December I personally was on the phone with an attorney, a senior attorney from the New York City Schools, Chancellor Ruby Cruz, asking her why is it that all over New York you put up menorahs but you don't have any crèches. And she cites to me the 1989 county of Allegheny ACLU decision which in fact undermines her case, because they said explicitly that a menorah was a religious symbol. She went back and referred to the actual case, came back and told me that I was right and wants to meet with me and see if we can't clear that up this year.

The Catholic League has even intervened in times dealing with release time. So the other inequities are just as bad in terms of the bigotry. I know my time is running out here.

CHAIRPERSON BERRY. You can take another minute.

MR. DONOHUE. Thank you. In April of 1997, the art department of LaGuardia High School in Manhattan authorized the distribution of flyers that depicted an image of the Sacred Heart of Jesus in a sexually explicit way. There was another artistic contribution showing a sketch of a man with "Hebro" written across his head and "Evil Jew" scripted above the figure. An arrow was pointed at him by a man holding a large penis. The man comments, "Jesus, I got a present

for your preachy ass." There were several other works of art that depicted Catholic school girls in a vile way. We've had other examples of having kids having to watch the *Last Temptation of Christ* during Holy Week. The kids complained and then their religion is mocked in the classroom. That happened out in Danville, California. And other examples that I could mention. Just recently we're involved in a case in Santa Fe, New Mexico, you talked about here already today. Kids with a religious T-shirt, "Our Lady of Guadalupe." They're told you can't wear that in school, and that kind of situation.

I do agree that President Clinton's memo in 1995 was excellent in its clarity. I don't think enough has been done, as many people have said here today. It's amazing to me that not only superintendents and principals and teachers who seem unaware of what the law is, but even the attorneys for the school districts. It's rather striking to me. But the other thing is—and one final comment. This is a problem that probably is existent at higher education in particular. I personally am sick and tired of seeing Catholics having to pay with their public monies, whether it's a play or whatever it might be in a college campus or in a high school, for plays that defame my religion, and that's called freedom of expression. And as soon as you try to put on a reverential tribute, "Song of Bernadette," instantly that becomes an establishment clause kind of question. So that if somebody puts on the play *Jesus Christ Superstar*, ACLU has in fact sued public schools over that. Nat Hentoff, who is an atheist, said they're crazy for going quite that far. I have no doubt in my mind that these people wouldn't mind putting on *Oh! Calcutta!* with simulated sex and full frontal nudity. Thank you.

CHAIRPERSON BERRY. Thank you very much.

Discussion

MR. HAILES. Thank you very much. Let me begin with my questions. Mr. Donohue, let me ask you this one question, because if I understand your testimony, you believe—or is it your view that the school districts have done a better job accommodating the beliefs and practices of Jewish students and teachers as opposed to Catholics?

MR. DONOHUE. Absolutely.

MR. EISENBERG. This will come as significant news to a lot of people I know.

MR. HAILES. Why don't you comment in detail, if you will, Mr. Eisenberg, to that statement.

MR. EISENBERG. Well, usually the shoe is on the other foot. I agree that the Hanukkah menorah is a religious symbol. We've opposed the erection of a Hanukkah menorah just as we opposed the erection of a crèche on public school grounds because it gives the appearance of sponsorship. The appearance of sponsorship is, in effect, subtle coercion, and this is really acceptable. And it's not acceptable. There's no question that a Hanukkah menorah is a religious symbol. There's no question that a crèche is a religious symbol. And I don't think they have any place on public school grounds because of the appearance of sponsorship. We deplore, as anybody—you know, any sensible person I think would, acts of bigotry and discrimination, whether it's against our own people who have suffered a great deal or against Catholics or against any other religious, racial, or ethnic group. The fact that these things are happening I think they're fortunate to have Mr. Donohue to fight that battle. We're not here to defend the ACLU's view of what is and what isn't free expression. What we are here to say is that the establishment clause is a major protection for religious groups and for minority groups and for irreligious groups. The public schools are not the place where these religious fights should be fought. They should be neutral.

In response to Professor George, true neutrality may be impossible to get, but the perfect is often the enemy of the good. You do the best you can. Generally with the diversity of religions that we have, whether it's Jewish, various Christian groups, Islamic groups, the danger of not being neutral takes on really increased resonance. I mean, if the school picks a prayer or if the school sets up a crèche, what about those people who feel that that is sponsorship and that's not me? And if you do a prayer, I have to be excused. And this goes back to *Schempp* and *Engle*, where Justice Clark, ruling for the Court, said that if the child has to be excused because he does not want to participate in the prayer or his religion forbids it, that picking the child out of the class, putting him out in the hall is a kind of stigma. And that's one of the reasons the Court ruled the way it did.

MR. HAILES. Mr. Donohue, just to follow up, I would ask you why do you believe in this distinction?

MR. DONOHUE. I think it's very easy to determine who's got the better of the argument. I invite anybody here on this panel to come into New York. We'll pay for you to come into New York and just walk around the public schools. All you have to do is walk into the schools. You'll see—look, the question is this. If you walk into the schools in New York City, you will see—all over the place you'll see menorahs. I am not offended by that. I would agree with Mr. Eisenberg maybe to one extent. I don't think the school ought to be purchasing menorahs any more than they should be of crèches. I do think that if Jewish groups or Catholic groups want to donate it to the school, I see nothing wrong with that in terms of freedom of expression. But I'm simply making this point. If you go into the schools, you will see Christmas trees and you will see menorahs. Now, I think Jews would be offended if you walked into the local public school and you saw crèches and a dreidel—that's my point. Just give us parity here.

And the Christmas songs. Is everyone so crazy you can't sing "Silent Night" but you can sing—I mean, we get the most absurd things that are going on. I think they ought to talk about the meaning of Hanukkah in the classroom and talk about the meaning of Christmas. And unlike Elliot Minberg, who seems to get upset because if you talk about the Resurrection, therefore you're into religion, well, what the hell are we talking about? That is my religion.

So, yes, you talk about it. This is the way people believe it. Now, you don't say you need to believe it. It's not a true and false question here. You know, is Jesus the son of God? If you answer that question the wrong way, then that teacher should be thrown out of the schools. However, if you say a Christian's belief is that Jesus is the son of God, that is telling the truth and that's what Christians believe.

You're free to believe whatever you want, but we've gotten so far right now that we want to excise from the discussion even what the term "Resurrection" means because some people don't believe in the Resurrection. Wonderful. Don't believe it.

MR. HAILES. Mr. Eisenberg.

MR. EISENBERG. There's Judge Reynoso.

CHAIRPERSON BERRY. No, no. Counsel gets to finish before we ask.

MR. EISENBERG. When I went before the FCC, they don't give that kind of deference to counsel.

In other cities where Jews do not form a significant minority and Catholics are not oppressed in the way in which they are apparently in New York, I do not hear them coming forward and saying, well, we ought not have—it's a crèche versus Hanukkah or Christmas versus Hanukkah. If it's Christmas versus Hanukkah, we will lose. Because Hanukkah is actually a fairly minor holiday. It's essentially a political holiday, a holiday of religious freedom, and there was as miracle and the lights burned for seven nights. But it doesn't match up against Hanukkah.

The pervasiveness of Christmas and of Christianity and of what Christmas is about, not the gift buying Christmas but the serious religious aspect of Christmas, to bring that into the public school and to have a Christmas concert which consists fairly entirely of christological music, song in a reverential way before a group of young and impressionable people, and to throw in "Hey, Draidle, Draidle," does not really make things equal. It's like separate but equal. You can't have separate but equal between Judaism or Islam and Christianity in a pervasively Christian country—a country whose majority are Christians. This is not a Christian country. This is a country where the majority of people are Christians. The majority of the television and songs and so on are Christians. Well, people will do that.

But to bring that into the public schools and have a Christmas concert where the kids rehearse in orchestra from Thanksgiving on and have the songs 90 percent "Hark the Herald Angels Sing, Glory to the New Born King," and the kids have to—and Jewish and other nonbelieving children have to participate or be excluded. Excluded from orchestra, excluded from choir, excluded from art. That is really not fair and it is not an equal battle. Wherever it's Christmas versus Hanukkah, except maybe where I come from in Brooklyn, that's not a fair battle. Where my daughter teaches in Salem, Oregon, and the school has maybe 5 percent of Jewish students and they have done this in the same way that I went through it 40 years ago when I clerked in Oregon, we don't win that. Let me tell you the story because I'm sitting in Stern's seat.

VICE CHAIRPERSON REYNOSO. That's the story seat.

MR. EISENBERG. When I went to clerk in Oregon, this was 1958, so 40 years go. I clerked for the Chief Justice of the Oregon Supreme Court.

And my wife calls, and we were married long enough for her to know that when the principal came to her room and said, "Please distribute these Bibles"—they were Gideon Bibles—she knew enough to say, "We can't do that, can we?" I said, "No, we can't." The school board attorney called the office, and the answer was Chief Justice McCallister's chambers. And the school board attorney said, "Who is this guy Eisenberg. He's telling us we can't distribute the Gideon Bibles when we've been doing it for 20 years." My roommate was a fellow named Douglas White who was a serious Catholic and who—this is 1958 in Salem, Oregon. Nothing went in Salem, Oregon in 1958. "We have crime. We have delinquency. We should distribute the Bible." I said, "Doug, it's the King James Version." And he says, "They can't do that. That's heresy."

MR. HAILES. I have no further questions.

CHAIRPERSON BERRY. You have no further questions. Commissioners, anyone? Yes, Commissioner Horner.

COMMISSIONER HORNER. Yes. Actually I have a Judeo-Christian question here. The Fourth Commandment, Honor Thy Father and Thy Mother. Now, this is my question. I want to ask you about this in relationship to what's said by teachers in schools. Because the question that concerns me is not so much the literal question of prayer in school. I am concerned about prayer in school as a surrogate for the deterioration of moral messages to young people across the board, including in school, or alternatively, and even worse, communication of very immoral messages in school. Obviously, not intentionally, but in my judgment, immoral messages. Now, a teacher of a ninth-grade student can say to the class, "You should respect your parents," can't they? They can use that language. I mean, if you read a story about a family situation, the teacher can say you should respect your parents.

Now, here's my series of questions. Can the teacher say honor thy father and thy mother? Can the teacher say the Fourth Commandment says honor thy father and thy mother? Can the teacher say the Fourth Commandment says honor thy father and thy mother, and I agree with the Fourth Commandment? And finally, can the teacher say honor thy father and thy mother, and I agree with that because my Judeo-Christian tradition or religion teaches me that? Is there that degree of liberty available to a teacher on this moral, ethical, and religious his-

torical question? And I would invite either of you, or both.

MR. DONOHUE. Well, I wouldn't want to censor the teacher's speech. Some people do want to believe in censorship. That's why they'll stop certain songs at Christmas time. I thought we lived in a society which believed in respect for diversity and for various expressions of one's religious and cultural heritage.

COMMISSIONER HORNER. So you would say—

MR. DONOHUE. And I would say certainly. Now, if that teacher is trying to proselytize and make the kid accept their understanding as being religious based, now I think you've crossed the line. But for the teacher simply to express I believe it's wrong to steal because I am a Christian and I believe that, or I am a Jew and I believe that, or I am a Muslim and I believe that, to think that you couldn't say that would seem to me to be an invasion of that person's speech.

COMMISSIONER HORNER. Well, what disturbs me is that—and this may be just part of being an American. That there are certain questions that are constantly held in tension and which are unresolvable. It disturbs me not in terms of a political decision but just a personal moral conception of the way human beings relate to each other that we must bifurcate the religion and the moral teaching which stems from the religion. And so I guess I would prefer a system which erred in the direction of teacher liberty even though I know that there will be teachers who will say that the primary moral issue of our time is tolerance of sexual orientation, and my religion might teach me not to agree with that and my kids' teacher might say that. Now, my kids' teacher might be even saying that because my kids' teacher is a Unitarian or a Universal Methodist and it might stem my kids' teacher's religious notions about—sort this out for me.

MR. EISENBERG. Oh, certainly. Be happy to sort this out for you.

COMMISSIONER HORNER. I mean, I think that's the sort of—

MR. EISENBERG. I think it is a serious question. I think we disagree. First of all, teachers do not have freedom of speech in the classroom. They are not permitted to say certain things about their beliefs, whether it's political beliefs—I'm a Democrat or a Republican and—

COMMISSIONER HORNER. They're not?

MR. EISENBERG. No, not in terms of persuading them to vote one way or another. I think most school systems—

COMMISSIONER HORNER. Can they announce their own preference to the class?

MR. EISENBERG. Generally, not. Generally, not.

MR. DONOHUE. There's a law in this country that says you can't say I'm a Democrat?

MR. EISENBERG. No, in the classroom—in the classroom when you are teaching. In the classroom when you are teaching, the question of what the curriculum permits a teacher to say does not—I don't believe—does not include in effect saying that you ought to vote Democratic or you ought to try to persuade your parents to vote Republican. That is not free speech. For instance, could a teacher as a matter of free speech say I think that gay/lesbian relationships are fine? I think they ought to be—

MR. DONOHUE. Sure. I've been teaching all my life until I got this job a few years ago. Everybody's been doing this. They do it every place.

COMMISSIONER HORNER. Could I say something here? All this morning's panels made a very big point of the confusion that exists among teachers and administrators over what is and isn't permissible. And here you guys are experts and I'm a Civil Rights Commissioner and we're trying to sort through this. I used to teach. I used to talk in seminars with my high school students. I used to explain why I was what I was politically, and we'd josh back and forth and I'd say, "Boy, if you were old enough, you should vote for X," and they'd tell me why not.

MR. EISENBERG. We're talking about in class teaching children.

COMMISSIONER HORNER. Yes, in class. Yes.

MR. EISENBERG. If you're teaching them history, I think that the better practice is that you do not, as was said by—

COMMISSIONER HORNER. Well, better practice is different from my question though. My question is, Am I permitted by law? not am I permitted by principle.

MR. EISENBERG. By law, I don't think so. I think there is discipline within the school system that's different than the system under law. You're not going to get fired legally for that. But in terms of practice as a pedagogical thing, you don't get up in front of a class and say I am a—now, going to your question about thou shalt—

COMMISSIONER HORNER. Honor thy father and mother.

MR. EISENBERG. Honor thy father and mother. That's all in the context. If the context is teaching morality, you shouldn't steal, you should honor your father and mother. If the context is that kind of morality, yes. But if the next question is thou shalt have no other gods before me and I am the Lord thy God, wouldn't you think that that might be a problem?

COMMISSIONER HORNER. So morality which is religious based is okay, but theology is not. Is that the distinction you're making?

MR. EISENBERG. I think it goes finer than that. It's the context of the class which you are teaching. You can teach morality. You can teach about religion. You can teach about what the history of Christmas is. You can teach about the history of Hanukkah if you want. But you cannot teach religion. And I think that we would probably agree with that. The problem about teaching about religion is that it becomes a wedge in which you not only teach about religion, but if you believe that Jesus did rise on—was resurrected or that Jesus was in fact the son of God, teachers tend to teach that as a historical fact and not say Christians believe that or Catholics believe that.

MR. DONOHUE. So if we educated, then you would accept that then?

MR. EISENBERG. It depends on the level. I think you want to teach about religion in high school. I think there are legitimate ways in which to teach about religion and you can teach about the Crusades and you can teach about the Inquisition. You can teach about all sorts of things that relate to religion. Sure. If you go to the history of Spain, it's hard to do it without teaching about the Inquisition.

MR. DONOHUE. If you talk about all the Catholics who service all the AIDS patients in New York, you couldn't?

MR. EISENBERG. What you pointed out about the bigotry against Catholicism is as offensive to me as a Jew. Jews have suffered that same kind of discrimination and bigotry, and I'm shocked that now this kind of thing is going on and I think you're quite correct in fighting it. And I think we have—the ADL—has done the same thing, not only with respect to discrimination and bigotry against Jews, but discrimination and bigotry against racial discrimination as well as religious discrimination. And we would join you

in that. On the other hand, when you get to having crèches in public schools, when you get to having situations where you have christological concerts which start rehearsals in Thanksgiving and end up at Christmas time and kids are excluded, that we do not join you in.

MR. DONOHUE. Can I ask you one question, sir? There are menorahs all over the city schools. Has your organization moved to ban them?

MR. EISENBERG. We have opposed the use of menorahs as we have the use of crèches, and we have fought with our Orthodox brethren who think it's a terrific idea to have this great menorah.

MR. DONOHUE. By the way, where are the Orthodox Jews here today?

CHAIRPERSON BERRY. This hearing is getting out of control. Please be in order. Commissioner Horner, did you have further questions?

COMMISSIONER HORNER. One last quick question. What's your position on music and art? Is it okay for students to learn to sing Bach, a mass?

MR. EISENBERG. I think in a music class, yes. I think you can teach Bach. But I do not think it's appropriate to teach that for presentation at a Christmas concert which is in the context of the celebration of Christmas, just as I don't think you exclude religious music from the music curriculum, but you do, I think, have to be careful and sensitive when you're doing this concert at Christmas time or at Easter time. You want to teach Bach? Let them do it in September. But they don't do it in September. They do it in December. Why do they do it in December? Because they're making a religious point.

COMMISSIONER HORNER. One last question. Just a reminiscence. In my public school kindergarten back in the late 1940s, I have a very vivid memory that before lunch we recited what the Protestants called The Lord's Prayer, and the Catholics called the Our Father. And at the end of this prayer, the Catholics stopped after a certain point, and the Protestants went on for "for thine is the kingdom, the power and the glory forever and ever. Amen." And I was instructed by my parents to remain silent during that period, and I did so. And to me it was a point of proud identification, not fear or shame. I was in a majority Protestant—very heavily majority Protestant environment, but it wasn't a problem. And so I guess I just want to say for the record, although I am very sensitive to the fact that it can be a great problem for students in class to

have these religious complications, I think we ought to also acknowledge that for some it's simply an opportunity to say this is who I am in contradistinction to those around me without any hangup about it. I don't denigrate—you know, conflict can lead to difficulties.

MR. EISENBERG. But comfortable—it's more comfortable if you're in the majority or in a context in a country where the majority says, well, that's okay. It's much more difficult if you really—if the difference is not just over the end of the Lord's Prayer, but the difference as to whether or not in effect you accept Jesus as your Lord. And you can't participate in any of it. We used to say lead us not to Penn Station.

COMMISSIONER HORNER. I understand.

CHAIRPERSON BERRY. Commissioner Anderson.

COMMISSIONER ANDERSON. Thank you very much. I'm afraid I have to leave the hearing now, but I just want to say before I do how much I appreciate the panelists, especially in this last panel. In the panel before, I think Robert Coles was mentioned and his work in terms of the moral belief that's appropriate for children, which is very real. And although there's a good deal of resiliency to their spiritual life, there's also a great deal of delicacy to it. And if anything has impressed me today about various witnesses we've heard, almost all of them have discussed this in terms of free exercise or establishment problems. I would hope in our next hearing in New York on this matter that we would be able to focus attention—well, I think we would all agree it's primarily the subject, which is the children. But perhaps we can hear from Professor Coles or some others in that other strain about how to deal with their spiritual life, with their moral development in ways that respect that delicacy and allow them to really form in maturity. So we did invite many lawyers to this, and we get very legal analyses of these problems. But perhaps—and there's nothing wrong with that. Certainly it's been very informative today. But perhaps our next hearing we could focus a little bit more on the subjects themselves and how we allow these children to develop while respecting their integrity and their need for information. So with that, let me thank the panelists again and say goodbye to you.

CHAIRPERSON BERRY. Thank you, Commissioner Anderson. Does anyone else have a question? Yes, Commissioner George.

COMMISSIONER GEORGE. Thank you, Madam Chairman. Let me begin by putting on the record that I'm a member of the Advisory Board of the Catholic League for Civil and Religious Rights, which is Mr. Donohue's organization. And as he said, it's the oldest and largest Catholic civil rights organization in the country. Mr. Donohue, Mr. Eisenberg spoke earlier of the historic unifying role of the public schools, and I don't doubt that the public schools have played a unifying role. But that unifying role is not one that has always from the Catholic point of view been a positive unifying role. The Catholic Church felt forced in another time to build a system of parochial schools, which is I think quite unprecedented in other parts of the world, or if it exists in other parts of the world is really modeled on the American Catholic experience. And many Catholics that I talk to believe that the historical role of the public schools has been a mixed record. One that involves serious anti-Catholicism. I'm thinking of Charles Glenn's book, *The Myth of the Common Schools*. And one that Catholics have felt it necessary for the preservation of the religious integrity of their own children to be free from. Now, I myself am a Catholic and I attended a public school. My school had some of the tension Commissioner Horner talks about in her schools. Although in the whole in my case, I must say it was a positive experience, and my own children are in public schools, which is also a positive experience.

However, many Catholics believe, and I know in some parts of the country it's really worse than in others, that the old pan-Protestant establishment that governed the schools in such a way as to make Catholics outsiders has really been replaced by a secularist establishment in the public schools from which Catholics are also of necessity outsiders. So that one establishment has been replaced by another establishment. Is that a view that you generally share, or that you're concerned about or do you have a more positive attitude toward the capacity of the public schools as currently run and constituted to accommodate the religious beliefs of Catholics?

MR. DONOHUE. Well, I think you're quite right. It's now a historical fact that the parochial schools were created because of anti-Catholicism in this country that extended to the public schools. At that time the Protestant majority and what was happening—I could go on quite a bit and give you some pretty illustrative cases as to

what the Catholic school kids endured. So they decided just to simply go their own way and find their own schools.

The situation we have now, of course, is a lot different. And I am not saying that Catholic school kids are routinely visited with bigotry or anything of the sort. I do think that if there's one thing that has come to my desk more than anything else in this regard, to talk about the contemporary situation, is multiculturalism, which at its best is something we should embrace, this respect for the diversity and the cultural and religious heritage which has made this country a mosaic. However, I am disturbed by the number of times that very vile anti-Catholic plays and movies are depicted on school campuses, particularly in the high schools. And then we write to the principal. We get an answer back that this is an example of diversity. Well, they wouldn't be putting on *The Merchant of Venice* to offend Jews. They wouldn't be putting on *Birth of a Nation* to offend African Americans. They're not going to run the reruns of *Tonto and Lone Ranger* to offend Native Americans. So why do they give us *Sister Mary Ignatious Explains It All for You*, one of the most notorious anti-Catholic plays ever made that Meyer's group was very good a long time ago in jumping on that as well as a number of other different Jewish members? Virtually everybody did. It was incredible. But you should see the letters I get from these people and particularly even worse—I know you consider more elementary and secondary. At the college and university level it's out of control. The letters I get back from the principal say, the reason we're putting on this anti-Catholicism here, this play, which could be arguably anti-Catholic, we're going to discuss it. We're going to have a roundtable after it. And I write back to them. I say, how about the gays? You got any good movies you're going to show about them and have a little roundtable of blacks and Native Americans and Jews? And of course the only way I can possibly win these arguments is by analogy, because in fact the other aforementioned groups have done a better job, which is more of a tribute to the people in the black community and Jewish community and gay community. Catholics have been rather lazy, to tell you the truth, up until more recently. But that doesn't excuse the fact that there is a bigotry that is tolerated there on the campuses. And if anybody doubts it, just pick up today's *New*

York Times. A woman writes in a letter to the editor. It's called "Anti-Catholic Art," justifying anti-Catholicism and claims herself to be a Catholic. I don't know what kind of Catholic she is. The Phil Donohue type. Not my kind of Catholic. There was an article just on Saturday—

CHAIRPERSON BERRY. No defame and degrade. [Crosstalk.]

MR. DONOHUE. When I was on his show, I said I'm related to you neither ideologically nor biologically. But—Steinfeld wrote a piece the other day talking about anti-Catholicism. I'm not going to go over this very grotesque vulgar stuff about Jesus and sexual expressions and Catholic nuns, and we objected to it out in Seattle. And this person writes back and says basically it's payback time kind of stuff. We've seen this kind of stuff all the time. And I don't want to leave the misimpression. I am not saying that individual Catholics are on kind of a daily basis victimized. There is a difference between bigotry that is visited upon individuals and bigotry which is visited upon the institutional church. Anybody is free to disagree with the Catholic Church's teaching about sexuality and women, but we don't need your insults and we don't need your disdain and we don't need your disparagement. It's not a dictation. If you don't like it, quit. And if you don't want to join, don't. But there is a tolerance for anti-Catholicism that I would match up with virtually any other segment of the population. Again, don't take my word—1995 National Conference of Christians and Jews. They measured prejudice in the United States against Catholics and Jews and African Americans, Native Americans and Muslims and Hispanics and Asians, right down the list. Do you know what the number one prejudice in the United States was? They didn't bother to flag it, which is another interesting characteristic. Anti-Catholicism far and away trumped everything in terms of the prejudicial attitudes that people have.

Now, discrimination is a behavior variant. Not every prejudicial attitude automatically evinces into discrimination, which is why many Catholics themselves—you know, I'm going to not go into schools like that. But when they talk about certain subjects in history that they pick out a laundry list of things the Catholic Church itself has even apologized for, but they bring that out constantly. And nobody else's religion is

held to that kind of standard. I wonder what's going on and what's motivating it.

COMMISSIONER GEORGE. Mr. Eisenberg, did you want to say something about that?

MR. EISENBERG. It's interesting for me sitting from my perspective to hear someone say that there's a secular establishment that is essentially anti-Catholic. That's really not been my experience, although coming from a multiethnic area; there was Anti-Semitism. There were people who didn't like the Irish. There are people who don't like the Italians, who didn't like blacks. Nobody sanctioned it. But I do want to draw some distinction. We've been talking before about elementary and secondary schools. Now you're talking about the general area which includes universities. And I think that the courts correctly have drawn some distinction in what you can do with respect to universities, where people are allegedly more mature, that there's a greater range for freedom of expression and so on than you can in the elementary and secondary schools.

And I think this line of—you talked about censorship. I think that we would be very hesitant—you can condemn anti-Catholicism. You can condemn the bigotry that you discuss. And traditionally the whole history of our organization has been the condemnation of bigotry regardless of race or color—race, ethnicity, and so on. But you also have to balance that tension against the censorship and freedom. If people are going to be anti-Catholic, you can't do that in a public school. You can't do that in a secondary school. Your interpretation of what is or what isn't permissible in a university gets a lot more difficult. And I think that I'm not ready to say that you could—what would you do? Block *Jesus Christ Superstar* from being performed at Berkeley or at the University of Pennsylvania?

MR. DONOHUE. The ACLU went in to block it there. I do agree with you. We at the Catholic League, we have specialized in public embarrassment because it's one thing nobody wants. Lawyers are too expensive, and they take forever to do anything. So what we do is we work on the media. We put the spotlight on the offender. We don't ask for the government to come in. Jesus having sex with Twelve Apostles is coming up on Broadway. I'm waiting to see that in September.

COMMISSIONER GEORGE. Is that true?

MR. DONOHUE. Yes, yes. Terrance McNally. Sounds awfully Irish and Catholic.

MR. EISENBERG. Thank God he's Irish.

MR. DONOHUE. That's right. The Irish have enough problems without having him. Now, look, all you're saying is that we don't ask for censorship. It's never our goal to call in the cops. I mean, if I have a choice between being offended as a Catholic and having the cops come in and help me out, I'd rather be offended than have them in there. That's why we depend on moral suasion and we get the public. All I'm simply saying is that I agree with you. I don't want any kind of governmental response here in that regard. However, I think that there is a duty in a positive way to educate teachers that they should be as intolerant of the intolerance against us as other groups. And I don't think that there's an equal playing field.

MR. EISENBERG. Just to respond further to Professor George's question on the secular establishment business. I think the answer to your question is that the educational establishment, the people who run the public schools, superintendents of schools, both State and local, have to sort that out. This is not something that is a Federal question. I think it's something that the educational authorities that I know are sensitive to. They should and are attempting to sort that out. I think they can get encouragement from commissions like this Commission and from their various State educational commission. That's something that they have to work on. But you're not going to be able to do it by Federal edict.

COMMISSIONER GEORGE. Mary, do we have to close it or—

CHAIRPERSON BERRY. Do you have urgent questions?

COMMISSIONER GEORGE. Not urgent. I would want to converse some more with Mr. Eisenberg because I didn't get my question for him.

CHAIRPERSON BERRY. I'm afraid we're going to get some more defame and degrade responses. [Laughter.] Let me thank the panelists for coming and let me read whatever I'm supposed to read about—oh, thank you for taking the time to testify, and someone from the staff will escort you through the sign-out procedures. And thank you very much. We will have a 5-minute break and then reconvene immediately.

[Whereupon, a recess was taken.]

Panel 4: Equal Access

CHAIRPERSON BERRY. Would everyone please take their seats. We're ready to reconvene the hearing. Could we have the sign interpreter ask if anyone is in need of sign interpretation. [No response.] Thank you very much. We now have a panel on discrimination issues covered by the Equal Access Act and similar laws involving religious groups requesting access to school premises for extracurricular activities. The witnesses are already before us. Mr. Troobnick, Ms. Underwood, and Ms. Schroeder, would you please stand. You have to take the oath before you begin. Sorry.

[Whereupon, an oath was administered.]

CHAIRPERSON BERRY. Thank you very much. Please, be seated. Counsel, please proceed.

MR. HAILES. Good afternoon. For the record, we will ask each of you at this time to identify yourself and provide an opening statement, a brief opening statement. Beginning with you, Mr. Troobnick.

Mark N. Troobnick, Special Litigation Counsel, the American Center for Law and Justice

MR. TROOBNICK. Hi. My name is Mark Troobnick. I'm special litigation counsel for the American Center for Law and Justice [ACLJ], and I have submitted a written statement to the Commissioners. I'm not going to read the statement. It's late in the afternoon, and I fear that I would lose my audience and I don't want to have you cure your insomnia problems here.

VICE CHAIRPERSON REYNOSO. We're all ears.

CHAIRPERSON BERRY. We're all ears.

MR. TROOBNICK. Let me just outline what I say in there. There's two problems that we see. One has to do with students and religious liberties in the public schools, and the other has to do with adult equal access to public school facilities after school hours and on the weekends because they are religious, and public facilities in general.

I have been litigating in the equal access area now for 10–11 years. I have litigated this issue successfully in most circuits across the United States, including the United States Supreme Court. We did *Lamb's Chapel*. My organization also did the *Mergens* case and a *Jews for Jesus* case. So we're intimately familiar with the equal access issues.

The standard of law for equal access is this. There are three different kinds of fora under Supreme Court precedent. There's the traditional

public fora which is streets and sidewalks. That's *Haig v. CIO*. Then there is an open forum by government designation. That is a forum that's not necessarily traditionally open to public speech. But the Supreme Court has said in a number of cases now—*Widmar v. Vincent* being one of them, *Lamb's Chapel* being another—that once you generally open the doors to the public for speech purposes you can't close those doors to a particular group based upon the viewpoint or content of their speech.

Then there's a third class of fora that's called a nonpublic forum. The *Adderly* case is a good example. Prisons, military bases, that sort of thing. That's what I lay out for you all basically in the first few pages here—what are the different kinds of fora, what's the standard. How do they get open? Very simple. *Perry Educators Association v. Perry Educators* said once a facility is "generally open to the public," then it becomes an open forum by government designation. So, for example, if you have a building, a school building, and you rent your facilities on the weekends or in the evenings to the public at large, you can't close the door to religious groups based upon the content or viewpoint of what they want to say. Now, we've litigated that case extensively.

The second part of my statement, which starts on page 3, talks about a very recent second circuit decision that flies in the face of those Supreme Court precedents, and I try and detail, because a large part of the interview that I did before appearing here today centered around what's wrong with this decision. So I've tried to detail—I won't read it all out for you—what it is that's wrong with that decision, why I believe that the Supreme Court or else an *en banc* panel of the second circuit itself will overrule that decision. Let me just say this: that aside from flying in the face of very clear Supreme Court precedent that dates back to at least 1981, if not before, the second circuit stands alone among the circuits in this regard. And basically, as I understand the *Bronx Household of Faith* decision, they say that there's a difference between religious speech and religious worship. Obviously, they can't say religious speech can be excluded after *Lamb's Chapel*, but religious worship, they say, is somehow different than religious speech. *Widmar* says differently. *Widmar* says there is no difference between religious speech and religious worship. I believe the sec-

ond circuit panel is in violation of the supremacy clause since the precedent is so forcefully clear.

Finally, on the last page, page 7—and I'm not going to read it for you all. I gave it in my interview before, and now you have it in writing—all of the incidents that we have dealt with as an organization at the American Center for Law and Justice concerning problems that we get calls on from various schools across the country and all of the incidents that we have had of those various problems. And amazingly, even after the enactment of the Equal Access Act by a unanimous Congress, starting Bible clubs is still a problem. Thank you.

CHAIRPERSON BERRY. Thank you very much.

MR. HAILES. Ms. Underwood.

**Julie K. Underwood, General Counsel Designate,
National School Boards Association**

MS. UNDERWOOD. Good afternoon. My name is Julie Underwood and I will be, on June 15, the general counsel of the National School Boards Association [NSBA].

CHAIRPERSON BERRY. Depending on how things go here. [Laughter.]

MS. UNDERWOOD. The NSBA is a nationwide advocacy organization for public schools. Our local school board members are elected officials who are accountable to and represent the communities that have elected them. School board members must also balance these large policy issues and the values of their community and the impact of those issues on the school district. In few areas is that balancing more difficult than is directing the role of religion in public life, especially in public schools. I'm not going to go through horror stories since I'm not in the story chair, or anecdotes. But I'd like to have you think about—and maybe that is one of the things that was alluded to at the close of this previous panel. Think about the purpose of public education and think about the children who are involved in public education and the purpose of the constitutional rights that they have.

America's public schools are the first and probably the best curriculum we have for our democracy. It is there that our children live and learn our democratic traditions and parameters. The Supreme Court Justice Felix Frankfurter wrote that the public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. The truth of that statement is the reason any well-

intentioned discussions concerning the appropriate role of religion in our lives, especially with regard to public education, can quickly heighten religious tensions and undermine our sense of shared community. It is most important here that our children learn the notions of individual liberties, majority rule, and the inherent conflicts between those two cornerstones of our democratic and constitutional form of government. Since over 91 percent of all school-age children attend our public schools, the responsibility to create an environment that meets with parental support is very important. On the other hand, the responsibility this institution has to provide a citizenry able to carry forward our democratic traditions is absolutely paramount to our nation. In fact, this is what Jefferson noted as one of the primary missions of the public school system.

I'd now like to turn to, for just a minute, questions of how we might resolve these issues and how we might ensure that our children do learn the inherent conflicts between them and still feel comfortable in a workable climate within the public school system. Over the last number of years, those of us who represent education, civil rights, and religion have learned that it is far better to cooperate than litigate. We have sat down together to discuss these matters of mutual concern. The Christian Legal Society wrote an article for one of NSBA's major publications. The American Center for Law and Justice, the National Association of Evangelicals, and a number of other religious organizations and educational organizations have been invited to these meetings to discuss their concerns. The materials which I believe you have a number of copies of entitled "To Find Common Ground" have been developed from those meetings a number of years ago. And one result of those cooperative actions was the development of the guidelines which are part of this hearing, I understand. And that was in 1996.

The National School Boards Association, particularly the office of our general counsel, made Secretary Riley's guidelines available to every school district and every school attorney in the United States. The office of general counsel included a verbatim copy of the guidelines in one of our quarterly publications that was sent out and continues to be available on the Web and has a distribution of over 5,000 members. We also published an annotation for those guide-

lines, which has been heavily used. We know those guidelines have been working and have been used to resolve conflicts in the schools. In 1996, although this is dated, after the initial dissemination of those guidelines, we had far fewer calls related to religious activities. And we did take a random sample survey of 30,000—I'm sorry—3,000 attorneys who are school attorneys. And contrary to previous testimony, they were knowledgeable in the area. And by a two-to-one margin they contended that the guidelines have been successful in reducing conflict, mainly in a preventive way. Not in terms of litigation but in a situation where they could be used to discuss issues. More recently in the last 2 months we've queried the counsel by Internet—technology advances, you know. However, we received very few comments. And if I could extend my time a moment to give you two of those comments verbatim.

From a State association council we received the following response about the guidelines and their usefulness:

When the guidelines were issued, they generated numerous questions from our member school districts. In conjunction with our policy services department, we developed a side-by-side companion of the guidelines with applicable State laws, administrative regulations, attorney general's opinion, and court cases in that particular State. This helped to inform districts and decrease questions even on this issue.

From a large firm which represents a city school district and many surrounding districts, a very large school law firm, they write:

While we have drawn the same legal conclusions as those found within the guidelines, we have not explicitly used or referenced them when dealing with religious issues. Instead, we have cited the applicable statutory provisions and case law for authority when responding to such problems. We have found this to be a successful method of dealing with such issues. No one has challenged these determinations. If they had or do so in the future, we see the guidelines as further proof that our analysis complies with these Federal expectations and requirements.

Public education has no need to be a battleground, particularly on the issues of children and religious liberties, nor should children be used as tools in adult wars on these issues. Protracted litigation is expensive, and the schoolchildren of America cannot afford to expend

those resources in this way. Nonetheless, we have a moral obligation to teach about individual liberties and particularly those liberties of conscience and the protection and the respect for minority groups within our society.

Will there be problems in the future? Well, with 80,000 public school buildings and 45 million public school studies, yes. Of course there will be. We've heard stories of misinformed teachers and administrators earlier today. We cannot protect against all of those things. But at least we can find ways to sit down and talk about them and resolve them in a preventive manner, in a way that is amicable in nature. Thank you.

CHAIRPERSON BERRY. Thank you very much, Ms. Underwood. Ms. Schroeder.

**Terri A. Schroeder, Legislative Analyst,
American Civil Liberties Union**

MS. SCHROEDER. Thank you very much. And thank you for inviting the ACLU to testify today. The American Civil Liberties Union is a nationwide nonprofit, nonpartisan organization dedicated to the principles embodied in the Bill of Rights. Currently, I am a legislative representative at the ACLU's Washington national office, where I am fully responsible for defending the first amendment right to religious liberty. Before coming to Washington, I was deputy director of the Indiana affiliate of the ACLU. During my tenure of 5½ years in that office directing its legislative and public education department, we developed numerous programs in conjunction with more than 50 religious and educational groups. These programs were devoted to resolving church-state conflicts in the schools. One of the most successful projects was the development of a handbook on religion in the schools, which was distributed to every school in the State by the Indiana State Superintendents and the State Principals Association.

We developed teach-ins around the program, and 4 years later the guide continues to be used by school administrators, teachers, parents, and legislators. I have been immersed in the civil liberties implications of the issues before this Commission for the last 10 years. I consider myself to be a constitutional analyst and advocate. I have a dual master's with a focus concentration on constitutional law and Supreme Court history. I am not a lawyer, which may give me more

or less credibility, depending on your view of church-state litigators.

I appreciate this opportunity to give a brief overview of the ACLU's position on religious expression generally and the Equal Access Act specifically before we open it up for questions. We believe that if our schoolchildren, particularly those in secondary and postsecondary school environments are to be trained in the democratic process, they must be given every opportunity to participate in the school and in the community with rights broadly analogous to those of adult citizens. In this basic sense, students in secondary schools, whether public or private, are entitled to the same freedoms enjoyed by college students. But the ACLU believes that the difference in age range between high school students and college students does suggest the need for a greater degree of advice, counsel, and supervision by the faculty in the former.

From the standpoint of religious freedom and civil liberties, an essential problem for administrators in the secondary schools is how to best maintain and protect freedom of speech, assembly, and expression, inculcate a broad sense of responsibility and good citizenship, provide supervision, and simultaneously refrain from affecting the content of that expression. This refrain is key. We believe that the farther the school distances itself from endorsing or sponsoring religious expression the more likely the establishment clause problems are alleviated.

The ACLU was opposed to all early drafts of the Equal Access Act. The legislation was conceived solely as a method of advancing a special privilege for student religious clubs. The ACLU argued that if the legislation explicitly advanced religious expression and did not advance free speech generally, it was a violation of the establishment clause. During the course of congressional debate, the coverage of the bill was expanded to all student-initiated groups. In addition, protections were added to minimize establishment clause problems caused by the appearance of school sponsorship of meetings involving religious speech. Believing that the establishment clause conflicts remained a recipe for mischief, the ACLU took no position on whether the bill should pass.

Although we find the provisions protecting student speech to be positive, we continue to be concerned that the act not be used as a tool for unconstitutional objectives. We believe that we

all must be aware of the delicate balance implementation requires and remain diligent in protecting the religious freedom of all children.

We should not forget that we have engaged in a long battle to bring this country to a place in time where diversity and tolerance are fluid, not only in principle but in practice. I would hope that at the end of the day we can agree that protecting every child's individual right not to be coerced, harassed, stigmatized, and/or ostracized is as great as protecting every child's right to religious expression. Over the last 14 years since the act's passage, there's been a focused effort on educating school administrators and others about the proper application of the law. The ACLU and a number of its affiliates have been involved in many of these efforts, including the joint statement on religion and the schools, the equal access guide, and the common ground curriculum.

Additionally, we believe that there have been attempts to mischaracterize and misrepresent aspects of the act that the ACLU believes are critical in distinguishing a constitutional exercise of speech under the act and an unconstitutional establishment clause violation. I experienced this first hand. I was in the trenches in Indiana dealing with the fallout of competing statements and litigation threats from a variety of external forces. The Indiana affiliate of the ACLU pulled together a very diverse coalition of religious, education, and civil liberty experts to develop the handbook that I talked about earlier. This book is very similar to the joint statement written a year later by national groups. However, we went further and proposed a variety of every-day scenarios to help administrators, teachers, and others understand the Equal Access Act. This problem continues to be much more than academic. The threat of litigation looms over administrators if they digest conflicting information. If that information is false and misleading, the potential establishment clause problems are exacerbated.

The ACLU continues to strongly support the development of educational materials that address the constitutional protections and limitations under the Equal Access Act. We also believe that it would be helpful if comprehensive information that was more scientifically based and less anecdotal was gathered that evaluated the prevalence of religious activity and the problems in the schools.

CHAIRPERSON BERRY. Thank you very much, Ms. Schroeder. Counsel.

Discussion

MR. HAILES. Yes. Thank you, Madam Chair. I ask each of you to answer the following question. Earlier today and during our staff interviews, we learned that there are those with a view that the Equal Access Act should be extended to students younger than students in secondary schools. Do each of you have a view on the statements that were made? Just that statement generally. Beginning with Mr. Troobnick.

MR. TROOBNICK. I wasn't here for those statements.

MR. HAILES. Just generally, the proposition that the Equal Access Act can and should be extended to younger students.

MR. TROOBNICK. I don't have a problem with that. One of the reasons I don't have a problem with that is in fact the act, I believe, uses the term "middle school."

MR. HAILES. Secondary school.

MR. TROOBNICK. Secondary school. I'm sorry. And secondary school is different from State to State. And sometimes it includes middle school; sometimes it doesn't. And I just don't have a problem with extending it so that it's made a lot more clear that younger students, younger than—

MR. HAILES. Let's say a 6-year-old, 8-year-old. Do you have any age where it would make a difference in your view?

MR. TROOBNICK. Yes. I think that there is a threshold of understanding. The thing about these clubs is that they're student initiated. And I think that students that are in middle school could initiate a club on their own such as this. I don't think that kids in elementary school could. I happen to know some very erudite young students that are 9, 10 years old that could easily initiate a club like this that wouldn't be permitted in certain States because they aren't secondary school students.

MR. HAILES. Ms. Underwood.

MS. UNDERWOOD. Yes. I do have an opinion on this question, and a very strongly held opinion. I believe that it would be an error to lower the age. We talk about lowering the age for driving. I guess we're raising the age for driving and lowering the age for the application of the Equal Access Act. And I think it would present both practical and theoretical problems. Starting

with the practical problems, you have the question of how many elementary schools really have open forums and student-initiated clubs as defined within the Equal Access Act. At the elementary school level there are very few student-initiated clubs. Off the top of my head, I can't even think of one, but I'm sure that somebody could come up with one somewhere, or that they might all of a sudden appear.

The other practicality of lowering the age of application for the Equal Access Act would be that of supervision. Young children need to be supervised more closely than secondary students, and probably middle school students need to be supervised more closely than that. So I think that both of those issues present very real problems with application at a lower level.

The middle school issue I think is, in terms of practicality, of great concern, since the middle school does have more open forums and would present more opportunities to have student religious groups. However, the clubs that exist now in middle schools really aren't student initiated. They're more curriculum related. They're the year book club. They are the photography club. They are maybe a language club, which really are curricula-based clubs, not student-initiated clubs. And being the mother of a 12-year-old who thinks she's a 30-year-old, even my daughter couldn't put together a student-initiated—a truly student-initiated group, or at least one that she'd admit to me that she'd done.

The more theoretical issue is the appearance of sponsorship, and maybe that's practical also, because young children are impressionable. I agree with your previous statements that young children are very impressionable. They may give the front, particularly during puberty, that they aren't, that they don't care what you say. But our actions speak volumes to our children, and when they believe that we want them to be in a student club, to do this, that, and the other, I think it does make a very firm impression on them. When we are representatives of the government, when we are public school administrators and teachers, I think that we stand as models, and our children would listen to our actions. And their lies the perception of sponsorship problems both at the middle school and at the elementary school level.

MR. HAILES. Thank you. Ms. Schroeder.

MS. SCHROEDER. I would agree with Ms. Underwood's comments. I would also add that back

in the '80s when the *Widmar* decision came down, which dealt primarily with college students and access to clubs, there was an issue even at that point about whether or not college students would be able, as young adults, to understand and to—if they have the capacity to understand the difference between student-initiated and student-sponsored activities and whether or not the school was involved in endorsing it. The court decided yes, that they were. And when we began to have discussions about equal access, there was a huge discussion about whether or not we could even make that leap, that we could argue that high school students would have the same capacity that college students would have to understand the difference and to function independently and to not require a level of supervision that would create too much school involvement. I'm not sure. I think we are still in the area of sorting this out in the high schools. I don't know that we are really ready to even begin to take the leap into the question of a student's capacity younger than a freshman in high school.

MR. HAILES. Ms. Underwood, in your interview with staff, you mentioned that the NSBA has intervened in cases in which the Equal Access Act has been examined. Can you describe the position of the NSBA in that matter and the case, in fact?

MS. UNDERWOOD. Without my notes, I could not tell you the case. But we can provide that in our written testimony. But we have—because I'm not—the name of the case escapes me.

MR. HAILES. Right. And I don't have it here. That's why I was asking for the record.

MS. UNDERWOOD. But generally, generally the position is one in which we support the individual liberties of students but also try and focus on the need to continue with the school and the need to be able to control the forum as much as possible.

MR. HAILES. And, Ms. Schroeder, does the ACLU see a distinction, one that Mr. Troobnick does not see, in religious worship and speech?

MS. SCHROEDER. I would say that that is—I would agree with the statement that the issue is unresolved, but I would not agree that it's not a contentious issue. And I think that as the Court has looked at this, even in the *Lamb's Chapel* case, that the ACLU was also supportive of and on the same side with the ACLJ, took the position that worship was not the issue in that case.

MR. HAILES. Did you have anything further? Would you explain your position further?

MR. TROOBNICK. Yes. Let me just say that I understand that the ACLU has a national office, then it has State offices. And the case that we're doing in the second circuit in New York right now, the *Gospel Tabernacle* case, which is pending before the second circuit—I spoke with Art Eisenberg of the New York Civil Liberties Union who spoke with his board. And they said that because of the prior *Bronx Household of Faith* decision, they felt it would not be—that nothing would happen with this circuit as far as filing an amicus brief on our behalf, but they would be interested in filing an amicus brief if cert. was granted in any of these cases, because they also did not see such a distinction. And again, it's real clear what the Supreme Court has to say about it. I mean, it's just very clear. And I must note that the dissent that they're referring to in *Widmar* was Justice White. And Justice White was eventually the guy that wrote *Lamb's Chapel*. So that kind of distinction simply doesn't exist as far as I can tell. I mean, I can't see anything that's more clear. I'm not going to read it for the Commission. You're all very educated people. But it's very clear. It's very apparent. Which is why our—and everyone else says, look, how are you going to start making those kinds of determinations. That's what the Supreme Court says. How are you going to say that—okay, you can teach about religion from a religious perspective, but then you can't stand up and read the Bible as a pastor and teach from the Bible from a religious perspective? It doesn't make any sense.

You can have a chorus sing religious songs, but you can't have people come together and sing religious songs? It doesn't make any sense [to make] those kinds of distinctions. So if you're going to allow religious speech, you're going to have to allow religious worship because they're basically one and the same.

The *Lamb's Chapel* case specifically had to do with a church who showed a James Dobson film series in which Dr. Dobson said this is the reason for my religious beliefs. "I urge you, the viewer, to come to know Jesus Christ as your Lord and Savior." That's what it said in the film series. That's the case we won. Now, I don't see anything that's different about that film series than what a pastor would say on a Sunday to his congregation.

MR. HAILES. Ms. Underwood.

MS. UNDERWOOD. I beg to differ quite strongly. First of all, there's an issue of audience. There's an issue of captive audience. There's an issue of intent. There are lots of distinguishing features here. To say that there's no distinction between teaching about religion and proselytizing, from a religious perspective, I would be offended.

MS. SCHROEDER. There's an additional distinction, also. We're talking about the difference between equal access to community groups versus—we're not talking about student initiated.

MR. TROOBNICK. Right. That's right. We're talking about adult groups here. We're not talking about student groups.

CHAIRPERSON BERRY. I want to be clear as to what it is you are talking about. If I understand it correctly, counsel, you're discussing whether or not a school building can be used for church meetings. A church worshipping, as opposed to activities that may involve religious materials and matters. You're talking about a church. Somebody wants to have their church meet at the school.

COMMISSIONER GEORGE. And there's not a captive audience, in other words.

CHAIRPERSON BERRY. Right. That's what you're discussing though.

MR. TROOBNICK. Right. What we're talking about is adults after school hours.

CHAIRPERSON BERRY. I understand. I just want to make sure the record is clear.

MR. TROOBNICK. Right. Absolutely. Okay.

MS. UNDERWOOD. But there still is a distinction, and there still is a question of appearance of sponsorship. These kinds of cases come in a well-intentioned setting where possibly a church has been burned down for one reason or another. And unfortunately that is happening more and more in our country. And the school, as a civic-minded group, says that's okay. Yes, you can rent our facility, or yes, you can use our facility. Then as it goes on and they may be meeting there over an extended period of time, so that it is come to be known that on Sunday that's not the elementary school. That's not First Elementary School. That's First Baptist Church. And the young child who walks into that school as First Baptist Church on Sunday morning and greets the pastor walks back into that school on Monday knowing that it's his school. And it does

lend a different amount of sponsorship to that group than to all of the others.

MR. HAILES. That's the end of my questions.

CHAIRPERSON BERRY. Any Commissioner have any question? Yes, Commissioner Lee.

COMMISSIONER LEE. I have a question for Ms. Underwood. Earlier today in different panels several panelists talked about the confusion applying or interpreting the Department of Education's statement of principles in different school districts. Can you explain to me since the school boards are elected, they're elected members, who appoint or hire the superintendent, who in turn runs the administration office—

CHAIRPERSON BERRY. I'm not sure in D.C.

MS. UNDERWOOD. Where local control has an entirely different meaning. Okay.

CHAIRPERSON BERRY. For good or ill. Go right ahead. I'm sorry, Commissioner.

COMMISSIONER LEE. So if a Federal—not mandate, or just anything that comes in from the Federal Government, does the legislation or the directive go to the school boards first and then it gets disseminated to the superintendent, or does it go directly to the superintendent to carry out? I'm just trying to make—

MS. UNDERWOOD. Well, if I can clarify what I said earlier. In our dissemination of the guidelines, we did disseminate the guidelines to every superintendent's office and to every school attorney.

COMMISSIONER LEE. So the school boards have nothing to do with interpreting and applying the statement of principles?

MS. UNDERWOOD. They would in policy adoption. If they were in the process of adopting policy about clubs, if they were in the process of adopting policy about public use of facility, they would certainly turn to their school attorney, to their superintendent, to look for some type of guidance on the issue.

COMMISSIONER LEE. So the fact that they are appointed members in different school districts, do you think that has—

MS. UNDERWOOD. No, they're elected school board members.

COMMISSIONER LEE. I mean elected. That's what I meant. The fact that they're elected by the locality that they represent, do you think that plays any role in the different interpretations?

MS. UNDERWOOD. Yes and in a couple of ways. One, just the practicality of turnover in school boards. We're talking about something

that was issued in 1996. Now, school board members more and more have a shorter and shorter period of time that they serve on school boards, unfortunately. And so the school board members who were in place in 1996, that school board in many districts may have turned over entirely or a majority of them may have turned over, so that you're constantly having to reeducate—that doesn't seem to be a very good term—to go back over information and to interpret it to a new audience. So in that way it does have an effect. The other is it's a political body. This is a political body. And unfortunately sometimes, as was stated earlier, the majority rules and the minority suffer in silence. We also clearly have elected officials all over this Nation who sometimes—I guess to use the technical term—run amok.

CHAIRPERSON BERRY. Does any other Commissioner have questions?

VICE CHAIRPERSON REYNOSO. Yes. Ms. Underwood, has there been a position taken by the National School Boards Association on the issue of renting or making available to religious groups for religious purposes their facilities, or does the association take the view that that's a local issue to be decided by the local board?

MS. UNDERWOOD. The National School Boards Association does not set policy for local school boards.

VICE CHAIRPERSON REYNOSO. No, I understand. But you can make recommendations.

MS. UNDERWOOD. Nor have we passed a recommendation in our annual meeting which would relate to the rental of facilities in that way.

VICE CHAIRPERSON REYNOSO. Okay. I understand that at least the court would take a lot of things into account, including whether or not the school has previously rented the facilities and so on. Mr. Troobnick, do you think that the court should take all those things into account, or do you think that as a matter of policy interpreting the U.S. Supreme Court rulings that school boards, public school boards generally should say yes, these facilities are available to religious groups, assuming they are otherwise available for purposes of renting for the conduct of religious services?

MR. TROOBNICK. With one caveat. Yes, with one caveat. And that is that we've always argued that religious groups do not get any special preference. That they're just like anyone else in the

community. So if you have a priority system where the first come, first served, that's fine. It's just the sort of blanket exclusion of religious groups from rental of public school facilities, particularly in New York. Now, as people who live around here, I can tell you that this is done in the Maryland, D.C., and Virginia area all the time, and it's done in most States all the time because it serves as a nice little source of income on the weekends when the facilities aren't necessarily used and the janitor gets a little bit of extra money for being there. So it's done in most States outside of New York. And the New York School Boards Association, to answer another question that was asked, has consistently opposed equal access and opposed us in *Lamb's Chapel* all the way up and opposes us in the case right now.

VICE CHAIRPERSON REYNOSO. Well, let me ask you about New York then. Is it your understanding that in New York many schools do lease out their facilities to other groups but have an exclusion for religious groups?

MR. TROOBNICK. Yes. The New York Education Law, section 4.14, specifically allows all other groups use of the facility with the exception of religious groups for religious purposes.

MS. SCHROEDER. By statute.

VICE CHAIRPERSON REYNOSO. Oh, by statute. So then the rules are clear there. The attack has to be a constitutional one presumably.

MR. TROOBNICK. Exactly.

VICE CHAIRPERSON REYNOSO. But coming back to my original question, you yourself believe that it's a matter of—I'm talking public policy. As a matter of public policy, even beyond the Constitution, as a matter of public policy it would be a good idea to have those facilities available to religious groups who want to rent it for religious purposes?

MR. TROOBNICK. Yes, on the same playing field as everyone else in the community. If you're going to open it up generally to the public, that's fine.

VICE CHAIRPERSON REYNOSO. Ms. Schroeder, you raised an issue that's been raised by some of the other panelists, but the responses you may have heard if you were here earlier, were different. You used the term "scientific information." I always have qualms about that. But I think what you meant was that you would like to have more information other than just anecdotes about the practices of equal access. And pre-

sumably if we're going to get that more scientific information, it should come from the Department of Education or some Federal agency. I just wonder whether you would explore with us a little bit more how you think we might get that scientific information about what's going on.

MS. SCHROEDER. Well, I know from talking to many authors who've been trying to do research on this area that it's been very difficult for them to get accurate numbers. For example—and I'm not sure. I wasn't here today so I'm not sure if they testified. But one of the national youth ministry groups that coordinates a lot of prayer club activities through the country has tried to provide statistics which kind of talk about the pervasiveness of prayer clubs in the schools. And their numbers have been anywhere from—generally one in four. In one in every four schools there's a prayer club and it's functioning well and it hasn't been a problem. But the number that they're using as far as total numbers of schools, how they're defining schools are not comparable to the Department of Education's numbers in schools and breakdowns of schools to where the information is reliable whatsoever. So just from that bottom line, I think it would be important. I think it's also important that we can talk about the anecdotes of where the clashes are happening, but we tend to ignore the majority of districts around the country where freedom of expression and school clubs and activities are functioning without a problem. And I think that it would be really important to look at that. And they also may serve as guidelines.

I know in Indiana, one thing that we tried to do was look at schools where programs were functioning well. Where school boards have set policies, where the administrators were working with the parents and with the community to educate one another on the proper use of equal access and the proper protections that needed to exist. But even in Indiana an outsider to the State hears of the problems that we have or those issues without focusing on how things are functioning and why they're functioning well.

VICE CHAIRPERSON REYNOSO. I suppose if we had a Rockefeller religious education foundation they would have enough money to fund something like this. But in the absence of that, the suggestion has been made that maybe the Department of Education, a Federal agency, ought to start or perhaps ought to be authorized by Congress to gather that sort of information. The

contrary view is that too often—that there's a concern that once government, the Federal Government particularly, starts looking into these matters even for statistical purposes that in the future there might start to be an inference by the Federal Government with the notion of local control. So maybe there's something to be said to living in ignorance, at least if the alternative is to have the Federal Government do that.

MS. SCHROEDER. Well, I think that—you know, I understand that problem. But on the other side, congressionally right now we are dealing with efforts to amend the Bill of Rights, which are very significant issues. And they relate directly to the issues before this Commission. There are many who are arguing that religious expression is suffering to the point in the public schools that we must amend our Federal Constitution to deal with the problems. And I think that that decision is based mainly on anecdotal evidence and anecdotal situations and not on the reality of what is or is not happening around this country in the schools. And I'm not arguing that there aren't problems or that there aren't problems that we would articulate. I really truthfully believe that a lot of the anecdotal stuff is really serving the opposite purpose that it's intended to serve. I think it's sometimes scaring administrators and schools to suppress religious freedom and expression beyond what they should be doing.

VICE CHAIRPERSON REYNOSO. So in this situation the absence of information is so serious that it may in fact be interfering with the rights that we as Americans have to exercise our religious freedom?

MS. SCHROEDER. I believe so.

VICE CHAIRPERSON REYNOSO. And therefore, you think at this point in history it would be worth the chance to get the information?

MS. SCHROEDER. Well, for example, in Indiana, if you can imagine being in a small town in Indiana functioning as a school administrator or school principal and trying to take in the information that you have versus what you're hearing in the community—and when you're hearing things like the ACLU is saying kids can't read their Bible on the bus or pray before meals, the ACLU is saying, which is completely inaccurate information, it starts the fear. I mean, we understand what they're trying to do, but it scares administrators to the point where they tend to be suppressing the very speech that we in fact

would also protect. And I don't think we need to get into any—we can get into case by case and hypotheticals and a lot of them are detail specific. And I would not even argue that I agree with all of the cases that the ACLU has or hasn't taken. But I think it is fair to say that particularly—I mean, you can reflect on the House Judiciary Committee hearings and what Congressman Hyde personally said, that we needed to amend the Constitution because the ACLU is not allowing kids to read the Bible on the school bus, and that's just—it's not helpful.

CHAIRPERSON BERRY. I'm trying to see if that's another defame and degrade. [Laughter.] Commissioner Horner.

COMMISSIONER HORNER. When the New York State Assembly voted to exclude religious organizations from renting public school buildings, did the ACLU support or oppose that proposal?

MS. SCHROEDER. I can't tell you specifically. I can tell you what I assume. The ACLU has taken a position that if a school opens up its doors to the community, that it cannot deny access to religious groups and that there is a free speech violation if the school is to do that. We do believe that the school has the first choice in deciding whether or not they will open the doors. But once they do in fact open the doors to outside community groups, they must allow access. That is the position of the national organization.

COMMISSIONER HORNER. Mr. Troobnick.

MR. TROOBNICK. Yes. That's a very difficult question. You see what happened was the New York Education Law, section 4.14, in the body of the statute does not exclude religious groups. It says recreational—this kind of group, that kind of group. Lists about 14 groups. There's no exclusionary language in it. And so what happened was years ago a mid-level appellate court, the New York State court system, not the Federal court system, before *Mergens* was decided, which was the Bible club case, as you know, decided that New York Education Law, section 4.14, excluded religious groups; read into this bland statute an exclusion so that the court could then rule that Bible clubs were unconstitutional and couldn't be allowed in the school. That decision, that mid-level appellate decision, was then relied upon in a series of cases by the second circuit to exclude religious groups. So there's never been a definitive reading of the statute by the court of appeals, which is the Supreme Court of New York.

COMMISSIONER HORNER. So therefore, the body politic of the State of New York has certainly not, through democratic processes, except tenuously through the judicial system, ratified this decision?

MR. TROOBNICK. That's correct.

COMMISSIONER HORNER. I see.

VICE CHAIRPERSON REYNOSO. I've never heard of the courts referred to as tenuous before.

COMMISSIONER HORNER. Maybe I should think about whether I want to say that or not. Certainly their outcomes are not tenuous. I'm glad to hear that because just speaking as a former teacher, speaking as a parent, it would seem to me not difficult to imagine a situation in which a mother and father who are militant atheists would say to their first grader, "Your school allows the Baptist Church to have a service on Sunday. We're atheists in our family. We don't believe in God. But it's okay for people who do believe in God to have a facility to use to express their belief. And if we wanted to have a meeting of atheists, we could ask the school for that purpose, too."

I think this is just the emotional force behind the interest in excluding the opportunity for religious organizations to rent public facilities or to rent schools. The motive force is not the one it seems to be. It seems to me it has got to stem from a desire to extirpate the vision of religious experience from the life of the young. Otherwise, it seems to me way too much emotional energy and legal energy is being tied up in something that any parent could explain rather simply to a 7-year-old. I just needed to say that.

CHAIRPERSON BERRY. Okay. May I ask just—one question I'd like to ask. On earlier panels we heard a lot of discussion about the need for training. I think it was Dr. Haynes and Thomas and others who were on earlier panels talked about how some of these conflicts over expression arise because teachers, superintendents, principals, or various people are just uninformed or they don't quite know how to handle something. Several panelists mentioned this and the need for greater training and education on these issues. And then we've heard from other panelists that it would be better to discuss these issues and reach some accommodation and educate people better than to litigate these issues. I know you are from a litigation organization, Mr. Troobnick, so maybe this is not a fair question. But what do you think about those views that

were expressed earlier about—first, that some of this arises because of a lack of training and education? Maybe the remedy is more training and education. And that also it would be better for peace, harmony, and greater progress to have people sit down and talk about some of these things. And reasonable people would agree rather than litigating.

MR. TROOBNICK. Yes. Absolutely. I think that more training and more talking is always helpful. And we did attempt to do that before. And I think to a large extent some of these equal access issues in the public schools have dissipated in a lot of other areas than in the second circuit, in the New York area, in particular. But yes, a lot more training is needed because, as my statement shows, there's still a lot of problems having to do with student-initiated speech, student-initiated clubs, and that sort of thing. But sure, I think that would be very helpful.

CHAIRPERSON BERRY. What do you think about that, Ms. Underwood?

MS. UNDERWOOD. I firmly believe that we do need more training in the area. One of the challenges is this and many other areas move rapidly, and so it is not enough to issue a statement in 1996 and rest on it for 10 years or to provide some training and do it once. It's the kind of thing that has to be done on a regular basis.

I'd like to take a second to go back to the issue of data and scientific collection of such data, because I think that that would probably be real useful in terms of devising some type of training system to figure out do people understand, why don't they understand, or are they just ignoring what they know. And I have to speak—until June 15, I'm an academic. And as an academic, I certainly have to speak for well-collected data and good research questions which have been devised appropriately. I am concerned about the possibility of ongoing collection of data by the Federal Government on this particular issue in addition to other issues that data are collected on. I'm not sure that it would be collected in a way which would be useful. And I would urge you to think rather—not to think of anything at all, but rather than thinking about ongoing data collection, think about the commissioning of studies, and done in such a way that they would be accepted in terms of design and results. Because you do have to worry about those kinds of studies being seen as twisted in one way or another. With that kind of information or armed

with that kind of information it would be very useful to try and put forth some sort of training effort. And I would prefer to see a training effort that was put together and data collection which was put together by a wide group that—maybe even the groups that you have invited here, similar to the wide groups of organizations that came together to write the joint statement.

CHAIRPERSON BERRY. Okay. Does any other Commissioner have a question?

COMMISSIONER GEORGE. Yes. I really want to follow up the question that you asked to Mr. Troobnick and Ms. Underwood, if I may. Mr. Troobnick, based on your experience, I'd like you to state very candidly your opinion as to the extent to which noncompliance with equal access around the country and in specific areas is the fruit of ignorance and the extent to which there is willful resistance to the equal access.

MR. TROOBNICK. Well, that's a very good question. It's a very good question. One would like to think in this day and age that you don't have such hostility, if you will, to religious people. That's just not the case, though. No one is going to come out and say I don't like blacks, I don't like religious people, I don't like Catholics, I don't like Jews. No one is that stupid. But what you are going to be able to establish is circumstantial evidence based upon a concerted effort to suppress something. And we have seen that pretty consistently, because if you'd look at the cases, a lot of these cases are in the 1990s that I cite, these equal access cases. *Church of the Rock* in Albuquerque, the tenth circuit. That's 1996. *Fairfax Covenant Church*. That's 1994. The *CWA* case, 1989. The ones we're litigating right now in the second circuit, 1998. To a religious person, the consistent exclusion from a place that's available to everyone else—well, all I can say is that when my dad was brought up in Long Island—and he's Jewish—it was very consistent to see signs that said no dogs or Jews allowed on establishments. And that's the clear message that a religious person gets when they are consistently excluded from a place that's available to everyone else.

COMMISSIONER GEORGE. You look like you want to say something.

MS. SCHROEDER. I want to say something, too. I think that that's true, but I think that there's another interesting kind of opposite scenario that's happening also that we are defensive about. Maybe sometimes I would even argue

the ACLU attempts to be overly defensive about this. There is a movement in this country. There is an effort to fill school boards and fill elected seats with people who have a specific view on a desire to see much more pervasiveness of what we would consider to be unconstitutional religious expression in the schools. I would say that the active intentional efforts on this issue weighs much more on the side out in the country. The issues are not usually revolving around individuals who are actively seeking to keep religious expression out of the schools. And in that sense it usually is ignorance, I would argue. I would argue that the flip side of that is that the intentional efforts are by those groups who have a specific point of view that we need to have much more religious expression in the schools, and it needs to be a specific majority community driven religious expression.

COMMISSIONER GEORGE. Would you care to give us the evidence?

MS. SCHROEDER. I mean, I would be happy to. I could talk to you specifically about anecdotes around the Indianapolis area with a variety of school boards. I could talk to you from my personal experience, and I think we can talk about Alabama. I think you could bring in situations from all over the country where the politics in the community that have erupted over school board races revolving around these issues are hard to deny.

MS. UNDERWOOD. They might revolve around religious issues or religious credentials so that we might have a majority of a school board that is elected because of their religious credentials.

COMMISSIONER GEORGE. Tell me more about that.

CHAIRPERSON BERRY. Could you—I'll let them in a minute, but if you have any information that you'd like to provide for the record on this issue that you have responded to, since you apparently didn't bring any, or if you have cases, or if you have things you'd like to cite or just instance that are in the public domain.

MS. SCHROEDER. Right. Well, I think it was brought up. I didn't bring anything up because I think it's at a different level than the level that we're talking about. We've been talking more about implementation, and we've been talking about litigation. But to not deal with kind of the macro-community issues around these hot button issues. They're hard to ignore when you're out there. I mean, I know somebody who's here

in Washington now, it's easy to ignore the reality of what's happening in the communities.

COMMISSIONER GEORGE. Let me tell you candidly what my concern is here. Your organization is a political organization. It's got a view. It's got a worldview. It's got a philosophy. It's got a way of looking at the nature of liberty and religious liberty. It's got a view about the relationship of individual and community. It's got a conception of freedom and so forth. All of which, of course, is very controversial. You're very much entitled to it. It's not the only view. It's one thing to say that people are organizing out there politically to advance in school boards or in Congress or wherever a view that disagrees with the ACLU's point of view. Even disagrees with the ACLU's point of view about what the Constitution means. But it's another thing to say that the groups are organizing in such a way as to—in a way that everyone would recognize, all people of good will would recognize is an assault on the Constitution of the United States. Now, given the very particular views about the Constitution that your organization has traditionally represented, there's plenty of room for disagreement. I find in controversial areas myself usually on the other side.

MS. SCHROEDER. Well, I would say—

CHAIRPERSON BERRY. May I please interrupt. We can have the transcript read back if we need to, but my recollection is that you stated it was according to your view of the ACLU view of people's constitutionality or something like that. You didn't simply say an assault on the Constitution. We can have it read back if that's the matter that we're going to end up arguing about here for the next few minutes.

MS. SCHROEDER. I don't know. I think I'd take it to the next level to further articulate where I'm coming from, because I do agree with that. And I do agree about the notion of where the ACLU is. I also believe that if we had an issue-by-issue discussion on where we are and where the law is that we wouldn't have that many disagreements. And I would argue that there are those—that those communities are not just organizing with a different point of view. They're organizing in support of—and maybe we may disagree, but what is constitutionally permissible behavior under current law, including current reads of the Equal Access Act well beyond what anybody has said in the guidelines, in the joint statement. I mean, what is considered to be

common. And there are groups in the communities who refuse to sign on to the joint statements and to other pieces specifically because they do not feel that articulating and making administrators more familiar with what is current law is helpful with what their goals are. And I consider that to be an accepted reality. And I'm not even arguing that there's a problem with that. We do not personally operate that way. We were more than happy to come forward and to agree on status of current law and to work in any environment to talk about that whether or not we even specifically agree with that current law.

COMMISSIONER GEORGE. Mr. Troobnick.

MR. TROOBNICK. You're trying to put a dog in this fight.

COMMISSIONER GEORGE. I'm sorry. If you don't, you don't have to have one. I just thought you seemed to be wanting to say something.

MR. TROOBNICK. I know what she's thinking of. I just don't see our country dissembling into anarchy in quite the same manner, so—

MS. SCHROEDER. I don't see it that way, but the whole point of this was to talk about where—how we're working in educating individuals and school boards and administrators in communities and why isn't this happening, where are the problems. And your question originally was, well, is it because there's just this real discrimination, that there's this pervasive desire to discriminate against religious beliefs. And my point is that that may exist, but you cannot talk about that and not look at the reverse side of it.

COMMISSIONER GEORGE. Okay. Ms. Underwood, could you go back over the distinction between speech and worship when it comes to the *Bronx Household of Faith* case? Do I recall correctly that you had a disagreement with Mr. Troobnick's view about that?

MS. UNDERWOOD. No.

COMMISSIONER GEORGE. I'm sorry. Could you explain what that was?

MS. UNDERWOOD. I was thinking that Mr. Troobnick was taking it much broader than just that particular case and was talking about an impossibility of distinction between proselytizing and teaching. And I believe he did say teaching about religion and that we couldn't distinguish between teaching about religion and worship.

COMMISSIONER GEORGE. Okay. I think there's still some confusion from where there was before, so I'm just going to take you back over it, and we can go through it again. Laying aside

what goes on in the classroom—okay. So now we're outside of the classroom. We're just in the after-school club. Now, one question that we had on the table that I thought you were addressing was the question of whether the equal access principle ought to be one—

MS. UNDERWOOD. As opposed to the Equal Access Act.

COMMISSIONER GEORGE. Act. Yes. So that we have—let's say we had open the possibility that I think Mr. Hailes' question opened of whether to recommend any revision of the Equal Access Act so, for example, to bring in lower grades. Now, one of the questions we had was whether that was a good idea. Now, again, we're not in the classroom, just the clubs. And I take it that there you strongly felt, no, it shouldn't.

MS. UNDERWOOD. That's correct.

COMMISSIONER GEORGE. Now, what was the reason for that?

MS. UNDERWOOD. That the Equal Access Act shouldn't be lowered to young people?

COMMISSIONER GEORGE. Yes. Say middle school kids.

MS. UNDERWOOD. Because I think that they are more impressionable. I think that there's a greater degree of concern that it would be perceived as sponsorship of religious activities by the school. I believe that you've got a problem in terms of practicality for supervising those clubs, and I have a question of whether or not they would actually be student-initiated clubs as opposed to curricula-related or school-initiated or adult-initiated clubs.

COMMISSIONER GEORGE. I think your second point was it would be—I think you were suggesting the idea of sort of a symbolic endorsement or something like that, a perception of a symbolic endorsement. Why should that make a difference in middle school as opposed to high school?

MS. UNDERWOOD. Well, high school is certainly the gray area, and personally I think that there are some high school students who have a problem determining whether the school is sponsoring an activity or not or whether just accommodating or making an open forum available equally as they should. There are many high school students that may not be mature enough to understand that either. But I certainly believe that elementary school children and middle school children would be even less able to make that distinction between making things available

to people on an equal basis and school sponsorship.

COMMISSIONER GEORGE. But if that's true, wouldn't the same principle extend to say school-based sex ed clinics? Making things available could be interpreted by a confused student as an endorsement of certain lifestyles or sexuality?

MS. UNDERWOOD. Well, I don't believe that sex education is constitutionally dealt with. To me there is a difference between teaching about sex and health and teaching about religion or proselytizing or worshipping.

COMMISSIONER GEORGE. Well, why should that be? I mean, could a school deliberately fly in the face of students' religious teaching when it came to sexuality or the teaching of students' families in the area of sexuality because parents would have absolutely no right to have their children free from teachings in the sexual area that go contrary to their religious teaching?

MS. UNDERWOOD. No, in those situations we have dealt with school religious excusals.

COMMISSIONER GEORGE. Yes. But if an excusal is good enough in this area because—any risk that students would be confused by the message would be ameliorated by the possibility of excusal. Well, then by definition it would seem to me a club that nobody's required to join, so you don't even need an excusal, would be good enough to avoid the problem of symbolic association.

MS. UNDERWOOD. At the elementary school level?

COMMISSIONER GEORGE. No, at the middle school level.

MS. UNDERWOOD. At the middle school level?

COMMISSIONER GEORGE. Yes.

MS. UNDERWOOD. I think at the middle school level it is a gray area.

COMMISSIONER GEORGE. Oh, okay. I'm sorry. I thought you said at the high school level it was a gray area.

MS. UNDERWOOD. No, no. At the middle school level it's a gray area. I think I had a problem, and as it was earlier stated that when you talk about *Widmar v. Vincent* I'm not sure whether—at that time we were trying to decide whether university students could make that distinction. And now it's fairly clear everybody believes that university students are sane, mature and make wonderful decisions on their own. I'm not sure whether they do. But I think as you go down that continuum to younger and younger

students it becomes less and less clear that they understand any kind of distinction between sponsorship and accommodation.

COMMISSIONER GEORGE. And that's not unique to religion, presumably.

MS. UNDERWOOD. No. I don't think that's unique to religion, but I think it's most important in the area of religion.

COMMISSIONER HORNER. It's more dangerous to have a student confused about State sponsorship of religion than State sponsorship of ideas that run contrary to his religion?

MS. UNDERWOOD. Yes.

COMMISSIONER GEORGE. In the area of sexuality, for example. Yes?

MS. UNDERWOOD. As one example.

COMMISSIONER GEORGE. Okay.

CHAIRPERSON BERRY. I'm not sure I understood the question or the answer. I may just be dense. Do that again.

COMMISSIONER GEORGE. Do you want to go over it again?

CHAIRPERSON BERRY. Yes.

COMMISSIONER GEORGE. Oh, okay.

CHAIRPERSON BERRY. I'm totally confused on the last part about whether— [Crosstalk.] Whether it is more—

COMMISSIONER HORNER. We're talking about in which direction the State should use its power to err. Should it err in the direction of facilitating the expression of religion in this gray area about how the students will take it, or should we err in the direction of excluding the students' sense of State endorsement of religion. And what I think Commissioner George and I have been trying to get at is that there are things which are done under the purview of the State through the public schools which, although not nominally under the direction of a church, nonetheless deeply and directly impinge upon vital values associated in the young person's mind with religion or his or her parents.

MS. UNDERWOOD. Can I use an example?

COMMISSIONER GEORGE. Sure.

MS. UNDERWOOD. I think it's entirely appropriate for schools to teach about AIDS.

COMMISSIONER GEORGE. It's entirely inappropriate or appropriate?

MS. UNDERWOOD. Appropriate for schools to teach about AIDS. If the school board determines that that should be part of the curriculum, I think that's appropriate for a school to do that. Now, that may conflict with some students' re-

ligious beliefs about sexuality and lifestyles, but I think it's appropriate for that to be in the curriculum.

COMMISSIONER GEORGE. The reason is—how do you distinguish that from the religion case, given that the values are religious values?

MS. UNDERWOOD. Well, particularly in the area of AIDS, I think about that first in terms of community health.

CHAIRPERSON BERRY. So you're balancing the health. This is balancing.

MS. UNDERWOOD. Yes.

CHAIRPERSON BERRY. What about teaching about—and maybe I misheard this. Teaching about—there was sex education generally. Teaching about contraception or something as—

MS. UNDERWOOD. As part of the health curriculum?

CHAIRPERSON BERRY. As part of the health curriculum.

MS. UNDERWOOD. I think that if the school board has decided that that is an appropriate part of the curriculum that it clearly can be taught within a public school curriculum.

CHAIRPERSON BERRY. So that the risk that that would be inconsistent with the student's religious beliefs and that the State would be erring on the side of conflicting with the student's belief in your view is less of a concern than if the State permitted some religious organization to—

MS. UNDERWOOD. To provide that information?

CHAIRPERSON BERRY. No. To meet on the premises or had somebody expressing something directly about religion or something. Is that the point? I'm just trying to see what point you folks think.

COMMISSIONER GEORGE. Yes. That's exactly right.

COMMISSIONER HORNER. Back in the late '70s, I did an article for the *New York Times Magazine* on sex education and development of sex education. And as a result of my research, I viewed a number of films that were being used in the Prince George's County schools. And several of these films followed the following progression: Teenage sexuality is primarily a public health question, and confused sexual identity leads to promiscuity. And therefore, if the students who are either currently or incipiently homosexual could be encouraged to announce that fact and to view that as entirely acceptable, they would be less likely to engage in practices

which would endanger their health. And at the conference at which I viewed these films there were people from the religious organizations that Ms. Schroeder was talking about before in which, in her eyes or the ACLU's eyes pose a threat, a political threat of some sort. They were very upset. Because to them this was a direct assault on the notion that heterosexual sexuality within marriage was the religiously based goal they held.

So that what you view as a public health—a good public health practice becomes a direct threat on a deeply religiously held value. And you're posing public health as a value as superior to religious belief as a value—trumping religious belief. And they are saying religious belief trumps an idea about facilitation of public health. So it's a deep conflict. And I think that's the reason these arguments are so pervasive. And that's the reason you're seeing people organized to go on school boards around the country. It's not because they just want to have power or overthrow the Constitution. It's because they feel there's an assault on a deeply held—and frankly, 2,000- to 3,000-year-old religious values tradition.

MS. UNDERWOOD. Of a particular religious value. And I think—

COMMISSIONER HORNER. Well, Judeo-Christian-Islamic religious tradition.

MS. UNDERWOOD. But we also are trying to equate discussion about sexuality and the endorsement of sexuality or sexual preferences with endorsement of religion. They're entirely different things. Our Constitution speaks to the endorsement of religion. It doesn't speak to the endorsement of homosexuality.

COMMISSIONER GEORGE. Oh, now there's the problem.

CHAIRPERSON BERRY. What's the problem?

COMMISSIONER GEORGE. There's exactly the problem. See, I think your natural tendency is to think—well, gee, the one thing is about religion; the other thing is about something that's not about religion. So that the schools have a sort of freedom to take whatever position they want on this other thing, no matter how much of an affront it is to anybody's particular religious values. But I think the message of this morning's panels was that of an instance of mistaking a particular view about the nature of values and where they come from. For neutrality—and when those fellows this morning were talking

about the need to see that there are religious ways of looking at the world which are competitors with and deserve no better status but no lesser status than certain secular ways of looking at the world. That's exactly what they were on about. That there's a misguided view about what counts as neutrality in the public school curriculum that gives rise to a lot of the objections from religious people. But people on the other side of that just don't see what the problem is because they think they're being neutral.

MS. UNDERWOOD. If we were to take out everything in the public school curriculum that possibly was offensive to a person, we would have no curriculum. We wouldn't even have math.

COMMISSIONER HORNER. We're not talking about that.

COMMISSIONER GEORGE. Well, I think Connie's got the right answer. Commissioner Horner's got the right answer. We're not talking about that. But if we press hard enough you can make us talk about that. In other words, your view. I don't mean you being Ms. Underwood. I mean one can press the issue to the point where—and this is why I lead with several of my questions today—to the point where we all forced to say, although everyone was resisting it, that you know what? Neutrality in a society as pluralistic as ours is an impossibility, and it's time to give up the whole project of public schooling because public schooling will inevitably represent some views and not others. And it's going to drive Catholics into their own school system and Muslims into their own school system because they just can't abide certain things that go on in the name of secular and not religious values but which impinge directly on their religious values. So we really have to sort of soberly face the question: Are we willing to live with the consequences of that kind of a view of neutrality?

CHAIRPERSON BERRY. Ms. Underwood, before you answer, if I may sharpen the point. As I understand it, the point is—the dispute over the precise issue you two were discussing before this pronouncement is that there are some people whose worldview or their view about what's important or their religious views, they would think that when you raise an issue like homosexuality or sex education or any of these things we were talking about, that that is part of religion. I mean, that is part of—it's connected to their religious—so that to say that you're raising

an issue but it doesn't have anything to do with religion would make, to them, no sense. It would be illogical and it would make no sense. So then you're pressed to the point where Commissioner George is. If that's the case and there are world-views that are like this, how can the public school accommodate these. I mean, that really is where we are.

MS. UNDERWOOD. As we're talking about religion dictating many things in people's lives, as a religious person, my religion dictates my actions, many of my attitudes, all of my values. And so if we are to say that there's no way that these two things can be connected, then I go to the same point. That if we're going to remove everything which is at all connected to religion, anybody's religion, from the public schools, there is no public school curriculum. But I cannot jump to the point of then let's just jump out of the ship. For 200 years we have had public schools precisely for the purpose of developing this experiment of democracy so that we can learn to live together. It has been a challenge for 200 years and a challenge for 200 years that the rest of the world has watched. I do believe we have been more successful than unsuccessful. And in order to continue that experiment, the need for the public school as an institution is paramount. There is no other institution which, as one of its base purposes, is one of inculcating the democratic values of our youth.

COMMISSIONER GEORGE. Two points about that. One, I think we have to candidly acknowledge that for 150 years of that 200-year experience there was an unofficial pan-Protestant establishment in the public schools. Number two—

VICE CHAIRPERSON REYNOSO. I'm sorry. Say that again?

COMMISSIONER GEORGE. I think for the first 150 years there was an official pan-Protestant—in other words, not specifically one Protestant denomination but a more or less generic Protestant establishment.

COMMISSIONER HORNER. The King James Version of the Bible was very big.

COMMISSIONER GEORGE. That's why the King James Bible and why it was The Lord's Prayer rather than the Our Father and generated a lot of controversy. So that's point number one. And then point number two is I don't think that we can say—and this is not an argument for abolishing the public schools. I'm trying to find a way, a scheme—

MS. UNDERWOOD. I thought that's what you said. I'm sorry.

COMMISSIONER GEORGE. What's that?

COMMISSIONER HORNER. No. We're looking for a way to keep everyone happy in them.

COMMISSIONER GEORGE. I'm willing to continue the quest for a view of neutrality that will work, that's genuinely fair. I'm not going to go for bogus neutrality that really is one view masquerading as neutrality. I'm willing to continue this search so that public schooling can be saved. But by the same token, I don't think it's fair to say that the public schools are the only institutions in the educational world that really do transmit democratic values and values of democratic citizenship and principles of self-government and patriotism. I think, for example, the Catholic schools have done an exemplary job in that, very often in modern times educating non-Catholic students in those very same ideals. Now, that's not an argument for abolishing the public schools, but I think it's an argument against claiming too much on behalf of the public schools. Those are my two points.

CHAIRPERSON BERRY. Ms. Underwood, how about if we ask ourselves whenever one of these issues was raised, whether sex education or any of these matters, or even something—banana. Let's say banana so that nobody will have any stewardship of bananas—that the way we decide how we teach it or whether we teach is if someone objects because they say their religious worldview is impinged by the approach we're taking in teaching banana, that we will no longer teach it. Or should we say that we will teach banana but we will be neutral about the discussion or include everything we can find out about bananas on all sides. Everyone will be happy.

VICE CHAIRPERSON REYNOSO. Or allow students to excuse themselves from the curriculum.

COMMISSIONER GEORGE. If they don't like bananas.

CHAIRPERSON BERRY. How would we go about—just think banana instead of some hot button issue. What would we do?

MS. UNDERWOOD. And specifically, the question is development of curriculum?

CHAIRPERSON BERRY. And trying to maintain public education and have a place for everybody in the schools. Should I rule whenever someone says I have a worldview that banana—and I just made up banana. Orange—anything impinges

upon, we try to find some way to accommodate that, or should we just stop teaching about banana?

MS. UNDERWOOD. Well, as we deal with curriculum and censorship, we have scores and legions of books and issues that have been attempted to be censored from the public schools for those reasons. I do believe that even in the worship of banana that we have done a very good job of making a definition. And this is where we started before: a distinction between the inculcation of banana and teaching about banana.

CHAIRPERSON BERRY. Okay. Mr. Troobnick.

MR. TROOBNICK. If I may respond. And I'm going to respond like a lawyer. I'm sorry.

MS. UNDERWOOD. It all depends on the context, right? [Laughter.]

MR. TROOBNICK. There is case precedent on point. One of them is *Mozert v. Hawkins County School District* and the other is the *Hot, Safe and Sexy* case out of the first circuit. Both of those cases stand for the proposition that parents don't have the right to opt their kids out of things that are religiously offensive. And it has been the position of these school districts that they don't have that right. And it was litigated and went up to the circuit courts. So the reality is that the school systems that we've been dealing with really don't want to accommodate religious people when they have, as in the *Hot, Safe and Sexy* case—if you read that case and what this lady was doing—I'm not even going to describe what she was talking about. Suffice it to say that people that have religious beliefs could easily be seen to object to those sorts of things. And so the reality is that those kinds of opt out provisions do not exist right now. The only reason that they do exist is that State legislatures, in reaction mainly to *Mozert*, started enacting on a State-by-State basis procedures for opting out. But that's a patchwork quilt across the United States.

CHAIRPERSON BERRY. I don't have any other questions. Does any other Commissioner have any questions? [No response.] If not, then I want to thank you for being here with us. You're now excused. Someone from our staff will escort you through the sign-out procedures.

Open Session

CHAIRPERSON BERRY. And we will now begin a session where the Commissioners will hear

testimony from concerned persons. Individuals who have previously signed up and had a brief screening with our staff will be called on a first-come, first-serve basis. And anyone who has signed up but—or who would like to, can submit a written statement because the record will be open for 30 days. Why don't I take like a 10 minute break while everybody moves out.

[Whereupon, a recess was taken.]

CHAIRPERSON BERRY. Counsel, I see you have a witness already. Should I then swear in the witness? Do you have a name? Oh, Ed Doerr. Yes.

[Whereupon, an oath was administered.]

CHAIRPERSON BERRY. Please be seated. You will have a 5-minute limitation on your opportunity to speak, but welcome and please proceed.

Ed Doerr

MR. DOERR. Thank you. I did not bring a prepared statement, but I will submit one in writing within a few days. My name is Ed Doerr. I am president of the American Humanist Association and executive director of Americans for Religious Liberty. Both of the organizations I represent were signers of the joint statement on religion in the public schools which has been referred to earlier. I agree with the Supreme Court that public schools may, and perhaps should, do something about alleviating our profound ignorance about religion. However, what is good in theory is very hard often to implement in practice.

I know Mr. Haynes has done a great deal of work on this subject, but I think he makes it sound a little bit too easy. Since I'm sitting next to Marc Stern's seat, I will start with an anecdote. My son got an MBA, top of his class, from the University of Maryland. Went on to become a Navy officer. But the last time he had a course in world history was in the seventh grade. Now he's made up for it with his reading, but the point is that only about a third of the States require a course in world history to graduate from high school.

I'm a former teacher, by the way, of secondary school history, English, and Spanish, so I have some thoughts on some of the deficiencies in our schools. Inadequacies in the field of social studies education is just one of those areas. We are also quite deficient in that you can graduate from high school and even college without ever having read any literature that was produced

outside the U.S. or the U.K. We can graduate from high school and college without even the remotest workable knowledge of any other language, and we are often deficient in science and math education. Now, when somebody proposes that we teach more about religion in public schools, educators, none of whom apparently were on the program today, frequently say, well, if you want to add something to the curriculum, what do you want to take out to make room for it. Now, since I've taught U.S. history and world history, I know how much material you can cover in a school year. Each year more is added to history. We now talk about women. We talk about Native Americans. We talk about some other cultures. But in a year's time, every time you add new stuff to the curricula you've got to take something out. And if you're going to add something about religion, what else are you going to take out.

Now, obviously, particularly in the social studies, you cannot avoid dealing with religions. You know, the Reformation, the Counter Reformation, the rise of Islam, the role of religion in the abolition movement, slavery, civil rights, et cetera. You cannot avoid it. But even then, though you can avoid it, it's not the easiest thing to deal with. When you come to developing programs about religion, there is no agreement among experts on what to teach, how much of it you should teach, at what grade level you should teach it.

Now, Mr. Haynes and I were both in the National Council on Religion and Public Education, which served as a clearinghouse for materials in this field. And I have yet to see a single textbook that is sufficiently neutral, comprehensive, balanced, and objective in teaching about religion. The material is just not out there to teach—to purchase, to use.

Teachers are not trained and they're not certificated to deal with religion. I'm certificated to teach English and Spanish and history. I have no credentials to teach about religion, and I don't think an inservice weekend course is enough to do the job. If we're going to deal with religion realistically in the schools, are we going to deal with the hot controversies, or are we going to tell a Pollyanna version of history? We can talk about Martin Luther King was a Baptist minister, but for every Martin Luther King there were a thousand preachers who were defending segregation. For every Quaker or religious leader

who was a supporter of the abolition movement prior to the Civil War, there were hundreds and hundreds of preachers who defended slavery on biblical grounds. There were religious leaders throughout the South who themselves owned slaves and defended slavery. When you get into the Reformation and the Counter Reformation, religious persecutions, the Inquisition, you run into endless controversy. Are the schools and the teachers up to dealing with it? Are we willing to talk about Ann Hutchinson and Mary Dyer being exiled or executed in Massachusetts for their religious beliefs or activities? We hardly have time to go into all of the issues. But it is obviously very important that in any dealing with religion in the public school curriculum we demand balance and objectivity and neutrality. If we can't do it right, we shouldn't be doing it. It is better not to do it than to do it wrong.

I forget the wise professor from—I think it was Emory University in Atlanta, a church-connected college. In doing a subject on talking about religion, who said that no religious leader and no church should complain about what the public schools aren't doing unless they can demonstrate that they can do it right. And to my knowledge, not my church, not any other, has demonstrated that it can do this with adequate balance, objectivity, and neutrality. The text

books simply aren't out there to purchase. It's a free market. The textbook publishers publish what will sell. If you put a lot of controversy in a textbook, you're not going to sell any books and you're not going to make any money. Textbook selection is a State and local matter, something that the national government, Federal Government, has no jurisdiction over and cannot get involved in. I don't think that it's anything that the Civil Rights Commission can even touch. Finally, let us not criticize the public schools for not doing what is extremely difficult to do and what nobody else in our society has found it possible to do. Thank you.

CHAIRPERSON BERRY. Thank you very much, Mr. Doerr. That concludes our hearing. Thank you, Mr. Doerr, and you are excused.

That concludes our hearing. And as is customary with Commission hearings, the record will remain open for 30 days during which any of the witnesses can submit any written statements that will aid in our interpretation of the testimony received. In addition, any member of the public may submit any information helpful to our proceedings. We appreciate the attendance and participation of all that were here today. This hearing is adjourned.

[Whereupon, the proceedings were concluded at 5:30 p.m.]

PROCEEDINGS

New York City

June 12, 1998

CHAIRPERSON BERRY. This hearing of the United States Commission on Civil Rights will now come to order. First, may I please have all of the court reporters, clerks, interpreters, and signers to come forward. Please come forward if you are a court reporter, clerk, interpreter, or a signer. Come forward here. You have to take an oath.

[Whereupon, an oath was administered.]

CHAIRPERSON BERRY. Before leaving, could a sign interpreter ask if anyone in the audience is in need of interpretation. [No response.] No? All right. Thank you very much.

Opening Statement, Mary Frances Berry, Chairperson

CHAIRPERSON BERRY. Good morning and welcome to this public hearing of the U.S. Commission on Civil Rights in New York City. I am Mary Frances Berry, Chairperson of the Commission, and I will be presiding over this hearing. Scheduled testimony will commence at 10:00 a.m. and conclude at 4:45 p.m., as indicated on the agenda. Before I detail the purpose and scope of this hearing, I would like to introduce myself further and then allow the other members of the Commission to introduce themselves.

In addition to serving as the Chairperson of the Commission, I am the Geraldine R. Seigal Professor of American Social Thought and professor of history and adjunct professor of law at the University of Pennsylvania in Philadelphia, Pennsylvania.

And joining me today are Commissioners A. Leon Higginbotham, Jr., Constance Horner, Robert George, Yvonne Lee, and the Vice Chair of the Commission, Cruz Reynoso. Together we constitute, along with some of our colleagues who could not be present, the eight-member Commission on Civil Rights. Could I ask the other members of the Commission to further introduce themselves, beginning with Commissioner Horner.

COMMISSIONER HORNER. Yes. I am a guest scholar at the Brookings Institution, which is a research and public policy organization in Washington, D.C.

CHAIRPERSON BERRY. Commissioner George.

COMMISSIONER GEORGE. I'm a member of the faculty of Princeton University, where I teach philosophy of law and constitutional interpretation, and I'm of counsel to the law firm of Robinson & McIlway.

CHAIRPERSON BERRY. Commissioner Lee.

COMMISSIONER LEE. I'm a principal of a public consulting firm specializing in Asian community affairs.

CHAIRPERSON BERRY. Judge Leon Higginbotham.

COMMISSIONER HIGGINBOTHAM. I'm a public service professor in jurisprudence at Harvard University, and I'm associated as counsel with the firm of Paul, Weiss, Rifkind, Wharton & Garrison.

CHAIRPERSON BERRY. Thank you. Vice Chair Reynoso.

VICE CHAIRPERSON REYNOSO. I'm Cruz Reynoso. I teach law at UCLA and like seemingly half of the Commission, I'm associated with a law firm of Kaye, Scholer, Fierman, Hayes & Handler.

CHAIRPERSON BERRY. Thank you very much. Finally, I would like to introduce our Staff Director, Ruby Moy. Our general counsel is Stephanie Y. Moore, who is not here, but our deputy general counsel will be handling this hearing and he is Mr. Edward A. Hailes, Jr.

Today the Commission will focus on civil rights issues growing out of religious discrimination as it relates to the Nation's public schools. In other words, we're concerned with those acts which deprive individuals of certain rights because of their religious beliefs and practices. The Commission has a responsibility to ensure that the Nation's civil rights laws with respect to schools and religion are being applied and car-

ried out in a nondiscriminatory manner. Through this investigation we also seek to determine if further actions are necessary to ensure nondiscrimination. Within the broad area of religious discrimination as it relates to public schools, we will concentrate on student and teacher rights within the schools, the right of equal access to school facilities for religious groups, and curriculum issues. This is the second hearing addressing these issues. The Commission conducted a national perspective proceeding in Washington last month, and today's hearing will examine these issues at a local level.

As required by law, notice of this hearing was published in the *Federal Register* on May 15, 1998. A copy of this notice will be introduced into the hearing record and has been supplied to all persons scheduled to appear here today.

The authority of the U.S. Commission on Civil Rights to conduct hearings emanates from the 1957 legislation which establishes it as an independent, bipartisan Federal agency of the United States Government. Among the Commission's duties are to appraise the laws and policies of the Federal Government, to study and collect information, and to serve as a national clearinghouse for information all in connection with discrimination or the denial of equal protection of the laws of this Nation because of race, color, religion, sex, age, disability, national origin, or in the administration of justice.

The Commission submits reports containing findings and recommendations for corrective legislative and executive actions to the President and to Congress. To enable the Commission to fulfill its duties, Congress has empowered the Commission, or a subcommittee thereof, to hold hearings and issue subpoenas for the attendance of witnesses and the production of documents. Consistent with Commission practice, all witnesses within its jurisdiction have been subpoenaed to attend today's hearings.

The Commission has scheduled approximately 15 witnesses. These witnesses have been selected due to their knowledge of and/or experience with the issue on which this hearing will focus. We will hear from public officials, civil rights and religious advocates, academicians, and other concerned individuals. In addition to the scheduled witnesses, there will be limited opportunity for concerned persons to testify during an open session scheduled at the end of the day. Members of the Commission's Office of

General Counsel staff will be available at the appropriate time to assist anyone interested in delivering sworn testimony during the open session.

Before we proceed, I want to stress the function and limitations of this Commission. As the Supreme Court of the United States explained, this Commission does not adjudicate. It does not hold trials to determine anyone's civil or criminal liability. It does not issue orders nor does it indict, punish, or impose legal sanctions. It does not make determinations depriving anyone of life, liberty, or property. In short, the Commission does not and cannot take any actions that will affect an individual's legal rights. The Commission takes very seriously, however, its mandate to find facts which may be used subsequently as the basis for legislative or executive action designed to improve the quality of life for all persons in these United States.

I find it significant that the issues we examined in our first hearing, and will examine here today, have been the focus of attention in the White House and the United States Congress in recent weeks, as both have taken actions related to religious activities in public schools. In late May, the Administration issued a revised *Statement of Principles on Religious Expression in Public Schools*, originally issued in 1995, reinforcing a commitment to religious freedom. Despite this action and in accord with its interest in the subject, in the first week of June the House voted 224 to 203 in favor of the Religious Freedom Amendment, a proposed amendment to the Constitution that would allow prayer in the public schools, religious symbols on government property, and tax dollars for religious schools. The proposed amendment died on the House floor when the vote fell far short of the constitutionally required two-thirds to amend the Constitution.

I am certain that my colleagues join with me in the hope that this hearing will lead to open dialogue and will educate the Nation on existing civil rights problems, encourage sensitivity in our continuing effort to resolve these problems, and aid generally in decreasing religious discrimination that may exist in public schools.

Allow me now to address very briefly some technical aspects of the hearing. First, the record of this hearing will remain open for 30 days for inclusion of material sent to the Commission at the conclusion of the hearing. Anyone who de-

sires to submit information relevant to these proceedings may do so during this time period in accordance with the Commission's rules. Second, and most important, you may have noticed the presence of Federal marshals in the audience. The Commission's procedures require their attendance at all of its hearings. These marshals have developed security measures that will help preserve the atmosphere of dignity and decorum in which our proceedings are held. Federal law protects all witnesses before this Commission. It is a crime punishable by a fine of up to \$5,000 and imprisonment of up to 5 years or both to interfere with a witness before the Commission. I want to thank you for your attention and indicate that I intend to adhere strictly to all the times set forth in the agenda.

Now, please direct your attention to Vice Chairman Reynoso, who will read the statement of the rules for this hearing. Vice Chair.

Statement of the Rules, Cruz Reynoso, Vice Chairperson

VICE CHAIRPERSON REYNOSO. Thank you, Madam Chair. At the outset, I would like to emphasize that the observations which are about to be made concerning the Commission's rules constitute nothing more than a brief summary of the significant provisions. The rules themselves should be consulted for a more full understanding. Copies of the rules which govern this hearing may be obtained from a member of the Commission's staff upon request. Scheduled witnesses appearing during the course of this hearing have been supplied a copy. Staff members will also be available to answer any questions that may arise during the course of the hearing.

The Commission is empowered by statute to hold hearings and act at such times and places as it deems advisable. The hearing is open to all, and the public is invited and urged to attend.

As Chairperson Berry indicated, all witnesses appearing today within the Commission's jurisdiction have been subpoenaed for this hearing. Everyone who testifies or submits data or evidence is entitled to obtain a copy of the transcript upon payment of costs. In addition, within 60 days after the close of the hearing, a person may ask the Commission to correct errors in the transcript of his or her testimony. Such requests will be granted only to make the transcript conform to testimony presented at the hearing.

If the Commission determines that the testimony of any witness tends to defame, degrade, or incriminate any person, that person or his or her counsel may submit written questions which in the discretion of the Commission may be put to the witness. Such person also has a right to request that witnesses be subpoenaed on his or her request.

All witnesses have the right to submit statements prepared by themselves or others for inclusion in the record, provided they are submitted within the time required by the rules. Any person who has not been subpoenaed may be permitted at the discretion of the Commission to submit a written statement in this public hearing. Any such statement will be reviewed by the members of the Commission and made a part of the record.

The Chair has already indicated and advised you that Federal law protects all witnesses at a Commission hearing. These witnesses are protected by title 18 U.S.C., sections 1505, 1512, and 1513, which make it a crime to threaten, intimidate, or injure witnesses on account of their attendance at government proceedings. The Commission should be immediately informed of any allegations relating to possible intimidation of witnesses. I emphasize that we consider this to be a very serious matter, and we will do all in our power to protect witnesses who appear at the hearing.

Finally, I should note that these rules were drafted with the intent of ensuring that the Commission's hearings be conducted in a fair and impartial manner. In many cases, the Commission has gone significantly beyond congressional requirements in providing safeguards for witnesses and other persons. We have done so in the belief that useful facts are best developed in an atmosphere of calm and objectivity. We trust that such an atmosphere will prevail at this hearing. Let me stress, however, that with respect to the conduct of every person in this hearing room, whether testifying or not, all orders or instructions by the Chairperson must be obeyed. Failure by any person to obey any order by Chairperson Berry or the Commissioner presiding in her absence will result in the exclusion of the individual from this hearing room and criminal prosecution by the U.S. Attorney, when required.

As previously noted, unless otherwise indicated, each session of this hearing will be open to

the public. All are welcome to attend. Thank you very much. Madam Chair.

CHAIRPERSON BERRY. Thank you very much, Vice Chair. At this time we would like to invite Lita Taracido, the chairperson of our New York State Advisory Committee, to the podium to greet us. Please come forward. Ms. Taracido, an attorney by training, is a manager at Dixie Foam Limited in New York City. Before entering private enterprise, she served as president and general counsel of the Puerto Rican Legal Defense and Education Fund. Ms. Taracido has served on the New York Advisory Committee since 1991 and will be beginning her second term as chairperson of the Committee. We would like to thank you for joining us this morning, Ms. Taracido. Please, proceed.

Welcoming Statement of Lita Taracido, Chairperson, New York State Advisory Committee to the Commission

MS. TARACIDO. Good morning. As you've indicated, my name is Lita Taracido and I am the Chair of the New York State Advisory Committee for the U.S. Commission on Civil Rights. On behalf of the Committee, I welcome the Commissioners and participants to today's proceedings. I'm pleased that the Commission has chosen to hold the second of its three national hearings—which I hope there'll be a third, I gather at some point—in New York City as it seeks to evaluate the scope of religious freedom and its exercise in our nation's public schools.

Religion's role in the classroom has been a contentious legal issue for decades as courts have sought to prevent schools from forcing religion on students. In the past few years, New York has been in the forefront of some of these issues. It has served as the originator of several establishment clause cases which have been heard by the U.S. Supreme Court. For example, in the *Kiryas Joel* case, which involved redistricting of a school district to coincide with a Hasidic Jewish village, the Court in 1994 found that the primary effect of redistricting was impermissible to advance religion. In *Agostini v. Board of Education of the City of New York*, the Court in 1997 unfortunately overruled—I think unfortunately—the 12-year-old decision in *Aguilar v. Felton*. In 1985 the *Aguilar* Court held that the New York City program, seven public school teachers, and the parochial schools to provide remedial instruction to disadvantaged children

necessitated an excessive entanglement of church and state and violated the establishment clause. In *Agostini*, however, the Court reversed its earlier decision and held that the same practice did not violate separation of church and state principles under the establishment clause. So we still have a lot of issues that have to be dealt with in this arena.

As more Americans dissatisfied with traditional public education consider a parochial school as an alternative, many parents and students look to public schools to offer similar ideals and beliefs found in religious institutions. In addition, many Americans seem willing to allow greater exercise of religious belief in public schools in the hope that that would better the learning environment as a result. This effort has culminated in an increased number of student-led religious groups and clubs which conduct activities on schoolgrounds. This trend, coupled with New York City's increasingly demographic complexities, makes the city a religiously more diverse place and further underscores the importance of today's topic.

Many observers believe our nation is at a critical juncture as Americans continue to encounter racial tensions, crime, and other barriers that divide us as a community. As many have sought to return core values and greater religious tolerance to the schools, there remains the need to clarify what role, if any, Federal and State agencies play in the exercise of religion in our public schools.

The New York Advisory Committee is pleased that the Commission has undertaken this project to further the dialogue on this issue, which in turn will provide much needed information to the general public. I again welcome the Commission and guests to this important event and hope that your efforts will be successful and productive. Thank you very much.

CHAIRPERSON BERRY. Thank you very much, Ms. Taracido. On the agenda at this point the deputy general counsel has indicated that we should have a break. So then we will take a short break and promptly at 10:00 we will begin the presentation of witnesses. Thank you.

[Whereupon, a recess was taken.]

Panel 1: Overview—Schools and Region in New York

CHAIRPERSON BERRY. Back on the record after the recess. Could we have the sign inter-

preter ask if anyone needs sign interpretation. [No response.] Thank you.

The first panel of our hearing is an overview panel that will deal generally with the right of religious expression of students and teachers in public schools and the right of equal access of religious groups to school facilities. It is composed of the following witnesses: Mr. Joseph Infranco, who is an attorney and partner in the law firm of Migliore & Infranco located in Commack, New York. He is a member of all the various bar associations and his firm represents many churches and religious and not-for-profit corporations and he has been active in the practice of constitutional litigation in the area of church/state relations, has written several articles and made frequent media appearances concerning this subject and has testified before a congressional subcommittee on a proposed constitutional amendment and other matters.

The other witness is Mr. Vincent McCarthy who has been the senior Northeast regional counsel of the American Center for Law and Justice since 1997. He has taught constitutional law and remedies and civil procedure. He handles constitutional issues within Federal and State courts involving religious liberties and family values.

And the third witness is Ms. Pamela Bethel, who is the president of the New York School Boards Association—could all three of you come forward—for 1998. Before being elected president, she served seven terms as association vice president. Ms. Bethel has served on the association's board of directors since 1980 as the director for area 12, representing school boards in Suffolk County. At the national level, she represents the Northeast region of the National School Boards Association's Resolutions Committee, and she's a member of the NSBA's Federal Relations Network and the State Association of Legislative Network. Please remain standing and raise your right hand. If I'm not mistaken, I see four people instead of three.

MR. WARONA. I'm with Ms. Bethel.

CHAIRPERSON BERRY. Oh. Ms. Bethel is accompanied by her counsel.

MR. WARONA. I was notified that I would be able to testify as well.

CHAIRPERSON BERRY. That's fine. That's okay. It's just that I looked up and saw four people. Would you please raise your right hand while I give you the oath.

[Whereupon, an oath was administered to the panel.]

CHAIRPERSON BERRY. Thank you very much. You may be seated. Deputy Counsel Hailes, could you please proceed.

MR. HAILES. Thank you very much, Madam Chair. At this time we are going to ask each of our witnesses to identify themselves for the record, and you are allowed time to present an opening 5-minute presentation. You may begin. Additionally, if you would, if you're accompanied by counsel who is not at the witness table, if you would like to identify them, do that as well, please.

MR. MCCARTHY. I have with me Brian Raum, who is the director of our office, the American Center for Law and Justice, in New York.

MR. HAILES. Mr. Infranco, would you please begin.

Joseph Infranco, Attorney, Migliore & Infranco

MR. INFRANCO. Thank you. I have some prepared materials for the Commission. I'd like to begin by thanking the members of the Commission for this kind invitation and the opportunity to speak on some of these issues so critical to many Americans, issues concerning religious freedom and use of public facilities. I will try to make my remarks brief. I've outlined a number of things in my written material. I know you'll be able to review those later, and I guess, as all the participants today, we're probably more interested in your questions and seeing what you are concerned with.

By way of background, I've been involved in the litigation of religious liberty cases, particularly in the last 10 years, involved fairly heavily. I acted as counsel or cocounsel in a number of cases out of New York, including *Lamb's Chapel v. Center Moriches School District*, *Hsu v. Roslyn School District*, and recently as cocounsel in *Bronx Household of Faith*. And I'm also acting as cocounsel to a New Jersey organization called the American Catholic Lawyers Association and the cases of *Waldman v. Bedford School District* and *McComb v. Nassau Community College*.

It's been my observation that there are serious and longstanding patterns of abuse and discrimination against religious entities seeking to express their faith in a public forum. There's an atmosphere that seems to single out religious speech as if it is sometimes an evil that has to be eradicated. Often this attitude is a result of ig-

norance or fear of litigation. In some cases, though, it is purposeful and intentional. I would say the problem has been particularly noticeable with high school students in the area of Bible clubs. The tendency of most schools, out of fear of controversy, is to either ignore or trivialize the religious dimension of our culture.

I know that the Commission is aware of the standards dealing with the Federal Equal Access Act, which was held constitutional in the Supreme Court decision of *Mergens*. Of course, the school is not required to have extracurricular clubs meet. But once the school determines that it's going to open a forum and permit extracurricular clubs, it cannot discriminate against clubs and speech it does not approve of because the speech is religious or political. Having said that, the Supreme Court is clear in *Mergens* that it intended that religious and political clubs be treated in an equal fashion. What we have found is a regular pattern—I see the light. There's a regular pattern of singling out clubs for disparate treatment.

I've handled approximately 25 to 30 matters on behalf of Bible clubs. A great majority are resolved without litigation. We've found anything from great hostility to mild ignorance, but it's very common that religious clubs are told: "You're not an official club. You're not permitted to hang up posters. You're not permitted use of the PA system or mail facilities." They will not be given a monitor. Only this week I received a fax from a client—and I attached it to my papers just to show you it's a current problem—from a school district telling a religious club you cannot have a monitor. And the students were already told, "You're not an official club. We're not going to give you a regular room, a regular meeting place." So they will be hearing from me.

In some cases the problem is extreme. In the *Hsu* matter, the Rosslyn School District actually went on record, has investigated giving up its Federal financing if it would keep out a religious club. When I spoke with counsel to Rosslyn School District and I explained that even without the Federal Equal Access Act, the constitutional principles of equal access in decisions like *Widmar v. Vincent* would require that result anyway, the school reluctantly backed off its position but imposed certain requirements on the club that had not existed with any other club. And that ultimately led to the dispute over the leadership of the club.

I could give you many other illustrations, but I see that my time is up so I'll stop for now and wait for questions from the Commission. Thank you.

MR. HAILES. Thank you very much. Mr. McCarthy.

**Vincent P. McCarthy, Senior Regional Counsel,
American Center for Law and Justice**

MR. MCCARTHY. I have a copy of the remarks that I will be making before the Commission. I am Vincent McCarthy, senior regional counsel, Northeast Council for the American Center for Law and Justice, which is a nonprofit 501(c)(3) legal center which handles cases involving religious liberties and family values.

Many of our cases over the past 6 years in the Supreme Court have determined the law in the area of schools and religious freedom, including, among others, *Lamb's Chapel v. Center Moriches Schools District* and *Board of Education of the Westside Community Schools v. Mergens*. In *Lamb's Chapel*, the Supreme Court held that the Center Moriches School District violated the first amendment speech clause by denying access to school premises to the plaintiff church, which wanted to show a film that dealt with a subject from a religious perspective. The Court further held that allowing a church on school property to show a film from a religious perspective did not violate the establishment clause of the first amendment. In *Mergens*, the Supreme Court held that a public school was required to give equal access to a Christian club and that the Equal Access Act did not violate the establishment clause.

In the Northeast office of the ACLJ we have handled many cases involving discrimination based on religious viewpoint. We have represented students who have been told by school officials that they are not entitled to use the school bulletin board to advertise National Prayer Day, even though other community groups were permitted to use the bulletin board. We have represented students attempting to start a Christian club with Christian officers who were told by a school district on Long Island that they could not limit the officers to Christians. We have represented a prolife student group at the State University of New York in Buffalo which was denied student funding because they were told they were religious. We have represented a high school student who an-

swered the question, "Where was Christ born?" in a literature class, and answered the question "Bethlehem." And it was marked wrong because the teacher claimed that Bethlehem was only a biblical myth. We have represented students who were told that they could write papers on any subject they wanted except their faith. In short, we specialize in redressing religious discrimination.

Briefly, the religious viewpoint is considered by educators in this country as superstitious and not worthy of consideration together with other viewpoints. In one case I handled in the town of Brookfield, Connecticut, I represented a couple who wrote a letter to the principal of their school complaining about a pink triangle program which promoted the homosexual, lesbian, and bisexual behavior. They were critical of the program and of the failure of the school to present the religious viewpoint or at least the traditional viewpoint on this issue. The school flatly refused to present the religious viewpoint, saying that they did not feel there was any need to do so. When asked at a deposition why he would not present the religious viewpoint or traditional viewpoint, the superintendent let it slip that "these people, religious people, were the same ones that hanged blacks down South," ignoring the fact that it was religious leaders who were in the forefront of the civil rights movement.

To look at the situation in the light most favorable to educators there is a fundamental misunderstanding as to the meaning of the term "separation of church and state." Which, incidentally, is nowhere to be found in the Constitution.

There is the common belief that all religious viewpoint is to be eliminated from the public square, that religion has no place at the table with other points of view. Instead of treating religion neutrally, educators often treat it as an evil to be segregated or separated from public school discussion.

Recent Supreme Court cases such as *Rosenberger* and *Aquilar* have stressed the importance of treating religion equally, as did the recent decision by the Wisconsin Supreme Court several days ago, upholding the Milwaukee school voucher program. The Wisconsin Supreme Court emphasized the fact that religion was to be treated equally with other schools who were to receive money under the voucher program.

To look at this problem more deeply, even a cursory look at the NEA [National Education

Association] Web page demonstrates that there's an antipathy on the part of the educational establishment, not only to the religious viewpoint but to the views of any parents or children that contradict the narrow band or the straightjacket beliefs of the establishment on issues of sex education and child rearing.¹ What is frightening is that the establishment view seems to be moving with lightening speed toward the position that only the secular state should have the right to raise and instruct children.

In a recent law review article by James Dwyer, he argued that the State should grant to parents the privilege of raising their children. Barbara Woodhouse, a feminist scholar, argues that the community and not parents should raise children. The religious viewpoint is under attack and needs to be defended or at least given a place at the table. Anything this Commission could do in this regard would be greatly appreciated.

MR. HAILES. Thank you very much. Ms. Bethel.

Pamela Bethel, President, New York State School Boards Association

MS. BETHEL. Thank you. Madam Chair, I also have a prepared statement that I would like to submit to the Commission. Good morning. My name is Pamela Bethel and I am president of the New York State School Boards Association, a not-for-profit corporation which serves the interests of public school boards and the children of New York State. The New York State School Boards Association represents approximately 694, or 94 percent, of New York's public school districts.

I'm very pleased to have been invited here today to provide testimony before the United States Commission on Civil Rights on schools and religion. I am pleased to represent the interests of my association because it is a topic very near and dear to my heart.

Our association continues to be involved in numerous efforts and court cases related to this

¹ Under the defame and degrade guidelines of the Commission, which afford an opportunity to identifiable persons to respond to specific types of statements, including those that "allege discrimination based on . . . religion . . ." (see Administrative Instruction 7-1), the Commission offered then-NEA president Bob Chase an opportunity to review and respond to the testimony of Mr. McCarthy. The NEA response is attached to this transcript as appendix C.

topic, based on our belief that the best way to protect religious liberty is to ensure that government does not favor religion over nonreligion or one religion over another religion. Simply stated, we fervently believe that school districts are charged with a constitutional obligation to remain neutral in matters of religion. However, we also believe that neutrality should not be defined as encompassing the right of school districts to stifle personal religious speech on the part of students which does not interfere with the orderly conduct of our schools. It also should not be defined as discouraging our schools from teaching students about religion and cultural diversity, upon which our nation was founded.

As an association of school boards, we certainly support President Clinton's memorandum on religious expression in public schools. We believe that our schools may not teach religion to our students but should teach our children about religion. Only by teaching children to understand our differences can we expect our children to learn mutual respect for one another based upon our belief our public schools need to exist to promote diversity and pluralism and not religious segregation.

Our association single-handedly took a case all the way to the United States Supreme Court. This case, entitled *Kiryas Joel v. Grummett*, which our counsel, Jay Warona who is with me here today, argued, asked the question of whether the New York State Legislature violated the establishment clause of the United States Constitution by enacting legislation which permitted a group of individuals of a particular religious sect to secure their own publicly funded school district based upon the religious preferences of this particular community to have its children secure educational services in a religiously segregated environment. Our association was able to convince all levels of the New York State court system, as well as the United States Supreme Court, that religious segregation, even if requested by a particular religious group, is not constitutionally acceptable, and, if upheld, could dismantle and balkanize public education as we know it today.

Our association has involved itself in numerous other cases in a friend of the court capacity, in which we represented the interests of various school districts which had been sued by individuals and groups claiming that their free exercise rights had been violated by the failure on

the part of their school district to provide certain religious accommodations. In one of these cases, entitled *Moser v. Hawkins County Public School District*, arising out of the State of Tennessee, the question before the United States Court of Appeals for the Fifth Circuit was whether a school district had violated the free exercise rights of certain parents by a refusal to permit their children to opt out of portions of the school curriculum to which the parents had religious objections. We submitted a brief on behalf of the school district and argued that although the religious perspective of parents certainly should be respected, it is simply not possible for a school district to run an educational program which entitles children to potentially secure the right to opt out of any portion of the core curriculum to which the child and/or the child's parents have religious objections. The court agreed with our decision and position.

Our association has also represented the interests of public school districts in New York State which have been sued by outside religious groups that their free exercise rights have been violated by the refusal on the part of these districts to lease their facilities after school hours to such groups for the purposes of conducting religious service's or worship's instructional activities. Our association has taken the position that since the New York State Education Law specifically does not include as a permissible purpose the use of a school district facility by outside religious groups for religious worship and instruction, that school districts in this State simply have no authority to permit their buildings to be used for such purposes. Most recently the United States Court of Appeals for the Second Circuit agreed with our position when we supported Community School District 10 in the case entitled *Bronx Household of Faith v. Community School District No. 10*.

The New York State School Boards Association believes that school boards are charged with the obligation of upholding the Constitution of the United States and must act in accordance with the decisions of our State and Federal courts which interpret the Constitution. We therefore support all school districts that find themselves embroiled in litigation which relate to actions which such boards have taken in complying with their constitutional mandate. We continue to provide training sessions to our membership on the most recent decisions of our

courts pertaining to this topic as well as a host of other topics. We attempt at all times to facilitate an appropriate understanding on the part of our membership relating to the legal entitlement which students, faculty members, and the public at large in general have with respect to exercising their religious faith within the context of our community. At the same time, however, we also provide our membership with a thorough understanding of the limits of the establishment clause, which we are obligated to.

In conclusion, we believe that the success of our nation is due largely to the right on the part of its people to practice their religion free from the dictates of government. We believe all of our students need to be instructed and gain an understanding and an acceptance of the rich religious diversity upon which our nation was established and continues to exist. Our children should view our schoolhouses as places of learning and not as places in which religious teachings are endorsed or indoctrinated. Only by showing neutrality toward religion can we truly demonstrate our infinite respect for the religious and cultural diversity of our great State and nation.

Discussion

MR. HAILES. Thank you very much. Mr. Warona, do you have any comments to amplify the legal issues that were raised by Ms. Bethel on behalf of the School Boards Association?

MR. WARONA. Not at this time. I certainly would be available for any questions.

MR. HAILES. I'd like to begin my questions with Mr. Infranco. In your interview with our staff you noted that it was your belief that violations against students' expression of their religious rights is far worse here in New York than anywhere else. Can you elaborate on that? And then I would like Ms. Bethel to respond.

MR. INFRANCO. Surely. And I didn't mean to suggest that it's worse in New York than any other part of the country. Rather, I was suggesting that New York is an area where the abuses are particularly prevalent. My feeling is that like begets like. One school district has an experience, a principal networks with another principal, the State School Boards Association circulates a memo, people get together and talk. And after a while, I think what happens is there becomes a tacit understanding that these relig-

ious issues are a big headache and we're best off just avoiding them.

I had one school district attorney, for example, tell me: "I was at a meeting of school district counsel and I was so upset by what I heard that I told my school to cancel its annual performance of Handel's *Messiah*." This performance had been put on by the school for—I think it was almost 20 years. And I asked this particular attorney, "Why would you give that advice? This is a weekend concert, and Handel's *Messiah* is a piece of classical choral music. I think about 70 percent of choral music has religious themes." And he said, "Well, because any type of religious theme could potentially open up our district for other religious speech, and we want to keep it all out."

So what happens is I think people network, and as word gets around, people begin to adopt similar views. And I would say that's probably what has happened in the State. Perhaps another reason is that New York State, because it is a largely heterogeneous population, has been more sensitive or more fearful of offending a particular group, so that may have something to do with it as well.

MR. HAILES. Ms. Bethel.

MS. BETHEL. I'm not aware of these particular issues being raised in any of the schools that have come to my attention. However, staff does generally deal with telephone calls that come about regarding issues such as these, so I would defer to counsel on that.

MR. WARONA. Quite simply, if we get a call from a school district that would ask us whether that type of activity that Mr. Infranco was just discussing was appropriate, certainly we'd inform that it is not. I wish quite frankly we would hear about those instances, not that we stand in anything more than an advisory capacity to our school district members; we join in a voluntary basis. But we certainly would very much tend to extend that advice to them that that would not be appropriate. But I don't believe that that speaks for the entire State of New York. We deal all the time with a host of—a great number of school districts that do not take that type of perspective that religious diversity and teachings should be so disrespected.

MR. HAILES. Ms. Bethel, let me ask you this question. Do the school districts have guidelines that help them to distinguish between workshop

and instruction consistent with the second circuit decision that you mentioned?

MS. BETHEIL. We train school board members to have such guidelines, most definitely. We have a policy service as a part of their membership that they are entitled to. In fact, policies are now on the Web site, so these are issues that are dealt with every day. And to my knowledge—once again, I'm not hearing complaints. I am only aware so far that districts have been in compliance with the guidelines and have policies to ensure that.

MR. HAILES. And Mr. McCarthy, does your group routinely monitor efforts by school districts to comply with the decisions regarding access to school facilities? Are you aware of the training sessions, for example, that Ms. Bethel mentioned?

MR. MCCARTHY. I'm not aware of that. We receive complaints from parents or students when the school district doesn't observe their religious rights, and that's when we get involved in the case. What we normally do after investigating the case is send an information or demand letter to the school that's probably eight or nine pages long that sets out the Supreme Court's decision in this area of the law, together with the statutory law, and ask the school to cease what it is doing.

The kinds of cases we get—one young girl was told by school officials she couldn't hand out literature with religious content on the playground. She was told that such literature had no place in the schoolgrounds. We were able to resolve that by sending a demand letter and discussing it with the school attorney. I mean, we have probably—you know, lists and lists of these. But to give you just a couple of examples, a young woman is coming in this afternoon at one of your panels who saw us about a case against the Freeport public schools where the principal in Long Island refused to recognize a Bible club. And it was kind of—this happens so often. We have so many of these cases, for example, where school principals in New York refuse to recognize Bible clubs where they do recognize other clubs that go outside the school curriculum that it's curious to us—and I believe what's been said, but the training doesn't seem to be getting out to the principals and superintendents. Another student, Pat Shaw, was told she couldn't sing a song in a student talent show because it had the word Jesus in it. The school said this

would violate the separation of church and state. We sent out a demand letter, discussed it with counsel for the school. That was eventually resolved. Another young woman who's going to be on your panel this afternoon was told she couldn't sing the song of her choice in a student talent show because it had the word Jesus in it. We sent out a demand letter, discussed it with the school and the counsel. That was eventually resolved.

This is how we come to our knowledge of what happens in these cases. And I will say that in most cases where the school is informed of the law in New York we have been able to resolve the situation.

MR. HAILES. Thank you very much. Madam Chair, no further questions.

CHAIRPERSON BERRY. Any Commissioners have any questions for the panel? Yes, Vice Chair.

VICE CHAIRPERSON REYNOSO. I want to pick up on Mr. McCarthy's last statement. Mr. Infranco, you mentioned in your testimony that you, like Mr. McCarthy, get a lot of Bible club questions. We had testimony in our Washington hearings that with Presidential guidelines and with recent Supreme Court opinions that most of these issues seem to be resolved without the necessity of litigation. That sometimes it's a matter of folk not understanding what the courts have said. And the courts have, of course, provided more freedom and opportunity to spread religious views through Bible clubs and so on than many of our leading politicians seem to understand. I just wondered, Mr. Infranco, what your experience was in terms of that piece of testimony, whether you got that more often than not as opposed to Mr. McCarthy, who indicated that things are worked out once they fully understand what the groundrules are, what the constitutional guidelines are.

MR. INFRANCO. I think that the Secretary of Education's guidelines were remarkably helpful. Very often the schools, I think, are taking positions out of ignorance, and I find they are very responsive when I send demand letters. But there is still a surprising amount of either ignorance or bad will. You would think by this point most schools would have gotten the message, but somehow that has not happened.

I guess we have to remember in *Lamb's Chapel*, as recently as that—it was argued and decided by the Supreme Court in 1993—an at-

torney general wrote in a brief on behalf of the State of New York words to this effect—and I'm sorry I have to paraphrase. Religious speech only benefits a narrow group of adherents who subscribe to the particular philosophy. It is reasonable to exclude it because it does not provide a general benefit to society. The words were seized upon by Justice Scalia, who threw them in the face of the poor school district attorney who didn't write them with scorn. And during the oral argument at which I was present, there were, for example, exchanges as follows. "Would the school permit a debate between atheists after hours?" "Yes, we would." "Would the school permit a debate between an atheist and an agnostic and a minister?" "Well, not if you include the minister." "What about a debate between a Communist, an atheist"—on and on and on—"a socialist and a minister?" "Everyone's okay but the minister." "What about 100 atheists against one minister?" "What about an audience of atheists?" "Sorry, we can't do it because of the minister."

Justice O'Connor looked with disbelief and said, "Where is the balance in the school's position?" If you understand that that position by the State of New York was supported both by the School District Association and the Attorney General as recently as 1993, it's perhaps not surprising that many schools have not yet gotten the message. And so I find that there is probably not a month that goes by even now that I'm not contacted by some religious club in a school where there's some sort of overt or subtle form of discrimination taking place.

VICE CHAIRPERSON REYNOSO. I take it that that extends to the attorneys that represent those local school districts—would have gotten different sort of advice.

MR. INFRANCO. I would say so except perhaps the way it works in the real world is that the school districts don't know unless they ask the attorneys. And it often doesn't get to that because the school personnel want to avoid controversy. And because of that, they've reached the conclusion—equal access requires that if a forum is open for expressive speech, generally you have to allow religious speech. The way the schools sometimes prefer to deal with it is to either close the forum or to say we're going to exclude all religious speech as a category, which is what the school-use facility in *Bronx Household of Faith* did. We're going to exclude all religious speech, and we just want to avoid the controversy.

The tendency of schools to do that I think was captured very well in the recent editorial on the op-ed page of the *New York Times* by Harvard Divinity School's Harvey Cox in which he said:

In general public schools fearful of arousing controversy ignore or trivialize the religious dimension of our culture. Yet to teach nothing about religion is in effect to teach something wrong about it: that it is unimportant and unworthy of serious study. This form of exclusion discriminates against those Americans for whom religion has been particularly integral. For example, African Americans who struggled against slavery and segregation were inspired to a great extent by their religion, and Catholic immigrants whose faith helped them to survive prejudice. Today the heterogeneity of our public schools makes open dialogue possible. What excluding religion from the classroom produces is simply bad education.

And I find that that's the prevailing mode. Let's avoid it completely because it's controversial.

VICE CHAIRPERSON REYNOSO. That leads to a question I have for Mr. McCarthy. I think I was a little bit surprised, Mr. McCarthy, that you mention that in your view religion is often treated as "evil" by public schools. And I think you even mentioned, if my notes are correct, that the [educational] establishment considers religion a superstition. I say I'm surprised only because in terms of my own experience, so many of local school board members are indeed members of local churches and so on. And I find, at least in the area that I'm from in California, I would find it hard myself to describe the leadership in the public school in that light. But I do have the sense, as indicated by Mr. Infranco, that they are concerned, one, about the controversy; and two, about possible conflict between nonreligious groups and that for that reason they sometimes will have rules that at best are restrictive. I just wonder whether my reading of your testimony was correct—that you sense an overt attack on religion, or whether you feel that it's more an effort to keep away from controversy and that sort of thing.

MR. MCCARTHY. I believe that there is an underlying subtext to all of this, which is bigotry and hostility toward religion on the part of the educational establishment. And I say that again after having reviewed NEA resolutions over the years, having deposed numerous principals and superintendents of their views of religious expression. Even resolving the cases that I've re-

solved, they've been resolved grudgingly. The schools have never been happy about the fact that students have these rights. It's almost always the situation where they've backed down simply because we've threatened to sue them if they don't and they've seen that the law is clearly on our side. And I think the subtext of all of this in the schools is who decides what to teach children about the religious, ethical, and moral dimension of life. And it is my belief that schools are very—the [educational] establishment is hostile to the religious point of view on many of the hot points in the cultural debate in our country.

And it used to be that the courts said that schoolteachers stood in *loco parentis*. While the children were in school, the teachers took the place of parents. I'm telling you now without any hesitation that the position of the educational establishment is that parents stand in *loco parentis* for teachers while the children are at home at night.

You can go on the Web page of the NEA and see resolution after resolution about why and how teachers should be teaching children ethical, moral, and spiritual values and issues rather than their parents. I've been involved in many cases over the last—

VICE CHAIRPERSON REYNOSO. I'm sorry. You say rather than their parents?

MR. MCCARTHY. Rather than their parents. I've been involved in many cases over the last 3 years. We have tapes of teachers telling students at meetings don't tell your parents this, don't discuss this with your parents. I know this sounds astounding, but I am telling you this is what's going on. And the educational establishment is doing it because they believe they know better. They know what's better for kids.

Let me just take one particular issue: sex ed in K-4 or K-8. I've been working with parents in Connecticut who have been fighting to have control over their children's moral, spiritual, and ethical development in issues regarding sex ed. And there's a new proposal by the State board of ed in Connecticut that children in ages K-4 should be taught the specifics about how you contract AIDS and about sexual organs of the human body, how to prevent conception, et cetera, et cetera. This is K-4. The parents I represent object to this. They want their children to opt out of this. They want to teach their children these things. They don't believe that the school

should be teaching these things. And the schools not only feel adamant about it, but as we heard in the previous testimony, they object to parents being able to even opt out of these programs.

To give you an example, in Connecticut parents have the right to opt their children out of sex ed programs, so the schools offer information on sex ed in a program called sex ed. But then they'll have in literature or in other parts of the curriculum they'll leave sex ed in those other parts of the curriculum and tell parents they don't have the right to opt out of those other parts of the curriculum.

So in short, the subtext of all this, I believe, is a belief by the educational establishment that they have a more enlightened view than parents, and particularly parents who have a religious view about chastity and about virtue and about living a life that is committed to values that go beyond the secular world.

VICE CHAIRPERSON REYNOSO. Well, perhaps so. But I can certainly understand. I could visualize a school board member who is very religious and would agree with those parents and yet disagree that they could opt out. I don't see that—it seems to me that the situation is not all that incongruous as you indicate, because I think there are valid arguments on both sides, i.e., do we want our children to have a commonality of experience in terms of what they learn; and two, how to protect youngsters in terms of being raised only in the religious background of their parents. That is, I can give examples of both sides of that argument.

MR. MCCARTHY. But religious parents believe that they should have the sole right to teach their children those things rather than the school. And they will teach their children that chastity is, for example, in this instance, is something that goes beyond just the sexual act. It includes a whole way of life. And for them it offends their religious beliefs and burdens their religious belief to have the school teach it in the way that the school does.

VICE CHAIRPERSON REYNOSO. No, I understand that. Those are in some ways traditional tensions in our society. I'm just observing that because somebody might not agree with the parents you represent does not mean that they are necessarily antireligious. I can understand a person being religious and actually agreeing with those parents on practically everything and

yet agree that the option ought not to be good public policy.

Finally, Ms. Bethel, I was interested in the litigation that's come up in New York pertaining to the use of school facilities for religious services, and I understand that the statute here has been interpreted by the appellate court. The testimony before us indicated it said, yes, the statute means that you can't lease out or rent out school facilities in the school districts.

I guess because I've had experience with school districts doing that, renting out their facilities and having no problems. So it's separated from the school. I mean, facility rents. They're paying good money for the use. So it could hardly be said that the school is endorsing a religious activity. So I guess my question to you is would it not be consistent with the view of separation of church and state to have the New York School Boards Association—I just want to get the title correct—urge the legislature to change the statute and say, hey, if we want to lease out facilities to religious organizations why shouldn't we be able to?

MS. BETHEL. I don't think that's really within my purview, but at this point I would refer to counsel on that issue.

MR. WARONA. We've always taken the position on that which—basically, what we try to do is when there's ambiguity, interpret the law on behalf of our school boards so that they will, if in broad litigation, be able to perhaps be successful. And therefore, we don't opine on what the statute should or should not say.

But I think one of the things, if I may take one moment, that our copanelists have indicated that I think not only would we take exception to but have a great deal of concern about is when they say that when they've sent demand letters, these things are usually worked out. That always presupposes that their demand letter to the school districts are based upon their understanding of the law that is activated. Such a demand letter was in fact sent to the school district, as I recall, in the *Bronx Household of Faith* case as well. The second circuit certainly did not agree with their perspective.

So I think it is disingenuous to suggest that just because a school district doesn't do what they ask, that that school district is either being hostile towards religion or is in fact trying to steer away from controversy. I don't think we try to stay away from controversy. I would take ex-

ception to that statement, too. I think there are not always very clear understandings. There's no litmus test when certain questions have not yet been asked. And I think that we try our best to interpret the law as we can. And I think that we can all come up with a parade of horrors for anything that may be existing, but that doesn't necessarily mean that evidence is the entire state.

Some districts may think that individuals of this particular organization are hostile. I know a superintendent who was served with a subpoena and with litigation papers on Christmas morning when he was in front of his Christmas tree with his family. That certainly would not necessarily demonstrate a very good faith effort to be respectful. So I think on both sides there certainly are no angels, necessarily, but I think people do the best they possibly can, and I don't think we're dealing with a systemic system that encourages people to show disrespect for religion.

VICE CHAIRPERSON REYNOSO. But the testimony before us at the last hearing was that in fact once everybody understands what the courts have said that practically all of these cases are worked out without litigation. That is, eventually the lawyers representing the respective associations and districts make that advice to their parties and they have settled. Has that been your experience?

MR. WARONA. That is my experience. It's just sometimes there's that traditional question that's asked. For example, in the *Hsu v. Roslyn* case that Mr. Infranco was referring to, yes, we understand and we support the equal access amendment. But does it require a school district that has an antidiscrimination policy to place itself in a position where it has to be perceived by the community to be placing children above the antidiscrimination policy? That is an unanswered question. Certainly, school districts will adhere to that decision at this point. So they weren't trying to vote against the equal access amendment. It was a question of complexities of things that weren't answered.

VICE CHAIRPERSON REYNOSO. Thank you, Madam Chair.

CHAIRPERSON BERRY. Other Commissioners have questions for the panel? Any others? Yes, Commissioner George.

COMMISSIONER GEORGE. Thank you, Madam Chairman. First, just a point of clarification for the record. I believe on one occasion Vice Chair-

man Reynoso and then on two or three occasions Mr. McCarthy referred to the religious establishment when they meant to say the educational establishment on this question on whether the educational establishment is hostile towards religion. Now, I don't have any doubt that some segment of the religious establishment in this country is hostile to religion, but I think that the issue was not them, rather the educational establishment. So perhaps that part of the record could just be corrected for the little oral typo.

CHAIRPERSON BERRY. Is that what the witnesses meant?

MR. MCCARTHY. That's correct.

COMMISSIONER GEORGE. You meant educational establishment, is that true? The Vice Chairman did.

Ms. Bethel, do you feel and do your organizations feel as though you're a bit under the gun? You're caught between a rock and a hard place sometimes, because on the one hand you have a request for the accommodation of the free exercise of religion. You may want to accommodate that to the extent that you can. But then on the other hand you fear a lawsuit from the other direction, because if you engage in a form of accommodation that can be perceived in one group's judgment as crossing the establishment line, you're vulnerable to another lawsuit. Do you ever feel as though you're sued if I do and sued if I don't?

MS. BETHEIL. Perhaps there are times when I think there's a bit of ambiguity that causes us to wonder if the balance is there and is it being tipped and where do we go. That does happen certainly at times, and we really generally look into the situation, the issues. We deal with our counsel very strongly in situations like that because we really want to do the right thing. We believe that a healthy balance is important for students. And as I testified before, we do have a rich religious diversity and that's to be valued, not diminished. But we also have to make sure that the balance is there.

COMMISSIONER GEORGE. You also have limited resources, and I'm sure lawsuits are not the way you'd like to spend the money that's available, not just to your particular organization but to the school districts and school boards that you represent. Now, the fear of litigation has to be just that for you, surely a fear. And you've got a fear from both sides. You can be sued from the

free exercise perspective and sued from the establishment perspective.

MS. BETHEIL. We certainly would prefer to spend our resources where it would directly benefit the students most in the classrooms. And our school districts feel that way, too. However, there are times when it is absolutely necessary to go into litigation to preserve what we feel is the proper role of the educational system within our greater society.

COMMISSIONER GEORGE. Now, you've indicated that you believe that the proper role of the educational system when it comes to religion is to preserve neutrality, to teach about religion but not to teach religion or religious doctrine. In fact, you said that the schools must not favor religion over nonreligion.

MS. BETHEIL. Or one religion over another.

COMMISSIONER GEORGE. Or one religion over another. But on this question of favoring religions over nonreligion, does it work the other way around? Must you also for the purposes of neutrality avoid favoring nonreligion over religion?

MS. BETHEIL. Yes. We should walk that line.

COMMISSIONER GEORGE. All right. So we must neither favor religion over nonreligion nor nonreligion over religion. What then is to count as nonreligion? Is an advocacy group in a school, an extracurricular advocacy group for some cause, the free market economics, socialism, diversity, is that nonreligion?

MS. BETHEIL. I'm not sure if that really comes into effect under the equal access law. Once again, some of the questions you're asking I really do have to think a bit more about. Not being an attorney and not being a member of staff—

COMMISSIONER GEORGE. No, this is not a legal question. This is really a question about your group's philosophy. Because you've put forward the ideal as one of neutrality. That was an issue that we talked about in our last hearing with some very distinguished experts representing different viewpoints. And I think it's a very live and important issue that's in the background of these discussions, and we have to bring it into the foreground.

If our principle is to be the one you have articulated, and that is we have to preserve a neutrality, then we have to know what that means. We have to know what neutrality means concretely. If it's neutrality between religion and nonreligion, we at least have some idea of what

religion means. Notoriously difficult to define but we all, like Justice Stewart said of pornography, know it when we see it. But then we also have to know what nonreligion is, particularly if neutrality is also to mean what I think you rightly say it also meant, no favoring of nonreligion over religion. But if we're to really deal with those parents that Mr. McCarthy talked about in his exchange with Justice Reynoso, then I think we have to be clear on what it is that nonreligion is. Are we allowed to favor advocacy reviews say on a sex ed issue or on an economics issue in a way that we don't favor religious groups when it comes to making facilities or resources available?

MS. BETHEIL. As we were just mentioning, I keep going back to the law as it is now and as I understand it. And I think it just follows that what's already there we have been able to define.

MR. WARONA. I think the problem is this. You're asking a philosophical question, and you're asking a question of beliefs of the association. Generally what we have simply done is represented the interests of school districts who might have been embroiled in litigation for simply following the dictates of State law, whether State law was right or wrong or indifferent. We haven't taken a position on that. So if in fact they interpret State law to say that this particular purpose is not an appropriate purpose and they get sued for that, that is following State law. We would get involved to represent their interests. And I think the concern is something that Mr. Infranco said before. Because in New York State under our Education Law, section 414, there is not a distinction with a difference as he was indicating between an open forum and a closed forum. We have a limited open forum, meaning that there are certain purposes for which our school districts—we are authorized to permit usage for and other purposes that we are not permitted to utilize the schools. And you were asking a question, as I understand it, with respect to why shouldn't we allow it for purpose X, Y, and Z that may not be such an authorized purpose. And simply stated, we haven't taken a position on that.

COMMISSIONER GEORGE. But you do have the option or Ms. Bethel's organization has the option of either recommending or supporting to her school boards opt outs or not opt outs. It's not that you are required not to have opt outs. Am I

right? The law does not require you not to have an opt out in say Mr. McCarthy's—just to say with the example—Mr. McCarthy's sex ed course.

MR. WARONA. In fact, with sex ed we have a commissioner's regulation that allows children to certainly opt out of AIDS instruction and receive that instruction by their parents at home. There are certain limited exceptions for that type of parental instruction under State law.

COMMISSIONER GEORGE. But you'll grant that in some cases the school board itself has to make the decision as to whether in this particular case to permit an opt out or not? In other words, the law neither forbids nor requires the opt out.

MR. WARONA. No, I don't think that's correct.

COMMISSIONER GEORGE. So there's never a situation where a school board has to exercise judgment as to whether to permit—to grant a request by a parent for an opt out? Either they're legally bound to do it or they're legally forbidden to do it?

MR. WARONA. Depends on what the opt out is. If it's a core part of the curriculum, we do not have authority to grant a diploma at the end of that child's tenure with us in public schools and say we so authorized you to have gotten this diploma, when in fact the child might have opted out. And under the compulsory education law, we have no way of ensuring that that student learned the information that the State is requiring us to teach.

COMMISSIONER GEORGE. Now, is that true in areas of particular sensitivity to religion and people of faith? For example, in the sex ed area is that true?

MR. WARONA. I think there could be limited exceptions in something like that. We're generally talking about the core parts of the curriculum. However, as I said, there's a commissioner's regulation on AIDS instruction, and we have to do a little more research into whether the Education Department takes the position that that's limited. That is not applicable to that situation only. We wouldn't advise a district to act in accordance with a manner that the Education Department would not so authorize.

COMMISSIONER GEORGE. And Ms. Bethel, are there in your judgment—is there in your judgment the possibility of formulating a genuinely neutral sex ed curriculum with respect to religion, one that neither advances it nor burdens religious parents?

MS. BETHEIL. I don't know if I have the expertise to tell you that straightforward. It would be my hope that we could certainly find a way of reaching that type of possibility. But it just has not been in my area of expertise or discussion that we've had as a school boards association to define exactly what that would be.

COMMISSIONER GEORGE. Let me ask you a policy question then in the abstract. If it were not possible to develop a curriculum that was neutral with respect to religion, should then Mr. McCarthy's view prevail and the schools simply get out of the sex ed business or get out of it to the extent that neutrality was not achievable?

MS. BETHEIL. I think right now under State law we have a mandate to in fact comply with a curriculum for health and sex education. We do that because we feel it's very important for our children to be knowledgeable of aspects of the health curriculum that will provide them with safety as they grow and mature.

All religions have various beliefs, and not all religions coincide with another, obviously. It's difficult to determine what is acceptable by all religions. It always seems that when you start to get into a discussion like that although the majority of religions may in fact be able to deal with some of those issues in the way you wish to address them in curriculum, there's always the possibility that there are a few that will not. And even amongst various religions there are always going to be some people from that particular religious belief that differ from others within the same religious belief.

COMMISSIONER GEORGE. But if that's all true, it sounds as though neutrality is in fact impossible among these various—

MS. BETHEIL. I think we do the best we can. Do we please everyone? Does everyone agree that it's neutral? Probably not. Do most people agree perhaps that it's neutral? I guess we've reached that point in some cases. We certainly try to do the best we can. Once again, it's balancing.

MR. WARONA. And one of the balances, if I may just add, that I think we have to consider is the State's interest in ensuring that students learn certain things. If the State of New York determines that health education for good or for bad is an important aspect regardless of what the parent may believe because it may protect children from dying or whatever. And obviously that is an interest of the State that it wishes to

preserve. And school boards really don't have any authority to do anything else. I know some of our answers are frustrating, but it's not a philosophical issue in many instances. We simply have to follow State law.

COMMISSIONER GEORGE. True. But the position I thought being advocated at least philosophically by your client was the position that State law, particularly in the area of the schools, should be based on the principle of neutrality: no favoring of religion over nonreligion; no favoring of nonreligion over religion. It's fine to advocate. I want to know, all right, how does this cash out. Because it might cash out—we had some very powerful testimony in our last hearing that it very well in many cases does cash out where neutrality simply becomes a cover for a particular viewpoint that religious people find very much contrary to their views and which they judge to be—quite reasonably to be not neutral at all.

MR. WARONA. I would respectfully ask that when you are told that, you investigate what the State's professed interest is in mandating that curriculum, and you will be able to determine yourself whether there's some veiled attempt to discriminate against religion or whether perhaps the State may have an interest in protecting the lives of students.

COMMISSIONER GEORGE. Yes, I understand. Quickly, Mr. Infranco, I want to get back to the question that Commissioner Reynoso raised about how much of what you find by way of unlawful deprivation of religious rights is based on ignorance and how much on animus. And particularly to the question—I believe that Vice Chair Reynoso summed it up in terms of practically all the issues, practically all the disputes are settled once the lawyer gets involved, points out the defect in the school's policy. I think if that's right, if it really is practically all, while it's not a knockdown it would be some evidence that what's going on here is a problem of ignorance or fear of lawsuits and not a problem of animus toward religion. Would you agree?

MR. INFRANCO. I would say that ignorance is more of a problem than animus, but there are other considerations. When I mentioned earlier that a majority of these issues are settled with letters, I was referring to the more clearly settled issues. Now, for example, the second circuit recently ruled in the *Bronx Household of Faith* that a school district could have a policy in

which it opened up its facilities for a wide range of uses but could exclude a few categories, religion included. We believe—it's my view that the second circuit is now in conflict with four and perhaps five circuits that have ruled on the point. And I know Mr. Warona will be very capable perhaps of making distinctions between the other circuits. That notwithstanding, the second circuit did acknowledge in its decision that there was at least one circuit that apparently had reached an inconsistent conclusion.

But from what I understand, it's fairly common that school facilities are rented to religious groups even for religious services throughout the country.

New York has an odd type of jurisprudence. Dating back to a case in the second circuit called *Trietley* and a subsequent case, *Deeper Life Christian Fellowship, Inc.*, the second circuit essentially said to a school you made an error. You rented to one religious group, and now you have to perpetuate the error and grant it to other religious groups. So religious groups got in kind of on the theory that it was an error with tenure, which is odd, because if the State Education Law, section 414, really prohibits use by religious institutions, you would think that rather than perpetuate the error there would be some policy to eliminate the religious speech. But so far, religious speech has only gotten in under the error with tenure type of theory. The Supreme Court in *Widmar v. Vincent*, though, did say—and this is what we felt was important. And actually, I should backtrack. The schools—

COMMISSIONER GEORGE. Before you backtrack—I don't want to take up too much time. On my specific question about whether practically all the cases are settled quickly upon the school being informed by lawyers for the parents or other religious parties that they're in violation of the law, is it true that practically all are settled?

MR. INFRANCO. In the area of religious clubs, yes. I would say virtually all of them are settled. In the area of outside groups seeking to use religious facilities, no.

COMMISSIONER GEORGE. Thank you, Madam Chair.

CHAIRPERSON BERRY. Any other questions?

COMMISSIONER HORNER. Yes, I have a question for Mr. McCarthy. We have been talking a lot about law and constitutional law today, but one of the things that interests me is the old-

fashioned concept that a school district operates through its school board to reflect the intentions of the families of that district, democratically expressed through an elected school board in the choice of curriculum, for instance. And the question I have for you is to what extent are the issues that you deal with through legal advocacy resolvable outside the framework of jurisprudence and within the framework of title 2?

MR. MCCARTHY. As Mr. Infranco testified, in areas of religious clubs and things like that, it's pretty easy to resolve those issues. But in areas where there hasn't been—in areas that have not been litigated, such as parents' rights to opt out of particular programs they find offensive to their religious beliefs, that's something that I doubt very much will be resolved outside of the legal arena. And the reason is because parents are not usually permitted to be involved in those decisions by the school boards. Usually the school boards defer to a superintendent who is someone who has been trained in the prevailing theory of sex ed that prevails in this country. And they rely upon the advice given to him.

For example, in this case I was talking about in Brookville, Connecticut, the particular program was never even put before the board. It was just instituted by several teachers in the school. And after about 6 months of a longer report by Dr. Judith Reesman on the program, on the false information that was contained in the program, the harmful information and the positively deadly information to kids that was contained, the board reversed itself and took the program out. But they were never even informed of it. And that's normally the case we find is that there is a—and Dr. Reesman, who is an expert in this field, noted that in her report. That the attempts to get these programs in school are normally covert. There is never a public hearing, rarely a public hearing on these things. They are just put into the curriculum, and then the burden is placed on the parents to object to them.

COMMISSIONER HORNER. Now, once the parents begin to object, is it the case that their recourse must be not just to the local school board on curriculum but also to the State office of education or State law respecting curriculum? That is, there is, apparently, I gather from listening this morning, a State law which defines the content of sex education for students in the State of New York. Is that—

MR. MCCARTHY. Well, that's a very interesting question because like New York, for example, Connecticut has a statute that allows parents to opt out of family life programs. And that's a direct quote. And that has been interpreted by boards of education in Connecticut to be only sex ed and AIDS programs. However, the State Board of Education in defining family life in their report originally made on this subject, defined it as any decisionmaking involving the moral, ethical, or religious development of the sexual or religious development of the child.

So what we've been arguing in Connecticut has been if the school offers a program that a parent believes is in the area of moral, religious, ethical, or sexual development of their child and they object to it, they should be able to opt out of it. The school may require them to offer some alternative to it, and we have no objection to that in the home, but that's the argument that we're making.

COMMISSIONER HORNER. I guess I would just make an observation to conclude. And that is that opting out must be viewed as—should be viewed in my opinion as an interim tactical step toward the democratically approved selection of a curriculum in the area of sexuality which does not violate the religiously based norms of that majority, and I emphasize majority of the population, regardless of what their religious affiliation is. It's my experience both as an educator and as a former government official at the U.S. Department of Health and Human Services that there is a huge and widening gap between the so-called expert opinions in sexual education and morality affiliated with sexual education on the one hand and the religiously based norms of the vast majority of Americans on the other.

And the first step that needs to be overcome is that people need to be made aware of the content of the education that so many of their children are receiving. And secondly, they need to refresh their experience with democratic governance and use that experience not just through the courts but also through the elected—system of elections and local elections and State elections to frankly modify the thinking of the experts through political pressure in the first instance, and secondly through selection of a new set of experts in the second instance, more reflective of how people feel on the subject. And I think that's important because I think we don't want to create an environment over the

long term where we deny the expertise of experts. We want to have experts conducting the business of education, and we want to have experts to whom we can delegate the decision-making very largely. And the problem as I see it is that the experts have deviated hugely from the sensibilities—the proper sensibilities for married people, and there's a real correction that I think can be made for the support of the judicial system, but largely through the political system.

MR. MCCARTHY. Can I take one minute and just say something about that?

COMMISSIONER HORNER. Yes.

MR. MCCARTHY. I couldn't agree with you more. I see an agenda to this because it's largely determined by the experts that you choose. For example, if you take a child in K-4, any expert that I've ever talked to in this area says that the primary danger is presexualizing a child during the period of latency. A child shouldn't know anything about sex during that period of time other than what is kind of obvious for that age or what the child naturally asks through his own curiosity. By giving a child all this sex education information at that point you presexualize the child, destroy his latency, and actually interfere with the child's sexual development.

Now, why is it that these experts are never listened to? And the reason, I believe, is that there's an agenda here to advance sexual liberation at virtually all ages. And the reliance on Kinsey for example—if I see Kinsey cited one more time, I'm just going to hit somebody because Kinsey has been so discredited at this point. He abused children. I mean, Kinsey would effect numerous orgasms on children 18 months of age. I mean, he was a very sick man, and yet the educational establishment cites him in reliance on its theories and experts for the development of these programs. So I agree with you.

COMMISSIONER HORNER. Thanks very much.

CHAIRPERSON BERRY. Commissioner Lee.

COMMISSIONER LEE. I have a question for Ms. Bethel. I think the school board's ultimate and most important responsibility is to educate their students and to make sure that each student does not feel he or she is excluded or being different or being left out. What happens if for whatever reason a student opts out of a class or some other activities? What does that do to the student's personal development compared to other students who are attending health educa-

tion class, but this student for some reason cannot because the parents opted out?

MS. BETHEIL. I'm really not sure I would know what the impact would be on a particular student, not knowing the circumstances, per se, to an individual case. Obviously, one can generalize that whenever a student is removed or opts to be removed, there is going to be an impact on that particular student and upon those remaining in the class. But without the circumstances as to what was involved in each, I could not say what the impact would be.

MR. WARONA. The only thing that we have argued in some of the briefs that were submitted is that there is also an impact on the children who remain in the class. The Sixth Circuit Court of Appeals agreed in the *Mozert v. Hawkins County* case, which was that if every time I, the student in the class, say something that's objectionable to you and you leave the class, we're certainly not teaching diversity and pluralism. We're teaching almost disrespect. So we're not asking students to accept what everyone has to say but the fact that people have different viewpoints that we have to respect because they are different viewpoints.

MS. BETHEIL. I just have to interject one thing because I think it's a perception that's really not valid. We don't have an agenda of any type, and we're not looking to cause people to be disbelievers. We don't do that. We are trying to create an atmosphere for students to flourish, if you will, to become intellectual, to differing views and respect the difference, to concur with one another and respect that. I guess we always say respectfully agree to disagree. We want students to feel well rounded, to feel comfortable, to feel part of a whole. What we try to avoid is the feeling that students don't belong, that they're disenfranchised, that they're discriminated against. That's really the concerns we have.

We believe in inclusion, not exclusion. And judging by what goes on in the newspapers and the media, some of the terrible things that you hear today, we're working very hard to create an understanding and an enjoyment of the diversity we have in our society, both religiously, racially, even amongst socioeconomic classes, even among sexual preference.

The feeling of having a comfort and respect for one another as individuals, that's really what's important, to teach children to love to learn. And yes, it does bother us when we have

to go to court often, but if it's necessary, then we do it. But we certainly don't have a separate agenda other than doing our very, very best for all the children that we serve in the State.

CHAIRPERSON BERRY. If there are no other questions, I have a few myself. The questions that I'm about to ask the panel do not in any way indicate my own personal point of view about anything I'm asking you. I'm simply asking you the questions in order to try to illuminate the issues and in part because I'm somewhat puzzled about the state of play on this issue and where we're headed as a people.

The first thing I'd like to ask, several times witnesses said things like the education establishment is opposed to bringing in the religious point of view, expressions like that. I'm curious about what one means by "the religious point of view." Which religious point of view is this?

Secondly—I'm going to ask all of you to address these questions, please. The first one is what do we mean by the religious point of view. Which one is it? Secondly, if the education establishment or people who run the education, the schools, and the State departments of education and all those offices, even if we assumed that they wanted to avoid some of these issues because they were worried about offending particular groups or worried about controversy and conflict and polarization, isn't it important to avoid conflict and polarization? And why are we opposed to avoiding conflict, those of us who are, if any of you are? Why are you opposed to avoiding conflict and controversy and polarization?

I'm a historian, among other things, and I'm aware that throughout human history some of the major conflicts have emerged over issues like race, nationality, and religion. People with different religions—all of us, at least in my case, thinking our religion is better than everybody else's and people ought to adhere to it. So if indeed what they were trying to do is avoid controversy, why isn't that a good value?

Then the third one is when we talk about avoiding—the schools should avoid teaching matters that affect the moral, religious, and ethical development of a child, give me some examples of something that does not affect the moral, ethical, and religious development or may not in any way affect that so that we can figure out what is left for the school to teach. That's the other thing I'd like to know.

And then finally I'd like to know, What do we think public education is for anyway? What are public schools supposed to be doing in the backdrop of your litigation or the issues that you deal with? What do you have in mind that you think these public schools are instituted for, and what is it they are supposed to be doing that is valid as you go about litigating these matters?

So, to the extent that any of you can shed any light on any of these questions I've asked, I really would desperately appreciate it. And I'd ask you, Mr. Infranco, first.

MR. INFRANCO. Thank you.

CHAIRPERSON BERRY. Any or part of it.

MR. INFRANCO. I'm glad you saved all the easy ones. [Laughter.] I think with respect to the first question, which religious point of view, I would say obviously in this country the longest standing tradition is the Judeo-Christian heritage. And I would say that it's inevitable that in studying the history of the Nation, for example, we would have to consider—a proper study of history should consider the role of religion in the formation of the country, in the formation of political institutions and social institutions. So there's a place where we recognize the contribution of religion and yet where we avoid espousing a particular religious view, where we avoid favoring one religion over another. And yet we understand the contribution of various religions. And that helps us, I think, to have a better appreciation for the diversity of religious tradition in the country. I mean, there was a time—I'm sure you know that the Puritans considered the Baptists—I guess Rhode Island considered them the cesspool of all religious views.

With respect to your other questions, if I might just give a framework, because you're really dealing with two issues here. The schools are primarily concerned with the establishment clause, which we understand. They most often talk about balancing the establishment clause with the free exercise clause. And I would submit to the Commission that there really is not much left of the free exercise clause, particularly with the Religious Freedom Restoration Act [RFRA] being stricken, although New York State is working on a State RFRA which may come in the future.

But I would point out to the Commission that the cases that I think promote religious freedom have not been decided on an establishment clause—pardon me—on a free exercise basis but

rather on a speech basis. Mr. McCarthy is, for example, talking about issues of sex education and the objections of parents, you're really dealing more with free exercise issues in which parents seem to have little to say. When you deal with issues of speech and opening what's otherwise a limited forum, you have decisions such as *Mergens*, *Lamb's Chapel*, *Rosenberger*, and others which the court strongly seems to feel that we cannot favor one type of speech over another.

So, given that background for understanding, it seems to me that while it's—and I'm trying to remember your second question. While it's probably impossible to avoid some conflict, I really think the crux here refers to Commissioner George's earlier comment of understanding what is nonreligion.

I have a student in a high school presentation stand up and ask me angrily, "Why do we have a Bible club here, why should there be any religious club?" The student, interestingly, was the head of an animal rights clubs. And I said to him, "Well, why do you have an animal rights club?" And he said, "Why not?" And I said, "Then why not a religious club?" And he said, "Well, we should have an animal rights club." And when I pressed him as to why, he said, "Well, because it's not religious." When he said that, he engaged in that remarkable piece of circular reasoning, oddly enough, to the approval of a majority of those present.

So again, there's a perception that religious speech is somehow dangerous or inappropriate. And I would submit that when you open a forum, you take a forum that's otherwise limited or closed and you open it, you have to understand there are a thousand other worldviews, some of which would be inconsistent or objectionable to religious views. So while there may be a great diversity of religious views, once you open the marketplace of ideas, quite simply it's wrong to exclude ideas because you don't agree with the comment.

I would suggest that in practice the Bible clubs that I've seen have produced not only little controversy once they're functioning, I've actually had school administrators tell me that they are wonderful clubs, that they do wonderful charitable works. And we have to understand to a great extent our moral beliefs are, of course—our societal beliefs are dictated by our religious background, even when we're not aware of it. So I'm cognizant of the time, and I will leave your

other two more difficult questions to my other esteemed counsel.

CHAIRPERSON BERRY. Yes, Mr. McCarthy.

MR. MCCARTHY. What is the religious point of view? I think the point of view of people of religion. And to give you an example, the *Bronx Household of Faith* case is one involving a church that wanted to use a school facility open to other groups. And the school said that they couldn't because they were going to be conducting religious worship there. Well, how is that neutral? How is it that religion in that instance was treated neutrally with the other groups that could use the [school] facility? It wasn't. There was no neutrality. In fact, the educational establishment's position has consistently been an antireligion position. Instead of being neutral in that case, they took the other side. In the *Shoe* case, instead of being neutral, they took the opposite side, the side against the religious group.

There are a diverse number of religions in this country, and they have to—their points of view have to be respected. There's much commonality among them. I mean, most of them do believe that we didn't create ourselves, that we were created by some supreme being, and that we owe that being thanks and worship for all he or she has done for us. So there are many, many common areas.

Secondly, you asked what isn't moral, religious, or ethical. Well, when I grew up and I went to school, the schools taught—I learned reading, writing, arithmetic, history, language, Latin. We weren't taught values because it was assumed that our parents would teach us those things. We were taught values that were values that were held in common by all the other students that attended school. For example, respect for others, honesty, integrity. Those things were always taught because there's no—I can't think of any religion that doesn't agree with those values. But there are many other values that are being taught by schools that differ sharply from the religious beliefs of many of the parents who have children attending them.

CHAIRPERSON BERRY. Well, I will—did you want to comment at all?

MR. WARONA. Yes. I think what we'd like to do is I'll handle questions one through three, and Ms. Bethel will take up the fourth.

CHAIRPERSON BERRY. Okay. Go right ahead.

MR. WARONA. I think—and I'm kind of bothered by what we've heard from the other copan-

elists today, because even when we talk about a religious point of view, it presumes of course that there's an "us" and a "them," and I think it ignores the fact that school boards are individuals with grassroots democracy who represent our communities. They are members of our communities. They are either religious people or they're not religious people. So I think there is no such thing as a religious point of view that is being discriminated by the big bad school district. That is just a topic that we don't understand.

In terms of why conflict is bad, I think it's not bad to avoid conflict unless of course in avoiding conflict you're setting very bad precedent or you're not speaking up for principles that are very, very important. And that's why, as Ms. Bethel was explaining before, we do litigate cases that we think are very important.

And lastly, in terms of when we talk about are we teaching values which affect moral, ethical, and religious values of children what do we mean, I think that there are oftentimes individuals who will claim the type of value that is always offended by what we do. And the only thing I think we can do is subscribe to the particular value of teaching children to be integral members of our society and productive members. If that means offending people at times, that is an unfortunate result but not an intended result. With respect to question four, I'll defer to Ms. Bethel.

MS. BETHEL. If my memory serves me correctly, it's why do we really exist. Well, we exist to educate students, educate children and we also educate adults. I think you're all aware of that. But in educating students, what are we doing? We're providing them with a groundwork, a foundation of information and knowledge that they can continue to learn on their own well after school, that they will be productive members of society with a knowledge base that will help them be successful in life, that they will reach their highest potential.

I don't want to be redundant, but basically I'd say we try to teach children to love to learn. Obviously, if we can accomplish that, we don't have to worry too much about it as they grow older. But we should, and I believe we do in New York State, recognize and rejoice in the degree of diversity we have in our State. That is to me something that is a positive aspect of our everyday life. In fact, in many areas, especially certainly New York City and many areas, many suburbs,

and throughout some parts of New York State the rich degree of diversity is incredible. The various religions—it's not just Judeo-Christian any more. Islam. Muslim. Buddhists. It's so many.

So many Third World nation students are coming to us and teaching all students to understand the intricacies of the religion. Not proselytizing that religion, not saying one is better than the other, but saying here we all are. We all make up citizens of this country or immigrants who have come to this country, possibly becoming citizens, possibly not. But we're all learning to live together, rejoicing in one another's differences, welcoming, if you will, the various things we can learn from one another. Understanding most of all respect for one another and sensitivity to one another so that no one should feel inappropriate. No one should feel as though they don't belong. There is far and enough room here for everyone to grow, for everyone to be educated respectfully with love for one another. That's what it's all about.

CHAIRPERSON BERRY. Okay. I want to thank the panel for taking the time to be with us today. You are now excused. We have some sign-out procedures for witnesses, and a member of our staff will assist you through that. Thank you very much. And the Commission will take a break and reconvene at 11:45 for the next panel.

[Whereupon, a recess was taken.]

Panel 2: Overview—Schools and Religion

CHAIRPERSON BERRY. Can everyone please take their seats. We're ready to reconvene the hearing. Could we have the sign language interpreter ask if anyone is in need of sign interpretation. [No response.] Thank you.

We will now have our second overview panel on schools and religion. This panel will address various viewpoints concerning the relationship between religious values and secular concerns. This panel has the following witnesses. Mr. Jeffrey Ballabon. Could the witnesses please come forward. Ms. Susan Douglass and Mr. Kevin Hasson. Please remain standing when you come forward, and I suppose the extra person is counsel to someone? What is your name, sir?

MR. DIAMOND. Nathan Diamond with the Union of Orthodox Jews Congregation.

CHAIRPERSON BERRY. Nathan?

MR. DIAMOND. Nathan Diamond.

CHAIRPERSON BERRY. Okay. Could you please raise your right hands while you take the oath. And I understand that Mr. Ballabon will affirm that he will testify truthfully.

MR. BALLABON. Yes, I do.

CHAIRPERSON BERRY. Could the other two of you raise your right hands.

[Whereupon, an oath was administered to the panel.]

CHAIRPERSON BERRY. Please be seated. Deputy general counsel, you may take over now, and we will continue with the proceedings. Have the witnesses identify themselves.

MR. HAILES. Thank you very much, Madam Chairperson. At this time we will ask each of our witnesses to formally introduce your name into the record and to present an opening statement, including information about yourself. Please proceed. We can begin with Mr. Ballabon.

Jeffery Ballabon, Member, Board of Directors, Toward Tradition

MR. BALLABON. Thank you. I am here today—my name is Jeffrey Ballabon and I'm here today to share with you some thoughts from a Jewish perspective on the critical matters facing schools and religion.

America is a great country, and I am proud and happy to be an American citizen. I am the son and grandson of Holocaust survivors. My wife and I have four school-age children, and I feel blessed by God and am thankful beyond measure for the freedom my family and I enjoy living in this great country to serve God according to our conscience, belief, and religion.

There are today many groups and individuals purporting to speak for Jews in America, but they have many different messages because the Jewish community is very diverse. I myself am a traditional Jew for whom adherence to Halakha, the Jewish way of life and law, is the highest priority. Halakha permits and results in much creativity and diversity within the ranks of observing Jews. So while I do not speak with authority for any particular group, I do hope my opinions are informative as a snapshot of the concerns of many religious American Jews about the state of public education as it relates to us and our children.

In addition, as I informed the Commission's staff, I do hope to pass on to the Commission written testimony from umbrella organizations that represent the broadest segments of Jews for

whom adherence to the dictates to our ancient yet vibrant faith is a way of life.

I have with me today Nathan Diamond as counsel who is the executive director of the Institute for Public Affairs at the Union of Orthodox Jewish Congregations of America, I believe the largest umbrella organization of Orthodox Jews. And I'm hopeful that between his knowledge of the law and my opinions, we'll be able to inform the Commission.

I would also like to say that I brought pictures of my clients. These are my kids. And I really don't know if I speak for anyone but them, but they're everything to me. Thank you.

MR. HAILES. Ms. Douglass.

**Susan Douglass, Principal Researcher-Writer,
Council on Islamic Education**

DR. DOUGLASS. My name is Susan Douglass. I live in Falls Church, Virginia. I represent the Council on Islamic Education, which resides in Palm Valley, California. For this reason, while I have a written statement with me, I would like to request that the submission in writing be delayed until Monday because the document on their letterhead is on the way from California.

The Council on Islamic Education [CIE] is a national resource organization that provides information to textbook publishers, education officials, curriculum developers, teachers, and other educational professionals. CIE, formed in 1990, is comprised of historians, academicians, scholars, and curriculum specialists associated with major universities and institutions throughout the United States, as well as educators, concerned parents, and students. The Council on Islamic Education's objectives include providing scholarly input toward achieving accurate and balanced information on Islam and Muslims, working with education professionals to make their responsibility of teaching about religion in public schools a worthwhile and successful one. A contributory approach towards participation in the education field is one of CIE's fundamental operating principles.

Civil rights for students of any religious faith begins with sound education of teachers, administrators, and students to build awareness about the diverse religious traditions followed by members of this world community. We are very fortunate in the United States that the efforts of numerous scholars and civic organizations and indeed theologians have resulted in development

of a sound civic framework for living in religious diversity. Working within the first amendment to the Constitution and decades of Supreme Court decisions, a set of guidelines for discussing religious faiths have been developed and disseminated nationwide. Guidelines for religious content in teaching and instructional material clearly differentiate teaching religion from teaching about religion. The relatively smooth process of building a consensus for teaching about religion must count among the most remarkable developments in the contentious debate over public education in the U.S. Detailed analysis has yielded approaches that allow for accurate balance and authentic portrayal of religions and the historical cultures they engendered. Grassroots efforts, such as conferences, teacher workshops, and collaborative efforts with State and local school systems, have helped to disseminate these ideas.

The three areas of most concern to the Council on Islamic Education with this testimony are first, sensitive and academically sound implementation of the guidelines in textbooks and other instructional materials, and, I might add, in teaching. Second, conformity of State history/social science standards and testing to the guidelines for teaching about religion and to a high level of scholarship. Thirdly, we are concerned with how implementation of these guidelines in curriculum and instruction contribute to maintaining a tolerant atmosphere in schools that supports the free choice of teachers, students, and their families to believe in God or not to believe in God and to fulfill the requirements of their religion according to the dictates of their conscience when they are in school. In such an atmosphere, neither policies nor teachers nor textbooks take a position in favor of or against the act of faith or in favor of or against the idea that religion provides a sound set of moral principles or constitutes a rational and viable model for life.

CIE as an organization believes that one of the best ways to foster civic respect for religious and cultural diversity is to focus on the shared human task through a comprehensive structure for teaching world history that does not depend on extolling one group over the other as superior at the expense of most others. The civic value of much recent history research, for example, is the way in which it has turned up links among the cultures and evidence of cumulative advance-

ment and achievement rather than contention over which ethnic or religious group should receive primary credit for certain achievements.

Effective teaching about religion is an essential component of an equitable and educationally sound framework for teaching about the human past. The focus of CIE's work encounters this kind of teaching in textbooks, where indeed we find that it was very common that antireligious assumptions were inserted into the text as though they were neutral and objective. It used to be very common for textbooks to attribute the development of religion in history as an invention or achievement of one culture or another. It was felt that God could not be portrayed in textbooks as the source of religion, even by attribution. Under the currently accepted guidelines for teaching about religion, this kind of sloppy teaching is labeled as a violation in effect because it explains away religion. This secularizing tendency of the material has the effect over time of undermining the ideas and chipping away at the intellectual validity of religion.

Another area of great importance and very recent is the State standards and accountability testing. The movements for creating educational standards suggest a very important civic challenge, particularly in the area of teaching about religion and history. While standards for math and reading seem quite straightforward, writing history standards is a very different exercise. Groups have thought that the process of determining what students should know would reveal if one was trying to save souls or indeed save the Nation. Which group's history is included; which is thrown out; which heroes and heroines are listed among the required facts; how much multiculturalism is enough or too much.

The new factor in the equation is that for the first time in history the States envision testing how well students have absorbed the list of required information and skills. Some of these are gateway tests determining access to scholarships, entry to college, and other privileges, even graduation. There are important civic implications in the idea that the State has legislated standards that require students and teachers to be held accountable for instructional material that may be neither intellectually nor religiously neutral. Some of the State standard setting processes have been very open to input before adoption while others have been less so.

It may interest the Commission that today all of the State standards documents contain the requirement that students learn the basic outlines of the world religions. As a testimony to the effective dissemination of the guidelines for teaching about religion by groups like the First Amendment Center at Vanderbilt University, we can report that nearly all of the State standards items on teaching about religion follow the guidelines for balance and neutrality among world faiths. All but two of the documents reflect awareness of these guidelines. Typical language notes simply and evenhandedly that students should be able to "compare the origin, central ideas, institutions, and worldwide influence of major religious and philosophical traditions" and then with a list following.

Virginia's and Florida's standards, which are nearly identical copies in terms of world history, however, are the only documents adopted so far whose standards do not meet the basic guidelines for teaching about religion. For example, these two States require analysis of Islam in terms of "the conflict between the Muslim world and Christendom, theological differences between Islam and Christianity, cultural differences between Muslims and Christians and religious, political, and economic competition between the two groups." Islam is the only world religion singled out for this restrictive and slanted treatment.

Requiring Muslim students to absorb this point of view and be able to repeat it on a test that may determine access to college and scholarships or even be denied full graduation on failure would be a clear violation of those students' civil rights. Not only might innocent students in these States be required to misrepresent their faith for the sake of an exam, but non-Muslim students are also directed away from recognized historical evidence and scholarship concerning cooperation between Christians and Muslims, theological and cultural similarities, and collaboration over the centuries of intellectual, scientific, and economic sort.

The effect of this negative—and I'm concluding now—combative discussion of Islam can lead to make of the Muslim student in the classroom a pariah. The effect in the schoolyard can be ostracism, bullying, and we now know all too well, even physical endangerment. I think that this is a development that our democracy does not need, but fortunately it is in fact isolated so far

to two States. But nonetheless, it is very crucial in most States, among which the State in which I live.

I have some other comments which I hope will develop in the course of questioning in terms of religion accommodation in schools. Thank you very much for your tolerance.

MR. HAILES. Thank you very much, Ms. Douglas. Mr. Hasson.

Kevin Hasson, President, the Becket Fund

MR. HASSON. My name is Kevin Hasson and I'm president and general counsel of the Becket Fund for Religious Living. The Becket Fund is a bipartisan, ecumenical public interest law firm which protects the free expression of all religious traditions. When I say bipartisan, our advisory board stretching from Sargeant Shriver and Eunice Kennedy Shriver, Rabbi Sobol here in the Congregation Emmanuel to Warren Hatch and Henry Hyde. We are ecumenical. We stretch from Cardinal O'Connor to again, Rabbi Sobol—Lenkowitz, Ibrahim Abul Mudia. We defend religious liberty not as a political packet, not as a proselytizing packet but simply as a basic human right for its own sake. Our clients to date have included Muslims, Jews, Christians, Buddhists, Native Americans, Mahout.

I have many war stories to tell you. I'll save them for the question and answer period. I'd like to suggest at this point that the stories that I have and the stories that I'm sure we'll hear from the other witnesses are most valuable as illustrations of a larger point: the implicit understanding of religion in America's public philosophy.

Every society has a public philosophy whether articulated or not. It is made up of the predominant assumptions about the great ideas on God and man, on the nature of society and the State, freedom and responsibility, and so forth. This public philosophy is the medium through which we all discuss the great ideas of the day. For example, it's a cardinal principle of American public philosophy that all men and women are created equal. That's an important difference from the American public philosophy, British public philosophy, Saudi public philosophy. There are enumerable examples of the elements of American public philosophy. Perhaps the preeminent one is all men and women are created equal.

A critical aspect of any society's public philosophy is its public anthropology, its implicit understanding of who we are and what makes us tick. Any[one] will tell you that all men and women are created equal even if he or she has never read the Declaration of Independence. That's an important statement in America's public philosophy of who we are. There are critical questions in any public anthropology as to whether human beings have a built in religious impulse or they don't. How society answers that question determines the contours of the religious liberty permitted.

Public schools are uniquely important vehicles for transmitting America's public philosophy in general, its public anthropology in particular, and especially its understanding of whether people are religious. By their curricula and by the behavior of their teachers and administrators, public schools literally teach children who they are. So when public schools systematically eliminate religion from all facets of public school life they teach children that their religious impulses at best are unimportant and at worse nonexistent.

I'll give you one example now. I'll give many more in the question and answer period. In the case of *CH v. Olivian* (which is now pending in the Third Circuit Court of Appeals in Wilmington, New Jersey) in December 1997, a little boy came to school with a book for the open reading period. The teacher had said, "When it's your turn to read, bring in a book you like." So after the traditional Dr. Seuss and—kinds of stories, CH got up and had a book called *The Big Family*, a story from his children's Bible, and it told the story of how the Jewish patriarch, Jacob, reconciled with his brother Esau. The teacher panicked. She thought it was utterly inappropriate for public school. She didn't permit him to read it in public. She required him to read it to her in private, thereby sending the message that religion is an embarrassment, that it's not something that's normal, it is something to be—it occupies the place that pornography used to have. It's something we tolerate in private and don't want to see in public.

Now, I have many stories besides that. In conclusion, let me say I don't think any of them represents some vast antireligious conspiracy. There is no such conspiracy. What there is is something far worse. There's no conspiracy against religion. There is a bureaucracy against

religion. There is an entrenched culture among public servants, no doubt good servants of the public, that says religion causes trouble and drains budgets with litigation and results in unpleasant items in one's personnel file. It results in shouting matches between parents and causes trouble.

The way to avoid religion, the way to avoid trouble, the theory goes, is to avoid religion. That is short-sighted, both tactically and pedagogically. It's short-sighted tactically because organizations like my own are here to ensure that there's at least as much trouble caused by excluding religion as there is by including it. And second, it's pedagogically unsound because it lies to kids about the way we really are. Thank you.

Discussion

MR. HAILES. Thank you very much. Mr. Hasson, you began this and I'll ask each of our other witnesses to describe an incident or a policy that you believe most directly and adversely affects the religious faith that you represent or know most about. We'll begin with Mr. Ballabon.

MR. BALLABON. Well, I said at the outset, I'm not really here with stories and the law. What I do know, however, to follow on with what Mr. Hasson said, is I believe it's true that in our culture generally we're overtaken somehow with the notion that religion or religious speech or religious ideas are shameful. They're embarrassing.

I know that in my work there are places where it's uncomfortable to wear a yarmulke. It doesn't make me less effective at what I do, but it's uncomfortable to wear a yarmulke. I know that there are people, when they find out that I'm an observing Jew, feel free—and I deal in my work daily with judges and I'm actually thinking in this case of a few judges who have done this—feel free to remark on it as if it's odd. I've heard the word barbaric. I've heard the word intolerant and judgmental, which I was only thinking at the time but they were saying about me without knowing it.

I've been asked with some surprise, "You seem so smart. How could you be religious?" And these are all genuine serious questions from judges. Because, as I say, I deal regularly with judges, not in their public capacity but privately. I think that what's emerging in this country, and perhaps not in all of the country but in many

places, is the idea that somehow religion is shameful.

And I reflect on how my children who are going to private schools, to Yeshiva, of necessity, because when we teach our children we don't just teach them the curriculum that the government wants them to be taught, as do we, which is math and literature and science and English and social studies and history, which is necessary and we want, but we also teach them our history. We teach it in Hebrew, Aramaic to some degree. Some schools, Yiddish. We teach them the laws and customs which are really all-encompassing and consuming.

So they go to Yeshiva, but in the afternoons or in the evenings when they come home, my kids play with their next door neighbors, the Walshes, who are Catholics and who send their kids to public school. And I know that when I see them interacting if they're not talking about sports, which is 90 percent of the time, the other 10 percent of the time they're usually remarking on the differences. They're asking questions. The Walshes just celebrated one of their son's First Communion, and my kids were over there. We had a bris in our family a year and a half ago. The Walshes were there. And the kids want to know about it. They want to ask about it. They're curious about it. They delight in it. The kids are proud of this.

And I wonder why we think that silencing that impulse in children in any forum, especially in the educational forum when they have the opportunity to interact and the opportunity to exchange information and feelings and ideas and pride in who they are and what they are, we try to squelch it. I don't understand the need to squash it. It seems to me the exact opposite if what we're trying to build up is tolerance and respect, to make it somehow shameful and private.

And so I certainly don't advocate the schools teaching religion as a form of advocacy for a specific religious point of view, but I do think that the idea that private religious discussion in schools, the idea of informing and teaching children about other religions and having children feel free to read a book that's important to them, even if its source is the Bible as opposed to Shakespeare or the Bernstein Bears, is something we should be encouraging and not be trying to hide.

CHAIRPERSON BERRY. Ms. Douglass.

DR. DOUGLASS. Well, I'm generally very optimistic about the education system, although I'm well aware that many of the difficulties that I've heard outlined here this morning have occurred. And I'm also well aware of a certain irreligious tendency. I don't want to say bias necessarily, but irreligious tendency which has a long heritage, I think, in Western culture and has its own history and its own sociology and maybe some anthropology.

In terms of policy regarding Islam and Muslims within the public schools and indeed in civic life, the two that I outlined, the State standards effort, because it is particularly I think as a new development dangerous because it really does impinge—as I like to say, it can tell students what to think rather than teaching them how to think.

Some of the processes that we're involved in in California have been very open, where public input is solicited. Some of the earlier standards efforts, among them, Virginia, were very closed and quiet and dealt with kind of by—and then produced as de facto things.

Now, these are very serious issues. This is the first time in the United States that such things will be tested. And math, okay. Reading, okay. History is a totally different matter, and it involves the cultures and the diversity.

And as I said, I'm very optimistic because I know that my observation on the Internet, most of the documents are up now, is that all of the States, with the exception of two so far, that have adopted standards have adhered to the guidelines. Virginia still does not. And particularly in the case of Islam.

What they also do then, it gets to the issue of identity which is very, very close to religion, is some of these State documents have a view of world history which is very exclusive, which tells students you are not important. After 1000 A.D. in some of these curricula, everybody but the West is out of the picture. It's not there, as though you could take a big eraser to the globe and put water masses there. Africa and Asia are the two that are most poorly dealt with. Meso-America is certainly the second.

In terms of the effect that this has on the civil rights of children because of the way Islam has been traditionally viewed in the West, the worst policy issue is the default ignorance that is allowed to exist. By bringing in text materials, we have gotten used to have our students through

generations come through the schools and come home with the most ridiculous statements about Islam which are ensconced in the textbook and which are eventually the object of testing. But when this comes to the State level, where such things can be enshrined in law and then be imposed through the system of testing, we have a different order of magnitude. While some people might not be overly concerned because this is just Muslims and kind of used to that sort of stereotype in the culture, the fact that some State documents—when I comment on them I say you're destroying with one hand what you're trying to build with the other. Because many of these State documents do want to clearly reengage the impulse of religiosity into the curriculum, but it does so in a very sloppy way.

One of the kinds of language that has come into, when you boil down this phrase, it says religion created the concept of God. First of all it makes little sense. And secondly, a religious person would not share that view. People didn't create God. God created people in the view of a religious person. If someone wishes not to believe it, that's fine. But the fact is that through much of human history people have believed in God and acted upon that belief. Therefore, it's historically valid to study these things and study them in detail and study them authentically.

There's always the problem in the discussion of religion, if one is not careful, and we deal in great detail with the textbook publishers and the reviews and the teachers on sensitizing them to the ways that this occurs. Where the text and the information being given very subtly can omit certain facts and interpret things, not from the point of view of the adherents as to guidelines or the way the adherents practice it but rather from the point of view of the filter of what people want to have thought about. That faith, eliminating it from the possibility of validity. And so when the dialogue among the various religious faiths occurs in the classroom, it must be done on a basis of accuracy, intimacy, so that the sacredness of the tradition is retained within the discussion and mutual validation of the various groups that are being represented in the curricula. I think that's a long answer to a short question if there ever was one.

MR. HAILES. Thank you. Mr. Hasson, with regard to the incident that you mentioned, do you have a view as to what the appropriate rem-

edy, legal or practical, would be for that student? And if there is none, what should it be?

MR. HASSON. That one is not in the case. Let me tell you what a parallel case was and what we did. The case was a little boy named Dwight Fisher in high school in Indiana in 1994. And once again, the facts are simply these. The teacher said—Dwight was in the first grade—“Your reward for reading for 5 whole minutes in front of the whole class is that you get to pick the book.” So once again there was a parade of Dr. Seuss and Fuzzy Wuzzy Bear and so forth. And Dwight got up one day and opened his book and said, “In the beginning, God created the heavens and the earth,” and got about as far as “In the beginning,” before the teacher took it out of his hand and said, “You can’t read that. This is a public school.”

Dwight’s parents called the Becket Fund, and we came riding over the hill and enforced the following settlement: that henceforth the sacred writings of all traditions, whether it be the Hebrew Bible, Christian Scriptures, the Koran, whatever, would be treated the same as any other source for purposes of literature and reading. And we demanded and got an apology in front of the whole class from the teacher. I think in such an individual case as that with an individual client, that is a sufficient remedy. The problem is these are not just a series of isolated individual cases. They are pervasive, and they’re not just in New Jersey, not just in Indiana.

My all time worst/best, however you look at it story, was in Baltimore in May of 1994. A little boy there was in shop class in a public high school fashioning a cross for his grandmother’s grave and was about to nail the crossbar to the upright when the shop teacher realized what was happening and reached over and took them both out of his hand and said you can’t build crosses in public schools. And once again, an apology and so forth was appropriate in that individual case. But in the systemic phenomenon that these cases really illustrate, that religion is excised from the public schools, again not out of some conspiracy but really out of some bureaucratic fear that I’m going to get in trouble. I’m not going to make it home in time for dinner. The budget is going to get depleted and all sorts of horrible things will happen if I let this kid build a cross or read a book or whatever.

A case we’re investigating now is a case of a little Muslim boy in Florida who simply wants to

be excused from class for 5 minutes every day to say his prayers in private without any fanfare. If he were a diabetic who needed to be excused three times a day to take his insulin, no one would blink an eye. But because instead of taking insulin he wants to pray, there is an uproar. That bureaucratic mentality needs—it’s system-wide and needs a systemwide remedy.

MR. HAILES. Thank you very much. Madam Chairperson, I have no further questions.

CHAIRPERSON BERRY. All right. Are there questions from Commissioners for the panel? Do you have a question, Vice Chair?

VICE CHAIRPERSON REYNOSO. Yes, I think I have two different sorts of questions. One is what should the role of public schools be when the religion of an individual requires that individual to proselytize? And they will proselytize because they believe their religion is the right religion and all the other religions are the wrong religion.

MR. HASSON. No religion worth its salt doesn’t.

VICE CHAIRPERSON REYNOSO. Beg pardon?

MR. HASSON. I said no religion worth its salt doesn’t think they’re right.

VICE CHAIRPERSON REYNOSO. And so—and assume that the schoolchild is therefore proselytizing on schoolgrounds. At what point is that proselytizing okay? Presumably if it’s a one-to-one situation at lunch time, I suppose it’s okay. What if it’s a Christian picture in a classroom? What if it’s at a graduation exercise? At what point does the school have a responsibility to also assure the comfort of those who don’t want to be proselytized? That’s one general question.

The other question is a quite different one, and that is that we all, I guess because we’re religious people, like to think about all the good things that religion has done, but the reality is that in the history of the U.S. we’ve had bad things. We like to point out that religious leaders were among the leaders in civil rights, but now we want to forget that religious leaders were very often the leaders of the segregationists. We like to point out that religious leaders spoke out about slavery. We want to forget now that religious leaders said that God meant to have slaves and blacks were meant to be slaves. And if we have a responsibility to teach about the good parts of religion, don’t we also have a responsibility to teach that sometimes it’s sad to say, not all of it has been well in American history in

terms of the leadership provided by some of those religious groups or religious leaders? But in terms of current issues, my first question is the more bothersome one. And any of you that want to comment on it, be pleased to.

MR. BALLABON. Could I put it to Mr. Diamond?

VICE CHAIRPERSON REYNOSO. Sure.

MR. DIAMOND. I would answer your first question from an adult context since it seems to me—at least my friends that have older kids keep telling me that kids are a lot smarter than we think. Mine's only 19 months, so I haven't learned that quite yet.

Last year my organization and a wide range of religious organizations were very pleased to join with President Clinton at the White House when he issued a set of guidelines with regard to religious accommodation in the Federal workplace, having to do with a wide range of issues, whether it's flexibility of time schedules that religious people need or various other issues, having a Bible in the workplace and so on. And one of the issues that the guidelines addressed is the proselytization issue. And it got in the President's guidelines in a very simple bright line rule. If you're the person that wants to proselytize, you can approach another person and begin the conversation, and when the person says, "No, I don't want to hear any more, I don't want to discuss this anymore," the initiator is obliged to stop. A pretty simple rule.

And I guess above a certain age you could explain that rule to most teenagers who would probably be the most likely candidates for this kind of activity, and they would see on the one hand that the capability not only of the initiator, but it engenders a respect for all the students because we're saying we think you can handle being approached on this topic, and we respect your ability to give a very simple response: "No, I don't want to hear any more."

And also at a practical level you can be sure that the person on the receiving end is probably going to go home that evening and say, "Gee, mom" or "Gee, dad, guess what one of the things we talked about in school today was with me and my classmates." And that would ensue an appropriate conversation, and the parents would be able to give guidance. So I think we can take a page out of the adult handbook and respect the ability of school kids to deal with it.

VICE CHAIRPERSON REYNOSO. An issue came up in California just recently where a youngster was going to speak at a high school graduation and had to prepare the comment ahead of time. The school officials viewed it as a proselytizing speech, 5-minute speech at a graduation and thought it inappropriate under those circumstances. The child went into court, failed to get a preliminary injunction. The courts seemed to say, "Well, there are too serious issues here to give you a preliminary injunction. We'll hear it later." Even though the graduation took place. Apparently feeling that at that point that proselytizing would then interfere with the right of the others not to be proselytized in a situation where they couldn't just say no. That is, it was a public setting. What's your reaction? Those issues, I guess, are going to be coming up.

MR. DIAMOND. There are two reactions. One reaction is how do you figure out when something is—if there's religious content, whatever exactly that means, in a student valedictory address to his classmates? So if a student wants to say, "I give thanks to God for the fact that I was able to achieve all I achieved in my years here at Smith High School and thank God" and so on and so forth, or if a student has some other form of religious language.

First of all, I'm afraid how we're going to measure. What's the measuring scale for it? Well, if you quote a biblical verse, it's proselytizing. If you thank God, it's not proselytizing. Where exactly are we going to start drawing? That is not a bright line test as far as I can tell.

And it also seems to me that—quite frankly, I'm often confused by all the litigation all the way to the U.S. Supreme Court that's gone on with the graduation exercises. There's some—I understand—I think it relates to the comments of the bureaucratic fear that any mention of religion or any mention of God is somehow the plutonium that lines the gymnasium during the graduation exercises. Because, again, I think on a certain level, of course, no one should be coerced with regard to any type of religious activity or faith or so on. On the other hand, it's disrespectful to the intelligence of students and their parents.

If I'm walking down Times Square and there's a preacher in Times Square who's evangelizing for Christianity with a megaphone and all Times Square hears it, I personally—and I'm happy to defer to the fact that other people

might view this differently, but I personally don't view that as any more coercive than somebody sitting in a gymnasium with a thousand other people, some of whom are Jewish, Christian, Muslim, atheist, and so on. If someone gets up and they say from their personal faith they want to thank their god for what they've accomplished, I personally don't view that as coercive, and I think it's disrespectful to the intelligence and the independence that hopefully—and the ability for critical thinking. And hopefully by the time a kid gets to graduation they have some of those skills to say just because we're in a room where some religious message is uttered you're not going to crumble.

CHAIRPERSON BERRY. Could I follow up on that question? What about—Mr. Diamond, what if more than what you just described so benignly occurred in the gymnasium during graduation? A speaker got up and said, "I not only thank my God for what happened and here I am, but any of you out there who have been less successful, it's because you don't believe in the one true God. My faith is the only true faith, and you're going to go to hell if you don't agree with it." How about that? That's less benign.

MR. DIAMOND. That person obviously does really not deserve to be valedictorian. [Laughter.] I think in a certain sense it begs the question whether students are obliged to check their constitutional rights at the schoolhouse door. Why is it just because they're in a building that says P.S. on the front of it, they do not enjoy—forget about religious speech. Let's talk free speech. Suppose a student wants to get up and say that they believe that the second amendment guarantees the right to bear arms. Suppose they get up and say that they're a woman and they had a very difficult period in their teenage high school years because she became pregnant and she chose to have an abortion and she's grateful for all the support of her classmates in getting her through. And there are people in the audience who are offended by the fact that in a public graduation speech someone is grateful for the support that they were granted in that trying and difficult personal experience.

They have a first amendment right to say those sorts of things. And this gets at the issue of why is religion different. Why is this fear of religion anything more than any other hot button topic on which there are sharp differences and disagreements within our society? If we want to

invoke the dinner table—you know, the classic dinner party rules of don't talk about religion and politics in public school, I'm not sure what we're going to be talking about any more.

VICE CHAIRPERSON REYNOSO. I wonder if the others had some observations on that?

DR. DOUGLASS. I think that there is a historical element perhaps to the sort of tension that's being displayed through such litigation. And certainly it speaks to the sense of civic responsibility and even just human, the desire to please others perhaps or to have others be pleased with one. Perhaps it's because the balance is sort of moving in a direction as a reaction to the vacuum that was there when the secular mode—I think this is changing. Where it seemed comfortable to just leave God out of even the discussion of religion and history. And now that this is coming out in their environment, we have an opportunity over the next generation to practice this in the classroom, which is a kind of mediated forum.

Very often the kind of proselytizing that you describe, particularly so poignantly, is the kind that is born of ignorance of other faiths, ignorance of other traditions, ignorance of other possibilities, and a lack of discussion where such commonalities would be brought out and instead, differences, contrast, competition is viewed as the norm. But over time, practicing through content, this becomes a very useful way to practice the civic discourse that we will carry out as adults. That certainly begins at the valedictory podium for these kids.

I keep wanting to come back to a solution again. Not sanitizing. Not covering up. Not even partitioning, for example, the three monotheistic faiths so carefully, which is so often the approach the textbooks take. You know, "We don't want to even come near the similarities. We claim this one. Yours is Abraham and this is Jesus, who belongs to this faith, and here's Muhammad." That doesn't wash Islamic speaking at all, because we accept all of the prophets going back to Adam. So it's the kind of thing where scholarship comes into the issue, where very often the content, the way the content is handled that becomes so contentious in terms of multicultural inclusion and religious discussion is not because we are providing too much information but because we're providing too little.

I have been forced through the work that I do—one year I read something like 12 textbooks

from cover to cover. History. World history textbooks. It was excruciating. But I sure learned a lot. And I learned that the coin of the textbook realm is not argumentation and evidence but competing narratives. Conclusions really shorn of argument. So you're being told in essence what to think; you're not being shown how to think. And then you have to go an extra work group to do critical-thinking exercises. That's foolish. It doesn't bring you scholarship, and it doesn't practice scholarship.

And the same thing that applies to the kind of inclusivity that discussion of world history would bring to where we understand each other's identity, foster each other's identity, religious and cultural, as a world, as seeing ourselves as human, as having participated in the human project. I think that's the basis on which we need to go where we look to scholarship to argue things in ways that students will be called upon to argue in their academic careers based on evidence, based on analysis and so on and so forth. And I think that this really does speak to the civic discourse of our relationships.

MR. HASSON. Two thoughts on the proselytization question. The question really is, Is the speech free? If the speech is free, then kids get to say whatever they want to say. There is a right of free speech. There is no right not to be spoken to.

VICE CHAIRPERSON REYNOSO. Even in a captive audience setting?

MR. HASSON. Sure. True. As long as the speech is free. The kid is free to get up and say the football coach is an idiot. You ought to be able to get up and be able to get up and say thank God. Not everything that is untoward in the society belongs in the courts. Sometimes it just belongs in good manners. If the speech is free, fine. Let him say what he wants to say.

On the question of doesn't religion do bad things and if we're going to talk about religions, shouldn't we say that, too. Sure. What the problem is now is we're being dishonest with our silence. And this dishonest silence really teaches the kids something. It is true that to the everlasting shame of believers in America there were people on both sides of the slavery dispute. It is true that to our everlasting shame there were people on both sides of the segregation issue. But nobody got up then and said what people are saying now, which is in effect, "President Lincoln, you can't say that in an inaugural address,"

or "Dr. King, you can't have that dream on the Mall, public property." The silence that we hear now teaches the kids that religion is anti-American and at worst an inessential part of your human constitution. And that is a terrible lie to tell our kids.

VICE CHAIRPERSON REYNOSO. Thank you.

CHAIRPERSON BERRY. Questions for the witnesses? Commissioner George.

COMMISSIONER GEORGE. Thank you, Madam Chairman. I was struck, Mr. Ballabon, by our stories about being confronted even by judges who would be willing to remark negatively on your religiosity and your status as a believing Orthodox Jew. And I'd like to follow that up a bit more generally.

We're of course accustomed to thinking of the religious diversity of the Nation in terms of Protestants, Catholics, Jews, increasingly Muslims, Buddhists, representatives of other Eastern religions, and so forth. And we're well-known to be a very religious nation, particularly by comparison with the West European nations, which by all accounts now have in most cases become highly secularized. But is it not also true that while we are a very religious nation, taken as a whole there is a significant divide in our culture when it comes to issues of religion which might be encapsulated by just reflecting on the different religious beliefs and levels of religious practice as between say my own faculty, the Princeton University faculty, and the first 700 names in the Trenton, New Jersey, phone book?

I suspect that you would find a much higher degree of religiosity in the public generally than on the Princeton faculty. And there's plenty of polling data that bears this out, particularly by Lipster and Rothman and people like that.

And I think when you bring that into focus, then you have to begin to notice that in the picture of religious diversity in America there's also a view called secularism. Secularism is a viewpoint, a worldview of a minority, perhaps even a relatively small minority there but a minority that is frankly highly represented in the elite segment of the culture in places like Princeton University. I imagine Harvard University or Pennsylvania, Chicago, UCLA, the leading institutions. Probably throughout higher education, throughout education schools. Not that everybody is secularized. I'm a university professor. I'm not a secular person. I'm a religious believer. Our Chairman is not a secularist. She's a relig-

ious believer and so forth. But still disproportionately.

In view of that, do you think that we ought to be concerned not simply about evenhanded treatment as between religious groups but evenhanded treatment as between religious groups and the secularist viewpoint? And if so, which way does that cut? Does that mean we have to be concerned that secularism not become the governing philosophy of the schools in the name of neutrality, that we confuse neutrality with secularism? Or does it mean that we somehow have to find a neutral position not only as between Islam, Christianity, and Judaism—just take the viewpoints represented on the panel here today—but also as between those viewpoints and secularism? And if so, is there a neutral position? And if there's not a neutral position, can we really carry on with the idea that we can have public education that's neutral in this country, public education that fulfills the requirements that we all want to see as far as our constitutional law is concerned in this country? And Mr. Ballabon, if you could begin.

MR. BALLABON. I'd like to confer with Mr. Diamond for a minute.

COMMISSIONER GEORGE. Certainly.

MR. BALLABON. Now that you asked me a general question, I'll talk about the schools. I think what you're saying is absolutely correct. I see it. I feel it. It's acknowledged. And sometimes what's frightening about it most is that the worldview you're describing is accepted as a sort of religion-created God. It's the norm. It's the rational position because after all, empirically, we haven't found a way to weigh, measure, and see God. And therefore, barring that empiricism, we simply ignore it as if it's not real. And that view, that view that there is no God is really what I think is inhabiting the secular culture you're describing and really I think infiltrating into the way children are being taught. But that in itself is a real belief. That is a belief that often I find in public and private discourse which brooks no doubt at all.

There's at least a degree of self doubt and agnosticism to some degree, I believe, even among faithful, even among believers who believe something but understand there may be a difference between belief and knowledge. And belief could be strong enough and maybe sometimes even stronger, but it's not the same necessarily as knowledge.

And yet the view, the secular view you're discussing seems to think that what it has is actual, pure, ultimate knowledge. It's remarkable because we've just begun to scratch the surface of the physical universe. We know almost next to nothing about it. Our ability to measure and see and quantify is—you know, just as if it's the first molecule in an ocean, and yet we think we've drawn ultimate conclusions about metaphysical certainties. And those are, since we can't yet see it, we will not discuss it. And the result of that is that the incredible divide, the quantum divide between people who believe from whatever position of faith that man is a unique creation and not simply an accidental development, that man is not just an agglomeration of molecules or a moving, talking piece of meat have a view about what the implications are for relationships with other human means, known commonly as morality, and the source of that morality and the deference and responsibility due to that morality that overcomes and exceeds himself.

I know that my youngest was listening to a tape recently and the song I'm thinking about, it's an important mitzvah. Mitzvah means commandment. It was a song about walking across the street because it's an important commandment to take care of yourself. And I remember being struck, having heard that a thousand times, 900 times too many, being struck by that message being different than be careful because you might get hurt. The message is you are steward over a body that you inhabit, but it's given to you by God and your responsibility is not to your whim of the moment but to a creator who is eternal who is simply giving this to you, lending this to you as a gift. And that's your responsibility. And taking that whole idea out is not neutral. That utterly changes the course of human interaction.

Now, I'm not saying we advocate in the public schools the idea of the creator, but the notion of advocating that we now know or teaching as if we now know that there is no such being, that human beings are not created by design, that the world is not created by design, just eradicating that from our children's education seems to have a profound impact on the way they deal with one another and a profound impact on public discourse. I hope that answers your question.

COMMISSIONER GEORGE. Thank you. Yes. Dr. Douglass, would you be willing to take a shot at that one?

DR. DOUGLASS. I was somewhat amused when he gave the description of the head covering because you can be typecast just by one glance. It is nothing but a 1-yard piece of fabric that you somehow attach to your head. But it speaks volumes in the civic arena.

And this again speaks to the prevailing notion or the notion that seems to prevail. I'm not really sure that it does, the one we're talking about here all day long, that somehow being religious means that you're rationalism is not fully intact, that you're not fully able to understand the way things really are and you're just sort of caught in some adolescent fantasy that is called religion or belief in God.

This is a very dangerous thing, and I very much appreciate what Mr. Ballabon has said about the issues of morality. And again, I think the way of addressing it is that we must understand, we must push the envelope of what it means to teach about religion, what it means to talk about religion in a civic arena to the point where we become intimately acquainted with each other's sacredness, with each other's sacred feelings and beliefs and the roots of those values.

Simply because it appeals to logic in some cases, as he said, that we have—Islamic interpretation of the entrusting by God of the human body to us for our lifetime and it appeals to a child. But it's not a question of saying, "No, you must not cross the street without looking because God has given you this body." We believe that is wisdom. So we're informing one another about our sacred and most deep reasons for what we do. And I think this is extremely healthy. And we'll begin to eliminate some of this kind of looking at each other across divides and proselytizing across huge divides of ignorance.

COMMISSIONER GEORGE. Mr. Hasson, if you could stay with the same question—but I'd simply note that—I would be particularly interested in your answer in view of your point about the bureaucratic mentality as opposed to a conspiratorial problem. When you say that the problem is a bureaucratic mentality that has resulted in what you described as a pervasive problem and not simply isolated incidents, to what extent is that bureaucratic mentality the fruit of (a) ignorance, (b) fear of litigation and controversy, and to what extent is it rooted in secularism as an alternative to religious faith and one which has adherents and indeed influential adherents and

who are likely to have an impact on public institutions, including public schools?

MR. HASSON. I think (c), all of the above, is the correct answer. In my experience, bureaucrats' misbehavior—and it isn't just in public schools. The exact same phenomenon happens at every level of government service if I can digress for one second and tell my favorite story. It's one that Perry Mason might have called the Case of the Sacred Parking Barrier. And of course, it could only happen in California.

The Golden Gate Park tea garden is a particularly beautiful spot, and behind the tea garden there was an eyesore, an abandoned parking barrier that someone had just junked one day rather than take it all the way back to the garage. And for many years the patrons of the park complained about indeed there's a parking barrier in our tea garden and for many years the parking barrier survived until the day that a new age group discovered the parking barrier and began to worship it. Whereupon, the very same people who refused to remove it as an eyesore instantly removed it, announcing they have a constitutional obligation to keep public property from being worshipped.

It is exactly the same mentality that demonstrates that it isn't confined to public schools and it isn't confined to good candidates. People on the Christian right who say there's an anti-Christian conspiracy are wrong. It's not an anti-Christian anything, and it's not a conspiracy. It's an antireligious generally bureaucracy that's born of fear, that's born of misunderstanding, and it's born really of listening to one side in the struggle for the public anthropology component of our public philosophy. One side says who we really are is not listening to the other side. Here's what I mean by it. And this maybe gets to your question about neutrality if you're doing religion and its opposite.

The Supreme Court has been saying—the majority of the Supreme Court has been saying about 30 years now the government must be neutral, not only as among individual religions but between religion and what it calls irreligion. There's always been a very substantial minority of Supreme Court Justices as there are today who think that that doesn't make any sense. Nevertheless, that's what the majority currently says. However, that can mean two completely different things. Neutrality between religion and irreligion can be mean two things. One is it can

mean neutrality on who God is. That makes some sense. Most governments can't get the department of motor vehicles right. Who's going to entrust them with theology?

The other thing it could mean is neutrality on who we are. Neutrality where the people are religious. And that makes no sense. Imagine the government trying to rule for the common good while pretending not to know whether people were sexual beings. The results could be hilarious. The results are equally hilarious except you don't know whether to laugh or cry when the government pretends to be neutral on whether the people are religious. And I think that's the way out—the beginning of a way out of the box.

COMMISSIONER GEORGE. I wonder though if you really can get out of the box. Because let's take a—I think it's still taught in schools—civics. Can American civics be taught while the teachers, whether they work in public school or not, while the teachers attempt to observe a strictly neutral position as between the proposition that human beings are created with God-given rights and that they're not? Given the nature of the American founding and the American regime, if I can use that word from political science, it seems to be pretty important as a matter of civics that a position be taken if we're really doing civics and not history or some other lessons. So what do you think, Mr. Hasson?

MR. HASSON. I try to focus by saying neutral on who God is. I didn't say neutral on whether God is. The founding documents take a position that there's a God. Our individual rights are from the Creator. The dilemma of the radically neutral civics course is that it has no good account for where individual rights come from if you're going to say that we have to pretend we don't know whether there's a Creator in our government philosophy. If there isn't a Creator who gives us rights, then rights are really not rights. They're just sort of little bubbles of political power held together by surface tension, and they can pop fairly easily. So if someone is teaching a serious approach to individual rights and attempting to be neutral on whether there's a Creator who's the source of them, that person is going to—taking it down one level and scratching the question of who this Creator is. Seems to me that's a perfectly appropriate thing for the government to be neutral on. Then taking in the question of who we are, that's a ridiculous thing for the government to attempt to be neutral on.

Human beings throughout history in every society there ever was have had birth rituals, death rituals. There have been protocols. There have been whatever. It's preposterous to profess agnosticism on whether we are a religious people. And the government, by coming down on its rather obvious side doesn't have to take a position on who God is. Shouldn't and doesn't have to. It can simply say religion is part of our people's basic society, and therefore because religious impulse is natural to human beings, religious expression is natural to human culture, and welcome it into society at all levels, including the public schools.

COMMISSIONER GEORGE. Toward the end of the last century and the beginning of this one, of course, what is now the largest Christian denomination, the Catholic Church, built a whole system of Catholic schools in order to accommodate the free exercise of the Catholic faith by the Catholic people, feeling, apparently, that their faith was not being accommodated properly in the public schools. I know now that there is an important, large, and growing Jewish day school movement. We were informed at our Washington hearing on this subject, that many in the Islamic community are now working toward building what is emerging as an alternative system because of the need to accommodate the very demanding, certainly from a non-Islamic point of view it seemed very demanding, obligations to pray frequently during the day and so forth of the Islamic faith.

DR. DOUGLASS. Twice.

COMMISSIONER GEORGE. Just twice? Okay. I could manage that, I think. But in any event, we are informed that there are those who feel as though it just can't be done or isn't being done in the public schools sufficiently to accommodate Islamic faith so an alternative system has to be built there.

In the opinions of Mr. Ballabon and Dr. Douglass, I'd be interested in knowing whether you feel that the schools, the public schools, are in fact on the whole and for most devout or observant Muslims and Jews, capable of creating an atmosphere, both in terms of curriculum and social environment, that could fully accommodate the religious rights and the free exercise of the Islamic and Jewish faith, or is the future for observant Jews and devout Muslims, if those are the proper descriptive terms, in alternative

schools like the Catholic school system? Perhaps Dr. Douglass could go first.

DR. DOUGLASS. There are of course debates within our community as to whether it should be this way or it should be that way. And my response to that is we don't need to argue this. The tradition of parochial schools, religious schools, is a long and old one in this country, and the existence of public schools is also a very proud tradition. I think it depends very much on the needs of the individual, and they should be allowed to choose free from any kind of judgmental handling of the issue within their community as well as without.

My children, as it happens, are in a Muslim school as well, but first and foremost—I won't say first and foremost, they're there because Arabic is a difficult language, and I had to learn it at the age of 20 something and am still working on it, but also because you don't learn nuclear physics on the weekend in a Sunday school. And Islam is a very deep religion and [has] a great deal of tradition.

There are also issues of accommodation, and there are also the kind of issues that you addressed in terms of the secularizing—I always called it the intrusion of secular assumptions until someone said, no, they're not secular assumptions; they're irreligious assumptions. But we're using that term here in terms of a perhaps alternative religion-like construct, as secularism.

The tradition of Muslim schools is indeed developing. I think the numbers have doubled since 1993 to the point where we're at about 450 some now and who knows. We don't even have complete mailing lists.

I think that on the issue of vouchers, for example, some of the committee would say this; some would say that. Some children have thrived in the public schools as Muslims, and I would want them to be there to contribute to the civic discourse. I would want the public schools to be there also for the reason that I don't see how we can maintain a diverse society where the components can talk to each other unless we have arenas where we exchange information, unless we even have an agreed body of very flexible but agreed body of information that we can draw on for our civic discourse based on the knowledge that is acquired.

Now, Sunday school has a natural—as you say, you do physics and science and math and reading and so do Muslim schools, so do Jewish

schools, so do Catholic schools. There are natural interests. Some of them material interests. There need to be Muslim schools. There need to be Jewish schools. There need to be schools to accommodate that personal choice. But there also need to be components from each in the public schools, and there need to be public schools as well to uphold and create a basis. But those public schools must strive to accommodate and affirm the identity of all the people who are there and not try to block out, erase, either through secular content if they wanted to call history that for a moment, or through the kind of biased treatment of religion or secularized treatment of religion that we're discussing is still somehow entrenched as a mentality.

COMMISSIONER GEORGE. Thank you. Mr. Ballabon.

MR. BALLABON. In some theoretical vague construct, could the public schools accommodate passive Judaism? Meaning, could a child go through a day of public school and not have his or her religious obligations offended or crossed over? Yes, theoretically. Could they include the affirmative—not just teachings but values of Judaism? Clearly not. And our religion imposes on us as parents an affirmative obligation to raise our children, to teach them the Torah, teach them functionally how to function as Jews. There are many requirements in life. It's not simply, or it's not only, a belief system. It's a very active physical system as well. There are laws to know. And it also imposes on us an affirmative obligation to teach them how to be productive citizens of whatever society in which they dwell. That obligation, that dual obligation, is really what's reflected in the day school movement and the Yeshiva movement to do both.

There was a time—I believe once upon a time and if you need to go into this in a little more detail, I'm sure Mr. Diamond knows more—that there were time limit programs. Kids could take math and science and public schools and then go study the Torah or Jewish law elsewhere. That was struck down by the Supreme Court. It's no longer feasible. It was once upon a time, although it was really never effective, where parents would send their kids to public school and then afterwards for some form of 1 or 2 hours of instruction separately and apart. That really wasn't effective either.

And what we're seeing now is people from all across the Jewish spectrum, from very observant to nonobservant, wondering why there seems to be, particularly in the nonobservant community, such tremendous attrition. Why all the studies show that if you start with 100 unaffiliated Jews in this generation, in four generations you have 2 or 3 left.

COMMISSIONER GEORGE. How many?

MR. BALLABON. Two or three. Something under five. And if you start with 100 Orthodox Jews in four generations you have 911. And it's really linked to nothing other than teaching. It's linked to nothing other than raising our children with a very clear set of ideas and ideals and standards.

The problem seems to me—and I really don't understand this, so now again I'm speaking for my client. The Jewish community spends—and this is certainly true of other communities which have private parochial schools, billions and billions of dollars year in, year out, and give the money as tax dollars to help support education, which is the second half of our belief: the obligation to produce productive citizens, the obligation to raise our children to be productive. And that's used by the rest of society to public schools to educate their children.

And I wonder why it seems too impossible, so impractical, or so offensive somehow that those same resources should also be helping our students, our children as they learn math and science and literature. Not certainly as they learn the first half of our obligation, Torah, but the things that the government expects, mandates, requires, anticipates, that we want from our children also, that we're teaching our children. They certainly will take standardized tests of some form or another. They'll end up competing in the world at some time. Doesn't the government have an interest in that, as well? The government takes our billions of dollars, doesn't help us with textbooks or computers. Now, we do not resent the idea of supporting education societally. It's critical. But it's unfortunate and I think utterly inappropriate and certainly it is not mandated by the Constitution in my view to have funds come back to us dedicated to those things that government wants us to teach our children in our school.

COMMISSIONER GEORGE. Thank you, Madam Chairman.

CHAIRPERSON BERRY. All right. I want to thank the witnesses and say that we appreciate your being here with us today and to say that you are now excused. A member of our staff will escort you off the table and there are some sign-out procedures. And I will say to the Commissioners we will now recess for a lunch period and return here promptly at 1:45.

[Whereupon, the luncheon recess was taken at 1:00 p.m.]

Panel 3: Religious Expression and Equal Access, Part I

CHAIRPERSON BERRY. May I have your attention, please. Our lunch break is over. We will now reconvene the hearing. Could the sign language interpreter please ask if anyone is in need of interpretation. [No response.] Thank you.

This afternoon we have two panels on the topic of religious expression and equal access. This part of the panel will examine the right of religious expression of students and the right of students to use school facilities, particularly under the Equal Access Act. This panel is made up of Ms. Christian Smith, Ms. Lindsey Smith. Please come forward as I call your names. Ms. Rebekah Gordon and Ms. Anna Crespo. I understand that these witnesses are accompanied by their parents. Could you please come forward. Please remain standing. Stand up, please, and raise your right hand.

[Whereupon, an oath was administered to the panel.]

CHAIRPERSON BERRY. Thank you. That's fine. Thank you very much. Please be seated. Deputy general counsel, will you please take over the proceedings.

MR. HAILES. Thank you, Madam Chairperson. And thank you for being here today. I want each of you in your own words to please tell the Commission at this time your full name, your age, and describe what happened to you that you discussed with our staff when they called you. Christian, do you want to start?

CHAIRPERSON BERRY. Let's turn the microphone down so we can hear Christian, please. Thanks very much to the parents.

Christian Smith, Elementary School Student, Woodbury Heights, New York

CHRISTIAN SMITH. My name is Christian De-mariner Smith and I'm 9 years old and when passing out these National Day of Prayer things

to my class and when I got to the teacher, she wanted me to collect them all and take them down to the principal and ask if I could pass them out. And he said that it's religious and he wanted me to collect them.

MR. HAILES. And what did you do?

CHRISTIAN SMITH. I collected them and took them home.

MR. HAILES. Lindsey, will you tell us what happened to you?

**Lindsey Smith, Elementary School Student,
Woodbury Heights, New York**

LINDSEY SMITH. My name is Lindsey Meyer Smith and I'm 12. And I wanted to pass out the National Day of Prayer invitations last May 1997 and I passed them out and I gave them to the class and the teacher. And then the day after I passed them out, the teacher said I couldn't pass these out and I had to go out in the hall and talk to the principal and the teachers. And he said that—the principal said that I was not allowed to bring in things about God.

MR. HAILES. Rebekah.

**Rebekah Gordon, Elementary School Student,
Brooklyn, New York**

REBEKAH GORDON. My name is Rebekah Gordon. I'm 9 years old. And we had a concert December 7. We were practicing and the concert was scheduled for December 19. So I was going to sing a religious song called "Happy Birthday Jesus," and it was a public school. So a few weeks later the school's principal said I couldn't sing it because it was a religious song. So my mom and some other friends helped me to fight for it, so I sang the song. And my mom finally told me that it's okay to tell you're religious and to show your faith to other people.

MR. HAILES. Thank you, Rebekah. Anna.

**Anna Crespo, High School Student,
Freeport, New York**

ANNA CRESPO. Hello. My name is Anna Crespo. I'm 18 years old and I'm a senior at Freeport High School. The major problem that we had in our Bible club last year was that we couldn't be in the yearbook because my principal said that our club was not sponsored by the school. And of my understanding, there are other clubs in the school that are not sponsored by the school and that they are in the school yearbook.

Discussion

MR. HAILES. Thank you very much, all of you. Now, I'm going to ask each of you some very specific questions. And Lindsey, I want to start with you. When did this happen?

LINDSEY SMITH. Last year in May 1997.

MR. HAILES. Did you have any literature this year for the National Day of Prayer to hand out?

LINDSEY SMITH. Yes.

MR. HAILES. And did you hand it out?

LINDSEY SMITH. Yes.

MR. HAILES. Were there any problems?

LINDSEY SMITH. No.

MR. HAILES. And Christian, did you hand out any this year?

CHRISTIAN SMITH. Yes.

MR. HAILES. You did. And did you hand it out to your classmates?

CHRISTIAN SMITH. Yes.

MR. HAILES. When you handed it out to your classmates last year, you mentioned that the teacher made you collect them.

CHRISTIAN SMITH. Yes.

MR. HAILES. Did your classmates—when you first handed them out though, did your classmates say anything to you?

CHRISTIAN SMITH. No.

MR. HAILES. They accepted them?

CHRISTIAN SMITH. Yes.

MR. HAILES. And then you had to go back and collect them when the teacher said—

CHRISTIAN SMITH. Yes.

MR. HAILES. Did your classmates, did they treat you any differently after you had to collect the literature you had given out?

CHRISTIAN SMITH. No.

MR. HAILES. And Lindsey, this year you handed them out without incident?

LINDSEY SMITH. Yes.

MR. HAILES. All right. Rebekah, you mentioned that you sang your song in December last year, 1997?

REBEKAH GORDON. Yes.

MR. HAILES. And how did your friends treat you after this happened?

REBEKAH GORDON. Well, they treat me really well because I have a lot of friends in the school. And there is like two of the friends got in—some of the friends, they didn't want to be my friend any more because most of them weren't Christians. So when I told my mom, she said to have friends that are Christians. So I had friends that are Christians in my class instead of other peo-

ple in the class, so I had friends in my class and nothing happened.

MR. HAILES. Were there other—you mentioned it was a religious song that you sang. Were there other songs that were sung that were religious?

REBEKAH GORDON. No.

MR. HAILES. You were the only one that sang a song that was religious.

REBEKAH GORDON. Yes.

MR. HAILES. Anna, you mentioned the yearbook. Was that an episode that occurred this year or was that last year?

ANNA CRESPO. Last year. But my friends, my peers, are running the club this year. They are also trying to get the picture, the club picture in the yearbook, but they couldn't.

MR. HAILES. So the same result as last year with the effort of your club? What's the name of your club?

ANNA CRESPO. The Truth Club.

MR. HAILES. And can you describe some of the activities?

ANNA CRESPO. Basically, the Truth Club is just a group of students that meet after school in a classroom to talk about some topics that are going on in our society and even our nation. Some of the topics that we talk about are AIDS—we had a topic that we named "Sex in the '90s," and we had some flyers. We put some flyers on the hallways in the school, and our principal took them down because he said that that was promoting students to have sex. And we don't encourage students to have sex. What we do is to—I'm sorry. What we do is to put the issue in the Word of God. Know what I'm saying?

MR. HAILES. Well, now, is your club open to students of all different faiths?

ANNA CRESPO. Exactly.

MR. HAILES. And are members of different faiths in your club?

ANNA CRESPO. Yes.

MR. HAILES. Can you tell us some of the faiths that are represented in your club?

ANNA CRESPO. One of them, just one of them that went to our club last year was from Islam. That religion is one.

MR. HAILES. Lindsey, let me ask you this. Where did you get the invitations to National Day of Prayer? Where did you get the flyers?

LINDSEY SMITH. My mom and I think a couple of her friends had them so she said I could pass them out.

MR. HAILES. Well, Madam Chair, I have no further questions at this time.

CHAIRPERSON BERRY. All right. Does any member of the panel have any questions for the witnesses?

COMMISSIONER LEE. I do.

CHAIRPERSON BERRY. Yes, Commissioner Lee.

COMMISSIONER LEE. I just have a question for Rebekah. If some of your classmates were not Christians, would you still be friends with them?

REBEKAH GORDON. It depends if they're really good friends inside of them. If they're really good friends, I'll be friends with them. If not, if they're bad friends inside of them, I wouldn't be friends with them.

CHAIRPERSON BERRY. Yes, Vice Chair.

VICE CHAIRPERSON REYNOSO. I have a question for Christian. Last year, Christian, where did you give out the pamphlets? Was it out in the playground? Was it in class? Where was it?

CHRISTIAN SMITH. Like when we just go into school, I passed them out.

VICE CHAIRPERSON REYNOSO. Before you went into the classroom?

CHRISTIAN SMITH. Like when I got in the classroom.

VICE CHAIRPERSON REYNOSO. Oh, when you got in the classroom.

CHRISTIAN SMITH. The beginning of school.

VICE CHAIRPERSON REYNOSO. Okay. So then that's before the class actually started? That is, before the teacher started teaching?

CHRISTIAN SMITH. That was when we were unpacking our backpacks.

VICE CHAIRPERSON REYNOSO. And then when the teacher started, she asked what you were doing and then asked you to pick them up again. I think you mentioned that not this year but last year the teacher asked you to pick them up from your friends that you had given them out to?

CHRISTIAN SMITH. Yes.

VICE CHAIRPERSON REYNOSO. And Lindsey, where did you hand out your pamphlets last year? This year, you testified you had no problem, but last year was it in the classroom? Was it in the playground?

LINDSEY SMITH. It was in the classroom.

VICE CHAIRPERSON REYNOSO. Sort of the same way as Christian, before the class actually began but inside the classroom?

LINDSEY SMITH. Yes. But she collected them the day after.

VICE CHAIRPERSON REYNOSO. And did the teacher ask you, too, to pick them up after you had distributed them, or what happened?

LINDSEY SMITH. Yes.

VICE CHAIRPERSON REYNOSO. And do you know whether or not the teacher had any instructions from the principal or anybody else or was that—do you think that the teacher was doing what she thought was the right thing to do?

LINDSEY SMITH. She didn't know what they were at first but then—

VICE CHAIRPERSON REYNOSO. Did she ask you what they were, or did she see one?

LINDSEY SMITH. Yes, I gave her one.

VICE CHAIRPERSON REYNOSO. Oh, I see.

LINDSEY SMITH. And then the day after she saw it, then she collected them from the class. The principal said.

VICE CHAIRPERSON REYNOSO. Oh, she collected them the day after?

LINDSEY SMITH. Yes, the day after.

VICE CHAIRPERSON REYNOSO. You mean the kids didn't take them home?

LINDSEY SMITH. Some kids took them home, and some kids left them in the desk.

VICE CHAIRPERSON REYNOSO. And this year, how did you distribute them? Did you distribute them the same way?

LINDSEY SMITH. They put them in envelopes, and that's how they distributed them.

VICE CHAIRPERSON REYNOSO. And did you give them to your classmates individually, or do they have boxes like for mail where you can just put them in?

LINDSEY SMITH. Yes.

VICE CHAIRPERSON REYNOSO. Did you put them in the boxes?

LINDSEY SMITH. Yes.

VICE CHAIRPERSON REYNOSO. So you didn't distribute them in the classroom itself this year?

LINDSEY SMITH. No.

VICE CHAIRPERSON REYNOSO. Okay. And Rebekah, when you sang the song that you sang, the complaint came later. Were the other children in your classroom also presenting songs? Was it an assembly, or what sort of function was it where you sang that song?

REBEKAH GORDON. I sang it at the Christmas concert. The children in my class, they were listening to other kinds of songs like jazz or hit songs like that, but to me, in those kind of songs,

I don't think they're really appropriate in my Christian—

VICE CHAIRPERSON REYNOSO. But this was you singing and some of the other children singing in your own classroom. Is that right?

REBEKAH GORDON. Yes.

VICE CHAIRPERSON REYNOSO. Okay. It wasn't in an assembly for the whole school or something of that sort?

REBEKAH GORDON. Yes.

VICE CHAIRPERSON REYNOSO. And you say that some of the songs you didn't think were right for—in terms of your Christian religion? Some of the songs that the children sang?

REBEKAH GORDON. Yes. Some of the songs the children sang that I didn't think they were appropriate.

VICE CHAIRPERSON REYNOSO. Can you give us an example of that?

REBEKAH GORDON. Like some songs like rock songs, jazz songs. Some of those songs I don't really know about.

VICE CHAIRPERSON REYNOSO. And they sang them in the classroom the way you sang yours?

REBEKAH GORDON. Yes.

VICE CHAIRPERSON REYNOSO. Okay. And Anna, do you know whether in your school—well, let me start this way. Why were you told—on what basis were you told that a picture of your club could not appear in the yearbook? Was there an explanation for why that was true?

ANNA CRESPO. No. The only thing that the principal told me that if we put our picture in the yearbook that would bring problems with the parents and he didn't want that problem with parents.

VICE CHAIRPERSON REYNOSO. So you weren't told that there's some sort of school policy that says only those clubs that are related to classes—I know that some schools, for example, permit clubs only when they're related to things that are taught in the school and then don't officially permit other—don't recognize officially other kinds of clubs that may have other interests but are not related to the subject matters that are taught. You weren't told there were any such policies or anything of that sort?

ANNA CRESPO. No.

VICE CHAIRPERSON REYNOSO. Just that the principal felt that some parents might object if a picture of your club appeared?

ANNA CRESPO. Right.

VICE CHAIRPERSON REYNOSO. Okay. Thank you. Thank you, Madam Chair.

CHAIRPERSON BERRY. Does any other—Yes, Commissioner George.

COMMISSIONER GEORGE. Thank you, Madam Chairman. Children, I'm sure that Dr. Berry, our Chairman, at the end of your panel will thank you all for being here. I want to give you my personal thanks for coming and sharing your testimony with us and helping us in our work, which we think is pretty important, particularly on this issue of religion in the schools. I want to ask you all some questions, but if any of my questions are questions that you don't want to answer or that make you uncomfortable to answer, please just don't answer.

VICE CHAIRPERSON REYNOSO. Or you don't understand.

COMMISSIONER GEORGE. Or you don't understand. Yes. If you're like my students, you'll say a lot of my questions are ones you don't understand. [Laughter.] And I don't want to make you answer any questions. That's my point. But I want to ask you some questions, and if you feel comfortable answering them, that's fine.

Rebekah, I hear people sometimes say, especially where I work people sometimes say that you should keep your religion out of school. That your religion is something for church and something for home, but when we're in school, public school, we should focus on other things and keep our religion private so our faith should be private there and be reserved to our home and to our church. Do you agree with that or do you disagree with that or what do you think about that? Do you have any thoughts about that?

REBEKAH GORDON. Well, I disagree with that.

COMMISSIONER GEORGE. Tell me why.

REBEKAH GORDON. Because I think everybody should know about Jesus if they want to have a good life and a Christian life. And I really think that religion—well, I think religion should be told to all people. So they should know their rights. That they want to know—that they can tell their religion in school and at work and other places.

And other people say you can't bring your Bible to school and you can't tell your testimony to school. There's a child in my class who's a Jehovah's Witness. She says she wants to be a Christian but her parents have to decide if she can change her religion. And I say all you have to do is ask God to change your heart so you can

be a Christian and you will live a long, good life if she wants to obey God. And she says she doesn't want to, so I don't do anything to her. It's her choice if she wants to be a Christian or not.

COMMISSIONER GEORGE. So you think it's pretty important to share your Christian faith with other students and teachers?

REBEKAH GORDON. Yes, I do.

COMMISSIONER GEORGE. But when they say that—when they've heard what you've said about Jesus and about your faith and they say that they don't agree with you or that they don't want to change their faith or change their religion, then you just drop the matter? You don't stay after them?

REBEKAH GORDON. I don't—because it's only their choice to listen to me or not. I don't make them listen to me. I just tell them.

COMMISSIONER GEORGE. Okay. And when you say that some of your friends and schoolmates are not Christians, do you mean that in the sense that they are members of other religions? For example, Jewish people or people who are Buddhists or Muslims, or do you mean people who maybe they're Christian in their background or formally Christian but they're not really active and don't really believe very much of Christian faith. Which of those did you mean? In other words, you have some of your classmates who are say Jewish?

REBEKAH GORDON. Well, I don't have anybody that's Jewish, but I have some—a lot of people, a lot of them are Jehovah's Witnesses.

COMMISSIONER GEORGE. Okay.

REBEKAH GORDON. So, like I said, it's their choice if they want to listen to me or not. I don't make them listen to me. All I just want them to have a Christian life. I'm like a caring person. I don't want them to have a bad life or a good life, just want them to have an okay life that they can go with.

COMMISSIONER GEORGE. Thank you. Lindsey, could you answer the first question that I put to Rebekah, too? What do you think about the idea that our faith belongs in our church and it belongs at home and our family but not in the school? That since in the school we have people of different religions, we should keep our religion private in the school?

LINDSEY SMITH. I disagree with that, because—

COMMISSIONER GEORGE. Can you move the microphone up so that we can hear you?

LINDSEY SMITH. I disagree with that because it's my belief that I can talk about God to other people who don't know God.

COMMISSIONER GEORGE. And what would you say if somebody said, "Well, Lindsey, if you want to do that, then you should go to a church school and not do that in a public school." What would you say about that?

LINDSEY SMITH. I would just—I would say that I want to like talk about God because it's my religion, but if they don't want to hear it, they don't have to.

COMMISSIONER GEORGE. So you agree with Rebekah that you'll share your faith with somebody, but if they tell you that they don't want to hear any more, you just stop?

LINDSEY SMITH. Yes.

COMMISSIONER GEORGE. Anna, do you feel the same way?

ANNA CRESPO. Yes. I believe that this Nation was founded with Christian principles. And basically what our club does is to try to maintain those Christian principles that helped this Nation, our nation, grow. That's basically it.

COMMISSIONER GEORGE. Christian, when you handed out your flyers for National Day of Prayer, did anybody that you handed one to tell you that he didn't want one? Do you remember anybody doing that?

CHRISTIAN SMITH. Yes.

COMMISSIONER GEORGE. And what did you do when they said they didn't want one?

CHRISTIAN SMITH. I didn't give one to them.

COMMISSIONER GEORGE. You didn't give them one. That was probably a smart thing to do. If I can come back to Rebekah and Lindsey and follow up on your answer to my question earlier. What would you say if somebody made the following argument. What if somebody said, "Well, gee, if we let you hand out your Christian flyers or let you sing your Christian song, well, then, all the people from the other religions would have to have their chance to hand out their flyers and sing their songs and pretty soon the whole school would be dividing up along the lines of the different religions. So the Christian kids would only be hanging around with the Christian kids and the Jewish kids only with the Jewish kids and the Jehovah's Witness kids with the Jehovah's Witness kids and we wouldn't be one community any more. That our religious faith, which is supposed to be a good thing,

would end up dividing us and making us sort of enemies of each other."

I've heard people say that, and then they say that's why they worry about letting Lindsey hand out her flyers or letting Rebekah sing her song. That it would all become a source of conflict, and we'd create cliques and divisions. What do you think about that, Rebekah?

REBEKAH GORDON. Well, you said that school could break up into different religions?

COMMISSIONER GEORGE. Yes.

REBEKAH GORDON. I will say that the Constitution, the first amendment will say we have freedom of religion and speech and—

COMMISSIONER GEORGE. It sure does.

REBEKAH GORDON. Well, I think the Constitution should be on firm ground for religions. So I think when they said I couldn't sing the song, I was real shocked because it's like if they took the privilege from the Constitution. The Constitution is for freedom of religion. So like you just said, if it breaks up, it will be like a war between religions and who should believe in this and who should believe in that. So I don't know what to do with that.

COMMISSIONER GEORGE. Lindsey, how about you? Can you imagine maybe kids forming into gangs, the different religions, and being unkind to each other because they were different religions if we all just didn't leave our religion behind when we came into school and not talk about it?

LINDSEY SMITH. Well, because religion—they're not supposed to like—they're supposed to be like preach about God and not try to make a big argument over it. And we should just—

COMMISSIONER GEORGE. Let me just ask, Lindsey, have you ever had a problem where because you've raised the issue of religion with somebody it created a conflict between you and that person so you didn't talk to each other any more or anything like that or not?

LINDSEY SMITH. No.

COMMISSIONER GEORGE. No?

LINDSEY SMITH. Because they believe that I'm not allowed to speak about God?

COMMISSIONER GEORGE. So you could have a friend—sorry. Go ahead. I'm sorry. I interrupted you. Go ahead.

LINDSEY SMITH. Yes. Because all my friends think I can because it's like a right. I could do that.

COMMISSIONER GEORGE. It's a right. Yes. And are you able to have friendly conversations even

with people that you disagree with about religion?

LINDSEY SMITH. Sometimes.

COMMISSIONER GEORGE. Tell me this. When you had your problems and you thought your rights were being violated, you raised the issue with your parents, obviously. Everybody can shake your head, yes. You told your parents about it. And then were you all represented by lawyers in the end? Christian, did you have a lawyer who helped you and your daddy and mommy with the case? Do you not remember or—Lindsey, are you Christian's sister?

LINDSEY SMITH. Yes.

COMMISSIONER GEORGE. Do you know the answer to that question if Christian doesn't?

LINDSEY SMITH. I think.

COMMISSIONER GEORGE. You don't know?

CHAIRPERSON BERRY. Ask your mother or your father. [Pause.]

LINDSEY SMITH. Yes. We had American Center for Law and Justice.

COMMISSIONER GEORGE. And they represented you. And eventually it sounds as though—in response to Vice Chairman Reynoso's question, it sounds as though your lawyer worked out—worked it out so that your rights would be respected and that the next year you would be able to hand out your literature?

LINDSEY SMITH. Yes.

COMMISSIONER GEORGE. Rebekah, do you know if your mommy—if you got a lawyer that represented you so that you could sing your song? You can ask your mommy.

REBEKAH GORDON. American Center of Law and Justice.

COMMISSIONER GEORGE. Same organization? Yes.

REBEKAH GORDON. Yes.

COMMISSIONER GEORGE. And did you talk to the lawyer personally, Rebekah, or did your mom just talk to him?

REBEKAH GORDON. My mom talked to the lawyers.

COMMISSIONER GEORGE. And did you ever go into court, or was it all handled outside of court? You can ask your mommy.

REBEKAH GORDON. It was all handled out of court.

COMMISSIONER GEORGE. Oh, okay. You know the answer. It was handled outside. Anna, how about in your case? Did you talk to a lawyer, or did your dad or mom?

ANNA CRESPO. No. First of all, I talked to my pastor because I didn't know what to do. I went for advice to my pastor, and he gave me the number of American Center for Law and Justice, the lawyers. So I talked the problem out with the lawyers, and they said that they were going to be on the case and they were on the case.

COMMISSIONER GEORGE. And did you talk to the lawyer personally or just your dad?

ANNA CRESPO. My pastor.

COMMISSIONER GEORGE. Oh, your pastor talked to the lawyer?

ANNA CRESPO. No. Me and my pastor. It was both of us.

COMMISSIONER GEORGE. You and your pastor talked to the lawyer, and you explained what happened?

ANNA CRESPO. Yes.

COMMISSIONER GEORGE. And do you know—did you ever have to testify, or was it all handled without there being any hearings or proceedings in court?

ANNA CRESPO. We didn't have to go to court.

COMMISSIONER GEORGE. Okay. Good. Unless any of the rest of you have thought of anything you wanted to say to me, I'm just going to turn it back over to the Chairman and she can see if anybody else wants to talk to you.

CHAIRPERSON BERRY. Thank you. Anyone else have comments or questions? [No response.] I just had a couple, just for information, just so I'm clear about what happened. In your case, Anna, I'm not clear as to whether the problem was solved. Your club, which is called the—

ANNA CRESPO. The Truth Club.

CHAIRPERSON BERRY. Truth Club. After the lawyer got involved, you and your pastor went to the lawyer, they didn't settle it by having your picture put in the book?

ANNA CRESPO. No.

CHAIRPERSON BERRY. What happened?

ANNA CRESPO. Nothing happened. They had a picture taken in the yearbook and we still—people that are in the club today this year, they went to the office, to my principal's office and talked to him also and they couldn't get the picture in this year.

CHAIRPERSON BERRY. So we need to have—staff needs to find out from the American Center for Law and Justice—it's the same counsel, right? what happened. Is the case ongoing, or what has happened in the case? Yes?

MR. RAUM. For the record, I'm an attorney with the American Center for Law and Justice, who is involved in all of these.

CHAIRPERSON BERRY. What's your name?

MR. RAUM. Bryan Raum, R-a-u-m.

CHAIRPERSON BERRY. Can you answer the question?

MR. RAUM. Sure.

CHAIRPERSON BERRY. Please do for the record.

MR. RAUM. I'm sorry?

CHAIRPERSON BERRY. Please answer the question. Can you answer the question, I said.

MR. RAUM. Can you repeat the question, please?

CHAIRPERSON BERRY. The question was the status of the issue that Anna was telling us about.

MR. RAUM. Yes. It was my understanding last year that it had been resolved, so this new information to me is surprising. We would certainly like to pursue it further.

CHAIRPERSON BERRY. Well, we'll just ask the staff to find out and place here in the record whatever the resolution is. Without objection, so ordered.²

Anna, the other thing I was interested in, when you were answering questions, you said one of the things that the Truth Club stood for, if I understood you correctly, was the idea of America as a Christian nation and adhering to Christian values. What does that mean in terms of people who don't believe in Christian values and who may be Buddhists or Muslims or Jews or have some other religion? If America is a Christian nation—and maybe I misunderstood you and that's very possible—what role do they play, and how do you think Christians should interact with them, people who are not Christians?

ANNA CRESPO. People who are not Christians?

CHAIRPERSON BERRY. Yes. Did you understand my question?

ANNA CRESPO. No.

CHAIRPERSON BERRY. When you were talking earlier, did I hear you right? You said that

America was based on—as a nation, was based on Christian values. Did I hear that right? Something like that. Maybe we could read it back.

ANNA CRESPO. I said that this Nation was founded by Christian principles, and that we are trying to maintain those Christian principles that were lost in the past in the public schools.

CHAIRPERSON BERRY. Right. So what about people who don't believe in Christian principles or who are not Christians or who believe that the principles that the Nation is founded on aren't necessarily Christian? They may believe in them, things like individual rights and freedom of speech or even of expression, but they don't believe they are necessarily Christian principles. What would you think about those people?

ANNA CRESPO. They have the right to do other things in school that are not valuable to this country. How come we don't have the right to talk to other students or to spread our feelings about the Word of God or about the Bible? How come we can't mention the name of God in school, and they can hand out condoms and stuff that are not being valuable to our society?

We're not trying to convert people to Christianity. We're just trying to let them know the truth. That's why we named our club The Truth because we believe that Jesus is still the only way, the truth and the light, and nobody can come to him [God] except by him. So that's why we—

CHAIRPERSON BERRY. Okay. And Rebekah, the song you were singing, would you mind singing some of it so I can hear which song it is? Do you remember it?

REBEKAH GORDON. Yes, I remember it.

CHAIRPERSON BERRY. How about singing a little bit of it? We have a couple of minutes here. I didn't get my dose of singing this morning.

REBEKAH GORDON. The song is called "Happy Birthday Jesus." And it goes—

[Whereupon, the witness sang.]

CHAIRPERSON BERRY. Well, thank you.

COMMISSIONER GEORGE. You can come and sing at my class any time, Rebekah.

CHAIRPERSON BERRY. I don't mean to say that the rest of you can't sing if you want to, but I pointed that out because that was the song that she was singing. It thought it was another song I know called "Happy Birthday Jesus." Well, I won't sing it to you. [Laughter.] Does anyone else have any questions for the panel? [No re-

² Despite its diligent efforts, the staff was unable to determine whether and, if so, how this matter was ultimately resolved. These efforts included several unsuccessful attempts to reach the pastor and attorney of Ms. Crespo by telephone and in writing. The staff was told that Bryan Raum is no longer an attorney for the American Center for Law and Justice.

sponse.] Well, let me thank you so very much for being with us today. This has been very, very helpful to us, and I'm supposed to say that the witnesses are now excused. And thank you. And the staff will have some procedures that you must go through as you leave. Thank you very much and thanks to your parents.

Panel 3: Religious Expression and Equal Access, Part II

CHAIRPERSON BERRY. There is a second panel, part two of the panel on religious expression and equal access. We'll have three religious leaders concerned with equal access by religious groups to school facilities. This panel has the following witnesses: the Reverend Steve Fournier, the Reverend Robert Hall, and the Reverend David Silva. Could those three persons please come forward and remain standing. Find your chairs, but just remain standing, please. And the other person who is counsel to one of the other ministers, whose name I did not call, is Reverend—

REV. ROBERTS. Jack Roberts.

CHAIRPERSON BERRY. Jack Roberts. Could you please raise your right hands.

[Whereupon, an oath was administered to the panel.]

CHAIRPERSON BERRY. Please be seated. Thank you. Deputy general counsel, please take over the proceedings.

MR. HAILES. Yes, Madam Chairman. Good afternoon. We're going to ask each of you, and each of you has a unique experience with regard to your religious faiths and the public school systems. Will each of you give us a 5-minute statement about your views with regard to the public school systems. And if you will further identify yourselves, starting with Reverend Fournier.

Reverend Steven Fournier, the Good News Club

REV. FOURNIER. My name is Reverend Steven Fournier. I'm a pastor of the small church in upstate New York. My wife and I held a Good News Club in the town of Milford. In 1996 my wife and I made a simple request of the Milford Central School District. Like many groups before us, we made a request for our club to be able to meet at the school after school hours. And little did we know that that simple request would bring us to where we are today, and that is in Federal court. When we first told the district that we would fight for our right to use the school, we were not

taken seriously. In fact, it was asked by the school board president, "Where will you get the money to fight this in court?" Fortunately there are groups out there who will help those who are unable to take legal action on their own because of the cost.

I'm sure many of you may be wondering what is the Good News Club. Like many of the groups that are allowed to use the school, for example, the Girl Scouts, Boy Scouts, 4-H, we seek to teach children moral values. However, the reason we are being discriminated against is that we seek to teach these values from a Christian perspective. In other words, we are going to be mentioning God, there is going to be praying and reading from the Bible, things which the Milford Central School District found unacceptable.

We live in a society where children kill other children, where children kill their own parents, and where children have little respect for others and even less respect for themselves. We seek to teach them morals. We seek to teach them that God has given a standard by which we ought to live. That we should not lie; we should honor our parents; that we should do unto others as we would have them do unto us. Those are the things that we teach in Good News Club. We do teach that we need to have a personal relationship with Jesus Christ as Lord and Savior, that that is what gives these moral values their Christian perspective. To take Christ out would be to lose that perspective.

The Good News Club is not Sunday school. We are not affiliated with any denomination. We do not teach the traditions of any certain church, things such as different modes of baptism, how one should celebrate the Lord's Supper, or any certain liturgy. We do not tell the children they should go to the church which I pastor. In fact, most of the children in the Good News Club do not attend my church. Some don't attend any church. Further, our church is seldom if ever mentioned during club. Again, we seek to teach morals from a Christian perspective. We seek to make these children better people through a relationship with God.

In the Milford Central School District policy for community use of the school facilities, it is written that the school is to be used for, and I quote, "the purpose of instruction in any branch of education, learning, or the arts." However, what they mean is any branch of education that does not mention God. From day one, the school

board and the former superintendent have made it clear they did not want us there. They looked at us as being different from all the other groups of the community simply because we are religious in nature. And because we are religious in nature, they have discriminated against us.

We ask for no special treatment. We simply want the same rights afforded to other community groups. We simply wish to use a public building to meet in. I find it sad that in this day and age, that in this country, we have to go to court for our right to meet in a public place. I find it sad that this Commission even has to address issues such as religious discrimination in this great country, but it's nonetheless a factor we all must deal with.

In closing, I praise God that I live in this country where I'm free to worship the god I believe in. But I see that freedom being slowly chiseled away. And my prayer is that this tide of religious discrimination which has crept over this country over the past 20 years or so can be turned back to the point where we can have a balance, where there truly is freedom of religion, freedom to believe, and freedom not to believe. Thank you.

MR. HAILES. Reverend Hall.

Reverend Robert Hall, Bronx Household of Faith

REV. HALL. My name is Reverend Robert Hall, copastor of the Bronx Household of Faith. The Bronx Household of Faith is a community-based Christian church of the historic biblical persuasion. It has functioned with limited resources over the years, using primarily our own homes and apartments and also rented facilities. It needs a larger place to meet for Sunday worship, but it cannot afford commercial real estate prices.

In September 1994 we approached Community School District 10 in the Bronx for the purpose of renting Middle School 206B for Sunday worship services. The request was denied citing a regulation which states no outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purposes of discussing religious material or religion or material which contains a religious viewpoint or for distributing such material is permissible.

We filed suit in Federal district court, arguing that the regulation violates our first amendment right to freedom of speech. The issue before the court was whether the school district, in renting its building to outside groups, creates an open or limited forum. If it is the former, then it is an open and shut case. The school district cannot restrict speech, including religious speech. We argued that it is an open forum by virtue of the broad spectrum of civic, social, and community welfare topics allowed in the forum. The court held that it was a limited forum. Therefore, since religious worship is outside the limited forum, it can be justly excluded.

The court's conclusion was clear. It was the premise that was disturbing. The presiding judge, Loretta Prescott, ruled that historically and constitutionally in this country, however, religion cannot be lumped with other social, civic, and community activities. From our earliest Pilgrim forefathers it has been the tradition in this country for government and religion to remain separate. Therefore, the assumption that broadly stated purposes such as civic and community must also encompass religious is unfounded. This is simply wrong. To say that religion—more specifically, to say that our Judeo-Christian tradition with its precepts to honor thy father and mother, to treat others as you would have them treat you, to love thy neighbor as thyself as neither civic nor social nor community implications is to ignore all of human history, let alone American history. Her reasoning has the appearance of marginalizing religious groups and edging them towards the fringes of society, a subtle and incremental form of discrimination.

We appealed to the Second Circuit Court of Appeals. They rejected our appeal on the grounds that there is no viewpoint discrimination in the school district's regulation. Religious discussion is allowed for topics and activities that are allowed within the boundaries of the forum. Since religious instruction and/or religious services are outside the limits of the forum, the freedom of speech issue does not apply. However, the courts have now created the categories of religious discussion, religious instruction, and religious services.

Thus, should the Bronx Household of Faith rent a school building after hours for an activity that falls within the boundaries of a school's limited forum, it must look to the State to see whether it has crossed the line from religious

discussion, which is allowed, to religious instruction and/or a religious service. For the State to enforce this distinction is nothing less than entanglement and therefore a violation of the establishment clause, contradicting the very purpose of the State's regulation.

The second circuit also expressed concern that impressionable schoolchildren would confuse the school with a church if a church was allowed to rent its building. Well, our church is allowed to rent the school as long as it is not for religious worship or instruction, but somehow children passing by the school would not be confused as long as we restricted our speech to secular topics inside the building. Religious speech is being singled out for discrimination. Moreover, the school in question currently rents its facilities to a youth paramilitary organization. The participants are quite distinguishable as they come to the school dressed in military fatigues, not to mention the highly visible military drills in the schoolyard for all passersby to see. I have yet to see the children in this community confuse the school with a military post.

Furthermore, it is a fact that New York is one of the handful of States that does not allow churches to rent buildings for religious worship. Thus the concerns expressed by the school district are not shared by the overwhelming majority of school districts throughout the land. The Bronx Household of Faith needs a larger place to meet until it secures enough funds to build its own building on a lot which it currently owns. To be able to rent Middle School 206B is the most economically feasible option.

We do not wish to blur the distinction between church and state, but the longstanding tradition in this country has been for our civil magistrates to encourage, not to impede, the exercise of religion. Thank you very much, Madam Chair.

MR. HAILES. Thank you very much. Reverend Silva.

Reverend David Silva, Centro Biblico

REV. SILVA. My name is pastor Dave Silva. I'm the copastor of Centro Biblico Church in Freeport. I am also a youth pastor, and I'm the founder of the group, Youth in Action in Freeport.

CHAIRPERSON BERRY. Excuse me. You are Anna's pastor?

REV. SILVA. Yes.

CHAIRPERSON BERRY. Okay. Thank you.

REV. SILVA. I thank the Lord for the opportunity to voice some of the things that take place in our public schools regarding freedom of creed and freedom of expression. My gratitude is double because I wasn't seeking to do this, thinking that nobody would care any more to protect the rights of our children.

I have to remind you of the origin of this Nation from the inception to the Declaration of Independence, and even to the formation of the Constitution. The Bible was the tool that the forefathers used to lay the foundation of a great nation. They prayed their hearts out for this Nation, and they worked hard to establish this Nation under biblical principles that encourage freedom, known as American liberty, as well as moral and spiritual values.

The right to freely express and profess your religion are some of the advantages that they want and the legacy that we and our children must enjoy. However, when our youth mention God or talk about their beliefs in school, exercising their rights, they have felt hostility. They have experienced discouragement and discrimination for trying to share their beliefs, values, and principles, those that they have learned at home and church. The pressure that they have suffered is great, sometimes in the form of a cold war. The discouragement they have received has caused them to go home wondering if what they do is worth it or if they really are part of the school that they attend. These were statements from those who have suffered these type of—it is very disconcerting to know that you cannot freely share those principles and standards because they come from the Bible, the same Bible that inspired the men who formed the Constitution.

Education is more than knowledge and the knowledge that they receive in the classroom. It is what they believe—the philosophy of the schoolroom in one arrangement would be the philosophy of the government of the—the question is, What message are we giving to our kids with this kind of actions that discourage their beliefs, especially when—prevented from falling into the decay of violence, drugs, sexual immorality, and so on?

This brings me to the second question. What do we expect from our children? George Washington said you cannot have national morality apart from religious principles. What kind of na-

tional morality are we expecting from this generation if we discourage them from openly expressing and demonstrating what adults have told them?

This is what the first-grade book text teaches about freedom of worship and freedom of speech. And I'm quoting from that first-grade text. The freedom of worship:

In America I can go to any church that I choose to attend. Whenever I want to, I can pray. I can open my Bible and read. In some countries people cannot do these things. Their churches are closed. Their Bibles are taken away. Many people are punished just because they love God. In America, I am not afraid to go to church. I am not afraid to pray and read my Bible. This is a great American freedom, the freedom of worship.

The freedom of speech from the same textbook:

I can listen to people say what they think about my country. Sometimes I like what they say. Sometimes I do not. But we are free to say what we want about our country. How glad I am to live in America. People in some countries are not free to say what they want to all the people. If they did, they would be put in jail. In America, I can talk to anyone and anyone can talk to me about our country. We call this the freedom of speech.

I wonder if we forbid students to have a—Bible club is proper when other clubs have done it. Or if the nonparticipation in the yearbook is legal when other groups were in it. I agree that this wasn't a club sponsored by the school. I can mention other incidents and the list will be long, but I believe that at this point God is asking our prayers to bring justice for all. Thank you.

Discussion

MR. HAILES. Thank you very much. Reverend Fournier, let me ask you this question. Are you currently meeting in a public school once a week?

REV. FOURNIER. Yes, sir, we are. We have an injunction from the Northern District of the United States District Court.

MR. HAILES. And where do you meet currently?

REV. FOURNIER. We meet in the—it's a central school, has K through seniors. And we meet in a room in the school building.

MR. HAILES. And all grades are present at that school?

REV. FOURNIER. Yes.

MR. HAILES. It's a school that contains kindergarten through 12th grade?

REV. FOURNIER. Yes, sir.

MR. HAILES. And you have students in each of those?

REV. FOURNIER. No, sir. The Good News Club is primarily for kindergarten through sixth grade.

MR. HAILES. And how—not the Good News Club started but the Milford effort? Did parents approach you, or did you start this club and advertise it so students could attend it?

REV. FOURNIER. My wife and a former teacher of the Good News Club started the Good News Club back in—I believe it was '94 or '95. And we were meeting in the church at first. Do you want me to go into how we ended up—

MR. HAILES. Please.

REV. FOURNIER. Okay. We were meeting in the church, and the bus stops in front of the church. It's a regular bus stop. It's where my two daughters get off. And some children were riding the bus and getting off to meet at the Good News Club at the church. The school told us that the kids could no longer ride the bus because there was too many kids on the bus. At that point we submitted a request to use the building, and it was at that point that we were denied that request.

MR. HAILES. Thank you very much. Reverend Hall, if your church asked the school district to lease its facilities to you on the weekend for a fundraiser—let's say a concert where religious songs would be sung—would you be able to do that?

REV. HALL. I would have to think under the current law that we would be able to do that. If musical concerts are within the limits of the school's limited forum, then—I don't know this for sure but I would think that we could do that, have a concert, a musical concert from a religious point of view. I would have to think that that falls within the law as it currently stands.

MR. HAILES. Would you consider that worship?

REV. HALL. This is the problem, sir. That we have to ask the State what the difference is. And the second circuit raised the issue, how can we differentiate between religious instruction and religious worship—religious discussion, rather, and religious instruction without entanglement.

This is the issue. And now the State has assumed the responsibility that it will differentiate between these things, and this is a violation, it seems to me, of the establishment clause.

MR. HAILES. Pastor Silva, do you have a specific role with regard to the Truth Club that Anna Crespo mentioned?

REV. SILVA. The relation that I have with the club is the relation that I have with students that attend the club that come to my church and that are in our youth group. When 2 years ago they decided they wanted to join that club, because the club was formed already, they came and they asked me for counsel. I say there is a Bible club called Truth Club. "We want to join. What do you think?" And I say, "Well, go on. Join."

Very often they used to come to share their experiences there and sometimes to ask a question. What we should do in school to make school better. What type of program that you can help us to develop about violence, drugs, sex, AIDS. We want to do something for the school and for the community. Many times they get very discouraged about the negative answers that they receive from the principal or teachers. My understanding is that no teacher or staff member could discourage them or encourage them, but many times they are discouraged. And even the discouragement wasn't an open persecution. It was a cold war against them with denying of things that they want to do in the school system.

MR. HAILES. Are you able to attend their meetings in the schools after school hours? And if so, have you?

REV. SILVA. They never—they told me that they want to invite me as a guest speaker, but they never did it. The reason why they never did it is because they became afraid. Like this year, I don't think that they are pushing hard to be in the yearbook because they are so discouraged that they are afraid to go.

Last time one of the students told me the experience about how he went and he asked the principal, "Can I have a table in the lobby of the school to distribute copies of our club and our schedules?" And the principal says no. And I say, "Why did you go to ask that?" He said, "Because I saw another club doing that." And I said to the student, "Why didn't you ask the principal how come other clubs do that and you don't?" He said, "No, because it's not worth it to ask anymore."

MR. HAILES. Thank you very much. I have no further questions, Madam Chairperson.

CHAIRPERSON BERRY. Any Commissioner have any questions for the—Yes, Vice Chair.

VICE CHAIRPERSON REYNOSO. Reverend Fournier, you apparently have succeeded in getting a temporary restraining order, a TRO, which leads to this question. New York appears to be one of those few States that by statute, as interpreted by the courts, the school districts may not lease their school facilities for purposes of religious convocations. And at least preliminarily some courts have said that constitutionally they're not required to do that. On the other hand, I haven't heard any testimony that says that there would be a constitutional proscription on the schools doing that. So it gets me back to the body politic. Has there been an effort in New York to simply have that statute changed? Because at least I haven't heard of any constitutional proscription from the schools renting out their facilities as is done for example in my own State of California. Are there efforts to change the statute?

REV. FOURNIER. Not that I'm aware of. Maybe I could clear up that we don't rent the building. We don't pay any fees to the school because we are a community organization. We should be allowed to just use the school as other community organizations do.

VICE CHAIRPERSON REYNOSO. Ah. You've pushed the envelope one step further. I'm surprised you got your TRO. Because some of the groups in New York have argued that they should have the right to rent the facilities. And as I understand, some of the courts have said no to that. And so at least in terms of the state of the law as I understand it, you're probably pretty lucky to get the TRO. You're arguing that a religious group is like any other community group?

REV. FOURNIER. Exactly. We're seeking to teach kids morals. What makes us distinctive from say the Girl Scouts or the Boy Scouts is that we teach them from a Christian perspective, our perspective. In fact the Boy Scouts, I'm sure you're aware of, you must pledge that you believe in God.

VICE CHAIRPERSON REYNOSO. Yes.

REV. FOURNIER. Our group has no such rule. In fact, we have a young man who professes that he doesn't believe Jesus ever lived and that there is no God and he's not ostracized or picked

on because of that. He's welcomed as a member of our club, and he's allowed to come every week. Probably comes for the candy that we give out as rewards, but— [Laughter.] Still, we are seeking to make children just better people, and we believe we need to do that by teaching them the standard that God has given, the moral standards as found within the Bible.

VICE CHAIRPERSON REYNOSO. Okay. Perhaps I should have asked my question of Reverend Hall because I think—did you say that you were trying to rent?

REV. HALL. Yes. Yes, we were.

VICE CHAIRPERSON REYNOSO. And there you haven't succeeded. I guess maybe the difference being that a Good News Club has a more general teaching pertaining to—I think you testified, Reverend Fournier, for a Christian perspective. You, Reverend Hall, have been very specific. We want to rent this hall to practice our religion.

REV. HALL. That's correct.

VICE CHAIRPERSON REYNOSO. Apparently the courts have thus far said no. And as I understand it, they said no, not because the school couldn't rent it to you constitutionally but because there's a statute, as interpreted by the courts that says, no, the State shouldn't do that.

REV. HALL. That's correct.

VICE CHAIRPERSON REYNOSO. So my question then to you as it was to Reverend Fournier, but more directly to you, what are the efforts, if any, to simply change the statute?

REV. HALL. I'm not aware of any efforts, but I think that's a good suggestion.

VICE CHAIRPERSON REYNOSO. I just asked the question because I don't know that the practice of many school districts in many States that do rent out their facilities—I don't recall any case where it's been challenged. But I doubt that such a challenge would succeed. So I was just curious as to that. Well, maybe one ought to think about that.

Reverend Silva, in terms of the Truth Club, I just wonder what your view is about how religion ought to be incorporated or not incorporated in public schools. You might have been here before an earlier panel where one of the witnesses testified that in his view there was institutional opposition by people in education to religion. And I must say that hasn't been my own observation. I think that the schools are struggling with the proper role of religion in public schools and public schools in religion. And from your

testimony, I gather you're struggling with the same thing, too. So I just wondered whether you'd share with us how in the world ideal from your perspective that relationship ought to exist.

REV. SILVA. Yes. I believe that our kids should be encouraged for living out what they believe. I think religion is not like your coat. That you go home and you take it and you leave it there and then you go to school without it.

Many more kids are afraid to express and many of the Christians that we have in Freeport High School, they don't like to come forward to the club because they believe that all the kids are going to pick on them because the news is going around that that's not even a club and that doesn't sponsor by the school. Now, how we can handle that, I believe that the school system should relegate a time in which they should receive religious instruction and the kids could be pulled out of the school for one period or two periods a week and go to a facility where they will receive Christian instruction, those that want to attend Christian instruction. Same for the Jews and same for the Muslims and so on. Whoever wants to attend to find out about Christian principles, join this bus, go to this facility. I think that that will be a good way without making religion something that will be divide but instead unite.

VICE CHAIRPERSON REYNOSO. Thank you. Thank you, Madam Chair.

CHAIRPERSON BERRY. Yes, Commissioner Lee.

COMMISSIONER LEE. I have one question for Reverend Silva. You mentioned that you think students should be able to take religious instruction classes on Christian principles. What happens if you have students who have religious principles but not based on Christianity and the Bible? What happens to those students?

REV. SILVA. I also added that that time will be for everybody and those that want to attend Jewish teaching, they'd go to the Jewish teaching. Those who want to attend the Muslim teaching, they can go to a Muslim teaching. So it won't be only for Christians. It will be a time that everybody should join some type of activity that encourages their spirituality. Am I clear with that or not? For example, classes finish at 2:00. What about if on Monday from 1:00 to 2:00 we give religious instruction. The Christians, they will take a bus and they will go to a facility in the community that will give Christian instruction. Only the Christians and those that

want to join the Christians. And at the same time, the Jews go to their facility and the Muslims and so on.

One of the things that shocked me is that our kids are so afraid to live out their religion because every time they mention the word Jesus, I mean, the whole school shakes. Yes, it's true. In the Bible club in Freeport, they are not allowed to mention the word Jesus. And when they do their announcements on the speaker, they can mention God, but they cannot mention Jesus. They're instructed specifically by the principal. Once they were announcing the Bible club through the speaker. Some of the students that attend the Bible club were in their classrooms with the teacher. The teacher heard the announcement of the Bible club and she made a comment. She said, "Oh, these people are trying to bring religion back to school. They're trying to bring that God, Jesus, to school." And the kids that belong to that club, they went like that [indicating] because the other kids found out that—oh, you are the ones who go there. You see the opinion of the teacher? So these things are very delicate. That's discouragement.

COMMISSIONER LEE. Now, do you also see or have you heard from other religious groups that because the students may belong to minority religious groups or what have you, that because of their religious beliefs they are also made to feel excluded because they don't have prayers, they don't carry the Bible? Do you hear complaints from students and other religious sources on that?

REV. SILVA. No, I haven't heard any complaints about that. But what I've heard a lot is other kids picking on our kids because the situation that they live at. They say your club is not even a club. And I was interviewing a student 2 days ago and I said, "How has this affected you?" And she said to me, "I'm becoming to believe that we are not important." Statements like that. When I see my kids discouraged, I get very worried because—not for nothing but I am a very dynamic speaker with kids and I taught them to go and live a righteous life everywhere they go. And when they come like that from school because it is discouragement, I get very worried. I say, Why did they not fight for their rights? Something has to change.

COMMISSIONER LEE. If I can ask one final question. Do you belong to any coalition, very

diverse religious organizations besides your own?

REV. HALL. No, other than the fact that we have helped Cambodian and Vietnamese refugees who were in our community some 15 years ago and we were involved with some of them who were Buddhists and we helped them with physical needs and so on. But the community in which I live, and which we live, is a very diverse community. We have a Buddhist temple three doors from my house, and we maintain a cordial relationship with them. But I'm not a member of any organization.

CHAIRPERSON BERRY. Commissioner Horner.

COMMISSIONER HORNER. Yes. I'd like to hear from each of our panelists what connection you draw, since I think each of you has alluded to it in one way or another—what connection you draw between religious belief and practice on the one hand among young people and the avoidance of various social problems or pathologies. In other words, what it is in your view, if anything, about religious belief that immunizes young people against drugs or alcohol or sexual promiscuity or whatever? How does it work?

REV. FOURNIER. I don't think there's anything that immunizes them against that. I think we have kids who are Christians who get involved in premarital sex and drugs. Kids who are Jewish, Muslim. I don't think we can, unless we take them and put them in a box somewhere and don't allow them into society.

I do believe because we are moving away from a standard, a set of morals that this country was built upon, and as Madam Chairperson mentioned, it doesn't matter to me if they're accepted as Christian or whatever, but we all need to live by thou shalt not kill, thou shalt not steal, and you shouldn't lie. We all need to live by those moral standards. Those are the standards this country were built on and the standards we still have today. I look at them as being Christian because they're within the Scriptures. I know a Jewish individual. I look at them as being Jewish because they're in the Torah or in the Old Testament as well. But I think that we're losing sight of those moral standards.

COMMISSIONER HORNER. Do you think the teaching—this may sound like a ridiculous question, but do you think the teaching of moral standards affects young people's behavior for the better?

REV. FOURNIER. I think the teaching of moral standards that when you break those standards there is a consequence, and maybe that's where we're kind of getting lost. There needs to be a consequence if you break the law. If you break these standards, there is a certain consequence. Of course with Christianity, the consequence would be if you continue to break these without forgiveness, your consequence is that eternal separation from God. And I'm sure there are other religious groups that teach certain consequences of breaking these moral standards. From a secular viewpoint, of course, if you kill somebody, you should go to jail and so forth.

COMMISSIONER HORNER. The reason I ask this question is that most interpretations that I hear in the mass media, for instance, most of the interpretation that I hear about when a young person goes wrong in some serious and harmful way is that that person is suffering from problems in his or her environment or mental illness. And both of those are serious contributors to young people's problems. But I never hear in the mass communications media anyway, I never hear an explanation that says that they simply never were inculcated with discernment about right and wrong that kept them from going down a slippery slope by recognizing at the beginning of the problem that there's something problematic about that behavior. And I'm looking for testimony, which I'm not asking you to give me if you don't believe it, but I'm looking for testimony that there really is a connection between teaching and outcome.

REV. HALL. I'd like to defer to my colleague, Mr. Roberts, to answer that question.

REV. ROBERTS. The statement that we have on the wall above your heads, "Equal justice under law," I think brings us to the fact that we do live out our beliefs. What we believe is going to affect the way that we act. And the founders of this country believed in a moral universe because of a triune God that held people accountable for their decisions and that moral basis which the founding fathers said was based upon religion would determine the behavior of the citizens of this Nation. And I think the past 200 years in our country have given testimony to that connection between beliefs affecting behavior.

Most of us here grew up in an age where there were still moral standards that, although they may not have been lived, were nevertheless

proclaimed and assumed to be right. And our generation of the '60s debunked all that, and the consequences of AIDS and all kinds of sexually transmitted disease and the skyrocketing abortion rate has been the fruit of those beliefs that we in our generation accepted, despising the absolute standard that our forefathers had given to us. I am a director of a program, a residential program for men with drug and alcohol problems, and I can tell you without doubt in the last 22 years I've seen men's moral decisions affected by their religious beliefs changing what they did with their lives, changing what they thought was right and wrong. And the consequences being in some cases, many cases, phenomenal.

REV. SILVA. I have a direct personal experience with young people and how their lives have been affected by the teachings that we give. When we started our youth group 3 years ago, we started like with 12 young people meeting in the basement of the church. Six months later, we had like 35 kids. Most of the kids, the initial 12 brought to the program, were kids that were in the school and they were doing drugs, marijuana, and things like that. And today I have some of them who are still in the church. Their lives are totally changed, and they're working hard to do good in school, to upgrade in order to obtain a scholarship and go to college. Living testimonies.

And the president of the Bible club this year, because Anna Crespo was the president last year, but the president this year, he came in that situation. He came and he heard the teachings that we gave him, and his life changed totally. And today he serves the Lord, and he does what he's supposed to do in order to become a right person. He came from a life of drugs, alcohol, and gangs. On the other hand, he was discouraged 2 days ago because he said this year, "I didn't see any increase in our Bible club." And somebody came up to him and told him, "You have done something great because violence in this school went down this year because you went twice a week around the hall before school and started to pray." What happened there? They prayed for violence to be out of the school, for drugs to be out of the school. They prayed for their principal, teachers, and for every single student. And many students approached him. And I said, "What were you doing outside around the hall?" "I was praying." "Praying for what?" "I was praying that violence go out of the school. I

was praying for peace." He was giving the message of what he was doing, and I believe with all my heart that when we teach our kids an experience of spiritual life, it will affect them deeply.

In the past 3 years I have organized a youth crusade called Solving the X in this Generation. That's in our church. And we have invited people from all over, from New Jersey, from Brooklyn, from Long Island. And I have seen hundreds of hundreds of kids come up front to do a chastity commitment, to do a vow not to do drugs any more or not to do drugs never, not to do alcohol. And you might say, "Well, you don't follow up on them. Of course they went away." But I follow up on the group that we have in the church, and I have to tell you that the success is incredible. Incredible.

COMMISSIONER HORNER. Thank you. I have one more question. Do any of you believe that your students have lost, as a result of their religious experience with their peers and in their churches, have lost their ability for rational judgment, skepticism, proper critical faculties? In other words, have they, in order to believe and enjoy the fruits of belief had to relinquish their intellectual capacities?

REV. FOURNIER. I don't believe so. I think we challenge them to use them even more. And by the way, Christianity is a factual religion. It's not based on myth or as it's many times promoted as being. I know not so much with the Good News Club but with the youth group that I help lead, we talk about apologetics. We talk about that it's not a blind faith. It's not something that you just [say,] "Well, I believe in God but I don't know why, I just do." We want to challenge them to be able to make a defense as to why they believe what they believe. I think that better equips them to stand up for what they believe in. And when they're taught something contrary to their faith, rather than just say, "That teacher is wrong, I don't care because my faith says this," they need to find out why I believe that teacher is wrong or that person is wrong and why I believe that what I believe is right.

COMMISSIONER HORNER. The reason I asked that question is that I think some people—I'm not among them, but some people are fearful that there will be a mass mindlessness that will lead to damaging political mass movements. I think the gentleman to your right wants to say something.

REV. ROBERTS. Yes, I do, because it seems—it's so obvious that we are all believers. We are all influenced by the media to think certain things are true or good or right. And our society has accepted the tremendous influence of the culture of our day, the anti- or the nondeistic view or nontheistic view of our world that there are no absolute, there are no right and wrongs. And people have just accepted that without really thinking it through. I think that quite the contrary it's the people who believe in the revelation of God in the Bible that have a perspective to be critical about what is passed out as truth in our society, both in morals and in public practice, in rights, in science. All these things have a belief system that there has to be an objectivity that can only be given with the God that's revealed to us in the Old and New Testaments.

COMMISSIONER HORNER. Thank you.

COMMISSIONER LEE. Could I have a brief followup question?

CHAIRPERSON BERRY. Yes, Commissioner Lee.

COMMISSIONER LEE. This is for Reverend Roberts. Your colleague mentioned earlier that you think that the increase of today's societal problems are directly connected to diminishing religious practice or belief. Is that based on your personal opinion or based on facts or other research that you can share with us?

REV. ROBERTS. It's based upon my observation both of human nature and of the history of the world and the way this society works and the way that our beliefs do affect our actions. And if we go back and read the letters of the founding fathers and the way that they talked about God and family and responsibility to other human beings, it was just infected with their view of this being a world that was created by God who has given certain standards to live by. And progressively as we turned away from that in the mid-19th century and the rise of evolution, Darwinism, and then Freud coming later to debunk all that and people accepted a new god, the god of science, and therefore rejected the god as creator to whom we are responsible, we are affected in our activities and what we do.

I don't know that there is any research that can be done other than the fact that we all look at life through colored glasses, and now the change has come where the world used to be looked at in our society through a Judeo-Christian perspective. Now it's looked at through a basically evolutionary perspective. And that

changes the whole ballgame from personal responsibility on down to the way the society is governed.

CHAIRPERSON BERRY. Thank you. Commissioner George.

COMMISSIONER GEORGE. Thank you. If I can just hold you, panel, for another minute or two. One recurring theme through our deliberations, both at our first hearing in Washington, D.C., and then again today, is the question of the extent to which those abuses and infringements of the right to free exercise of religion and the right to nondiscrimination in the practice of religion in the schools are the fruit of ignorance of what the law actually is or to what extent the fruit of some sort of animus.

And I fear when I use the word animus perhaps that's not quite the right word. Let me try to put it another way. I think we have some differences in perception. Certainly Vice Chairman Reynoso and I have some differences in perception about the extent to which what I would call secularist ideology affects the educational establishment in various parts of the country and the decisions that are made by administrators and others.

And I wonder if you could simply state your impressions. I mean, one of our problems is that there's no really hard data here. It's very difficult to do social scientific research on motives. But can you give me any sense of your own understanding of the extent to which the problems you have encountered have been the result of people with a secularist ideology or an ideology that doesn't have a high regard for religion just saying, "Well, look, what you guys are doing is really private stuff. It doesn't belong in schools, after school. It doesn't belong during school. It doesn't belong in the yearbook club." And to what extent is it just, no, they think the law requires them to do things which you think are actually an infringement of your religious rights, and it has nothing to do with a competing non-religious or antireligious or secularist ideology? Paster Fournier, could you begin?

REV. FOURNIER. I'm not sure I know what you're trying to ask me.

COMMISSIONER GEORGE. You encountered a problem in which you thought that your rights were violated. You ended up having to go to court over it. You got an injunction.

REV. FOURNIER. Correct. Yes.

COMMISSIONER GEORGE. Were your rights violated because somebody just didn't understand what the law was, or are you suffering because—and did you have to go to court to vindicate your rights because there's a sort of secularist mentality that doesn't properly value what you're about when it comes to religion, treats it unequally, treats it disparately from other activities which are considered good and legitimate whereas religion is superstition and nonsense?

REV. FOURNIER. I believe that we were discriminated against because there was ignorance of the law, ignorance of the Constitution. We were told that this is the school policy, which says you can't use the school for religious purposes. That was the policy which supposedly is based on New York State law. And we're saying that that law is contrary to the Constitution of the United States.

COMMISSIONER GEORGE. Why do you think the law is the law? How did we end up with such a law that you think violates your religious freedom?

REV. FOURNIER. I think fear.

COMMISSIONER GEORGE. Fear that religion causes division?

REV. FOURNIER. Fear that religion causes division. I think some people—I know the board, a few of their members, whether it was fear that they would be sued if they allowed talk of God into the school. I think that we just heard this phrase separation of church and state over and over again, and we just want to keep that distinction at any cost.

COMMISSIONER GEORGE. Pastor Hall, do you have a view about this?

REV. HALL. Well, I think it's secularist mentality, and the problem with secularism is how do you define what is right and wrong. Historically, universally, it was based on a transcendent belief. We ask for studies. That can be empirically verified by just studying everything—civilization. No civilization in the history of the world was ever organized without a unifying transcendent belief. But now supposedly we are a secular society. And what is right and wrong? Is it based on the 51 percent? That is frightening. If right and wrong is 51 percent, I think all of us in this room ought to be concerned. But I think that there is a fear. I was told privately. They said, "Well, if we let you rent the school, then we've got to let every weird group rent the school, whoever they would be." But, of course, of

course if they let us rent the school, they've got to let every religion rent the school. And we understand that, and we have no problem with that.

COMMISSIONER GEORGE. So you wouldn't have a problem if Satanists or practitioners of witchcraft—

REV. HALL. Certainly as a Christian I have a problem with any view that is antagonistic to my own beliefs.

COMMISSIONER GEORGE. But you'd have no problem in letting them rent the school?

REV. HALL. I'm sorry?

COMMISSIONER GEORGE. I understand you would have an objection to Satanism in principle, but as far as renting the school on equal terms with Household of Faith?

REV. HALL. I don't know how to answer that hypothetical, sir. I guess I would—I don't know how to answer that question. If a certain group does not kill rats because it's the Year of the Rat, and there might be a rat problem in the neighborhood, what comes first? If we have a health problem because of rats, or if we ought to hold rats sacred along with every other belief, then there's a problem. I think that sometimes we have to draw the line.

COMMISSIONER GEORGE. Pastor Silva.

REV. SILVA. Yes. And I want to speak on the last question that was addressed to him, if it was a problem to accept Satan's people. As a matter of fact, in Freeport High School was a heathen Satanist group of students that nobody knew about except the students. And they were meeting secretly, and they were sending message to the Bible club students threatening, "Don't pray around the hall." One of the student's bikes was stolen, and of course we figured that that was from the same purpose. So I would have a problem with the question. If the Satanists are trying to steal or to kill, I have a problem with that. If they're doing good to the community, well, I don't know their beliefs or what they do, but I don't think that when we talk about that type of cults, they are doing good or their purposes are good.

Now, I believe that it's part ignorance and part the secularism. And the secularism allows them to go over the line and to discriminate. Some of the students have told me how teachers that teach evolution, they don't teach just to teach that theory. They just preach their heart out on what evolution is. They came to me and

said, "Well, this teacher was like—he tried to convince us that it's like that." And that's one of the reasons that I said that we should have a time in which we take our kids out and we balance the theories like they're learning there according to our beliefs.

COMMISSIONER GEORGE. Thank you, Madam Chair.

CHAIRPERSON BERRY. Does any other Commissioner have any questions for the panel? [No response.] If not, I want to thank you for taking the time to testify before us today. You will have some sign-out procedures that the staff will execute, but we want to thank you very much and you're dismissed. We will take a 5-minute break, Commissioners.

[Whereupon, a recess was taken.]

Panel 4: Public Officials, Part I

CHAIRPERSON BERRY. Would everyone please take their seats. We're ready to reconvene the hearing. Could the sign language interpreter please ask if anyone is in need of sign interpretation. [No response.] Thank you very much.

We now have a panel of public officials who will present the viewpoint of school administrators when students and religious groups seek religious expression and equal access to school facilities. The two witnesses, could you please come forward. They are Dr. Margaret Harrington and Dr. Evelyn B. Holman. Could you please find your places, but you'll need to remain standing just for a moment. Could you please raise your right hand while you take the oath.

[Whereupon, an oath was administered to the panel.]

CHAIRPERSON BERRY. Thank you. Please be seated. Mr. Hailes, would you please take over the proceedings and have the witnesses further identify themselves and go forward.

MR. HAILES. Thank you very much. Dr. Harrington, I believe you're accompanied by counsel?

DR. HARRINGTON. Yes.

MR. HAILES. Would your counsel please identify herself for the record?

MS. GREENFIELD. Yes. My name is Robin Greenfield and I'm deputy counsel to the chancellor of the New York City Board of Education.

MR. HAILES. I'm going to ask each of our witnesses to further describe your experience and the school system, your credentials, and then give a 5-minute opening statement before we ask questions, beginning with Dr. Holman.

Evelyn B. Holman, Superintendent, Bay Shore School District

DR. HOLMAN. Yes. I'm superintendent of schools in Bay Shore, New York. This is my 5th year. I was formerly a county superintendent in Maryland, retired in Maryland, and I'm now double dipping in the New York school system. I have been active in trying to bring about common ground and consensus in the schools working with other principals and with superintendents in doing that. You may think it's impossible after I see the list of people you have talked to, and it is difficult on a day-to-day basis. But I think that my experience has been in writing policies for religion in the school and taking it through a process in the communities where I have been assigned. I have found it to be a long task, a long process, a complicated one, as you well could understand, but one that is certainly viable. I have no credentials other than being a soldier in the cultural wars, a veteran of these skirmishes. And in that respect, that's the reason I'm here to answer your questions.

MR. HAILES: Thank you very much. Dr. Harrington.

Margaret Harrington, Chief Executive for School and Support Services, New York City Board of Education

DR. HARRINGTON. I am currently serving as the chief executive for school programs at the New York City Board of Education. In that capacity, I have responsibility—central responsibility to the Central School Board and our chancellor for school programs, kindergarten through 12th grade, for the Central superintendencies. There are seven of them which have 220 schools, 330,000 children, which is about a third of the system. And a policy role with regard to the chancellor and the cabinet. My prior experience was a superintendent of the Queens High Schools for 8 years, a high school principal, assistant principal, teacher, et cetera. So a long range of experience in New York City.

I come with a statement because I represent over a million children and 1,100 schools and a very complex multitiered system. And that system has a Central Board, the central schools, and then it has 32 community school boards, where the school boards are elected by people who reside in communities. They select superintendents, and there are 32 community school superintendents who manage districts of this

city of K-8 schools. So it's a bifurcated system, and the rules therefore very often are K-8 and 9-12 because of that bifurcated reporting system. Would you like me to do the statement now?

MR. HAILES. Yes. Please do.

DR. HARRINGTON. New York City is a diverse multicultural community. Our public schools, which educate over a million students, reflect the community's rich ethnic, religious, racial, and cultural heritage. It is our responsibility as educators to foster mutual understanding and respect for the many beliefs and customs which stem from this diversity.

Part of our responsibility in teaching such a diverse population is to maintain an educational climate which strikes an appropriate balance between protecting students' freedom to engage in religious expression and their right to be free from government-sponsored religion. In order to ensure such a climate, teachers and administrators maintain a posture of official neutrality toward religious activity. Consequently, they are prohibited from encouraging the religious activity and from participating in such activity with students, and also from discouraging religious activity because of its religious content.

This afternoon I will touch briefly upon New York City public school policies and practices with respect to religious expression in the following areas: curriculum and instruction, distribution of material, student clubs, display of holiday symbols, prayer and religious observance, graduation, and the use of school property during nonschool hours.

New York schoolteachers are constitutionally prohibited from providing religious instruction. However, they may teach about religion, including the Bible and other Scriptures. Instruction may include topics such as the history of religion, comparative religion, and the influence of religion on art and literature.

As a general matter, public school students have the right to circulate newspapers, literature, political pamphlets, and post bulletin board notices within the school, subject to reasonable guidelines established by the school at the school level except when such material or notices are libelous, obscene, commercial, or materially disruptive to the school, cause substantial disorder, or invade the rights of others. This right is embodied in the Board of Education Bill of Student Rights and Responsibilities, and we do have a

package of materials, as requested. Consistent with this policy, which has been voted on by the Central Board and is widely disseminated, students have the right to distribute or post religious material subject to the same terms and reasonable guidelines established by the school that pertain to other types of nonreligious literature and material.

The board's Bill of Student Rights and Responsibilities recognizes that students have the right to organize, promote, and participate in student clubs consistent with the requirements of the Equal Access Act. Accordingly, high schools are required to grant equal access to students who wish to meet for religious, political, or philosophical purposes if the school allows other types of noncurriculum-related student groups to meet. This includes equal access to the use of the public address system, the school newspaper, school bulletin boards for the purposes of announcing meetings. Additionally, religious clubs may engage in prayer or other religious exercise. Every student club must be open, however, to the entire school community.

With respect to student prayer, students in the New York City public schools have the same right to engage in individual or group prayer and religious discussion as they do to engage in activities and expressions of a nonreligious nature. Generally, students may pray in a nondestructive manner when not engaged in school activities or instruction. School officials may neither discourage nor organize prayer exercises nor encourage participation in student prayer. The rights of students to engage in voluntary prayer or religious discussion free from discrimination does not however include the right to have a captive audience listen or to compel others to participate. In New York teachers and administrators seek to ensure that no student is in any way coerced to participate in any religious activity.

At the New York City Board of Education, it is our policy not to mandate or to organize prayer at graduation or invite religious speakers to lead prayer at graduation. As for religious observance by students, the policy of the New York City Board of Education is one of reasonable accommodation. Students who observe holy days are generally excused for religious observance upon the submission by their parents of a written request prior to the day of observation in accordance with procedures set forth in the

chancellor's regulations. Additionally, schools shall permit students who are fasting to be seated separately from other students during meal period if the students so desire.

The holiday seasons are a time for the school system to recognize the myriad beliefs and customs stemming from our community's diverse religious, racially ethnic, and cultural heritage. During these times we are particularly cognizant of our responsibility to be sensitive to the significance of seasonal observances and religious holidays and to also refrain from endorsing or promoting a particular religion or belief system. Toward this end, we have developed guidelines for the schools to follow with respect to the display of cultural symbols. Secular holiday symbols, such as the tree, Christmas tree, menorahs, and the star and crescent may be displayed. Such displays must be temporary in nature and should not appear to promote or celebrate any single religion or holiday. Therefore, symbols or decorations must be displayed simultaneously. The primary purpose of all displays must be to promote the goal of fostering understanding and respect for the rights of all individuals regardless of their beliefs, values, and customs.

While the focus of this hearing appears to be on student expression, I would also like to comment upon the religious rights of employees. It is the policy of the New York City Board of Education not to discriminate against any employee on the basis of religion or creed. Internal complaint procedures are in place to provide for prompt and equitable resolution to complaints of religious discrimination. It is also the policy of the New York City Board of Education to make reasonable accommodations to employees' religious observances and practices in accordance with relevant constitutional and statutory requirements. Toward that end, the chancellor has promulgated regulations which allow for accommodations for employees to observe and practice their religion.

And a final note, I would like to briefly mention the board's policy with respect to the use of school facilities after school by outside groups and organizations. The use of school facilities by outside groups is governed by the New York State Education Law and the Board of Education's *Standard Operating Procedures Manual*, or SOPM. In accordance with law and board policy, permits for space cannot be granted to outside groups for the use of school facilities for

religious worship or religious instruction. However, such groups may use school premises for the purpose of discussion and distributing religious material or material which contains a religious viewpoint. This policy was recently upheld in two Federal court decisions. It should be noted that our rules and regulations do not prohibit the issuance of a permit for the use of the facility by a religious organization, provided the organization uses the facility in a manner that does not violate the stated prohibition, prayer or religious instruction. Therefore, if no admission fee is charged, religious organizations can be issued permits to use school facilities for the same permissible purposes as other secular organizations. Thank you for giving the New York City public schools an opportunity to be represented here today.

Discussion

MR. HAILES. Thank you very much. Dr. Harrington, let me ask this question. It's based on the testimony just presented. Is there a unit of the Central Board that monitors compliance or the implementation of the guidelines that you just listed?

DR. HARRINGTON. There is an Office of Monitoring and Review that is in the schools on a daily and weekly basis that makes reports back to Central on a variety of items. They are very often sent out if there's been a complaint of a violation of the rules, and they are responsible for making sure that all aspects of SOPM are adhered to. So it wouldn't be a specific unit directed to religion in the schools but rather compliance with all of our rules and regulations.

MR. HAILES. Would you be able to determine or would your office be able to determine whether there is a pattern or practice of religious discrimination among all of the school districts that are within your jurisdiction?

DR. HARRINGTON. As a school assistant principal, principal, superintendent, and in my current role, I really have found no systemic discrimination, no consistent practice that could be viewed as discriminatory. What we might have is an individual case of not understanding what the rules are. In general, whenever we've had a question, we've referred to the Office of Legal Services to find out what is the appropriate interpretation of the regulations and State law, and I have always found that school people have

been very responsive to the direction provided by Central in explaining any issue or concern.

MR. HAILES. I guess my question is a little more specific. Do you have a unit in place? Is there any way to determine whether there is such a pattern or practice?

DR. HARRINGTON. There is. The Office of Equal Opportunity handles complaints, the LEOP, if you will. And they get a whole range of complaints.

MR. HAILES. And do you routinely analyze the data to determine whether—

DR. HARRINGTON. They do. And those reports are made available to the Central Board of Education.

MR. HAILES. And they can specifically determine whether questions of religious expression and allegations of discrimination are arising throughout the schools?

DR. HARRINGTON. There is a procedure. First it is attempted to be investigated at the school level and then the superintendency level, and then the Central level. And if the local—the Board of Education Office of Equal Opportunity is not sufficient, they then can appeal to the city Office of Equal Opportunity. So there's a whole structured response system and they do keep records and they do review the numbers. I am under the impression that there has been no systemic listing of religious complaints.

MR. HAILES. But if anyone was to ask the chancellor how many cases have come to that office within the last year, would they be able to identify exactly where and how many?

DR. HARRINGTON. Yes.

MR. HAILES. Okay. Thank you very much. Dr. Holman, once you were a superintendent in the State of Maryland. Do you recall whether there were any procedures in place or guidelines in place governing leasing public facilities to religious groups?

DR. HOLMAN. In Maryland you could do that. You could—at the time, I've been 5 years in New York in Bay Shore, but it was possible to rent your building under the same agreement you would rent it to anybody else. If you rented it for use on particular days to one group, it was basically an equal access. And they were allowed to—churches were allowed to rent the buildings.

MR. HAILES. And do you recall any conflicts or controversies that arose from the leasing of public facilities to religious groups for worship services?

DR. HOLMAN. No, it wasn't a problem. The problem came if there are—when you have to go through a list of many people who want to use the facilities and how you make that judgment, it becomes a complicated issues. But there was not a big problem with that. No, there wasn't a big problem with that. They were not proselytizing. There was not a case that you had a problem. The only time you would have a problem is when you had other groups coming in and out of the building in a social setting and whatever. And we needed to say we can no longer rent buildings because the students want to use it. Obviously, the students have first access to the building and not the public. It was not a problem for us. But I think it's one that you have to have clear guidelines on.

I think there's always a danger. I could give you some anecdotal information on why it becomes complicated for the school if you want me to. I had two board members who were newly elected to the board in Wicomico County, Maryland, and they decided they wanted a day of prayer for the schools. And I explained the process to them that they had to be very careful that when they were sending out invitations that it didn't look like the Board of Education was sponsoring this day of prayer, especially since they weren't inviting the Jewish community, the Jehovah's Witnesses, and the various groups. So I sat down with them and tried to talk to them about that, that they had to be very careful, especially since they had campaigned on trying to get on the board that they would bring religion back into the schools. And with respect to two sincere, well-meaning men who were wonderful board members, I tried to warn them about the first amendment, as well, and at the board at public meetings make it clear that they would rent facilities and they would have to raise the funds privately. That it was not sponsored by the board.

But it did become an issue within the community. Our Jewish members of our community showed up at our board meetings and the Office of Civil Rights came in to monitor this, just visited us to make sure that everything would be in order. And I will tell you that after that subsided, I sat down with two board members and said, "Did I warn you? Did I give you background?" Because it became very divisive in the community. And they just said, "Yes. And from now on, we'll do whatever you tell us."

[Laughter.] So in some ways, it came early. That's not a problem. But you can see where issues could be a problem. And I think I would just quickly agree that almost all 16,000 school systems would have some kind of policy or procedure such as was just read here.

I think that I would like to emphasize with you, you have had some wonderful people in front of you. I was a lucky enough in Wicomico, Maryland, to have Charles Haynes and Buzz Thomas come out when I was working through a procedure because I felt that if you don't bring the community together—I believe that involving the public in your policy development and working through what it is early on is prevention. You prevent these problems.

And if there's anything that you all can do in terms of encouraging—Pam was here this morning with the New York School Boards. I know Paul Houston. I was on the board of AASA, ASET. And we have had presentations on religious rights and first amendment freedoms and the Williamsburg Charter. But more encouragement and access to people like Charles and Buzz, who have tremendous background.

Obviously, New York has a whole team of legal attorneys they can turn to but many—I had a large county district in Maryland. I only had 5,000 students in Bay Shore. And my attorneys are contracted and probably would not be specializing in some of these issues. In fact, I would probably be more up to date with the point to get on the phone and call Buzz Thomas where he is in the country. But I believe that most of these issues could be avoided by bringing in the ministerial associations and your business community and your press and everyone to sit down and say, "All right, anybody who has religious beliefs, we want to make sure we're not offending them, that we're reinforcing what the parents want us to as a public school system."

Again, explaining to the public what we have to do and get a consensus, get a common ground in your community. The average lifespan of a superintendent is about 3 years, and I learned early on if I wanted to stay around in a community for a long time, that you had to develop this process so that the community trusted. And you have—we had fundamentalists who felt that there were some teachers hostile to their religion, and we had to address that. We had anecdotes. If we're not so late in the day, I could give you lots of war stories, and I'm sure you heard

them here, of things that happen. I don't think it happens out of maliciousness or even ignorance. I think they think they're doing what's right. I think it's a misunderstanding.

The guidelines by Secretary Riley sent out in '95 were wonderful. And they were sent to every school district. But I'm sure that if the paperwork across your desk is like the paperwork across the superintendent's desk, it was filed—

We have to do workshops. We have to train chief executive officers. We have to take—every 10 years you have new principals in buildings and the same issues that I'm dealing with today after 30 years in administration, I was dealing with 30 years ago. And despite I'm sure what will come out of this hearing, people will be dealing with 20 and 30 years from now. They are not as egregious. You do not have the kind of hostility we did the end of the '60s and early '70s, when the secular humanist wars were waging. I think that the law has been clarified. There are still some points that I would like to see the schools get some guidance on, but I think that we've come a long way. And I don't want to emphasize the divisiveness.

I think if you had college teachers in universities and that could be a whole other hearing in terms of the training of teachers understanding the process. I can remember 10 years ago asking college professors—they didn't even know what I was talking about in terms of individual privacy. And training. Training other people, awareness, not just paper or even being able to pull this off the Internet as we can do now. There has to be interaction. There has to be more training. There has to be more awareness. And I think bringing the various people together within a community is one way of doing it.

Maybe you'll come up with a list of values or character traits or whatever it is you want for those parents who are not providing their children with some kind of values, call it morality or whatever you want to call it.

I also serve on a Suffolk County juvenile crime prevention, and I think that when they're talking about people getting their moral structures in a vacuum or off the television set, there is a danger in the schools being too secular and being aloof from the consensus within the community. And we have to listen to these parents. We have to understand their concerns. And maybe we haven't done that as well as we might.

But there has to be training with teacher education, our school officials, our board members.

MR. HAILES. Thank you very much. Madam Chair, I have no further questions.

CHAIRPERSON BERRY. Any of the Commissioner's have questions for the panel? Go ahead, Vice Chair.

VICE CHAIRPERSON REYNOSO. One of the issues that has come up has to do with what some call the opt out option. That is, when some material is being presented, presumably in a predominantly nonreligious course, there may be information or theories or concepts that some parents might find objectionable in terms of their religious beliefs, and they ask that their children be opted out.

Interestingly, a different issue has been raised, but in some ways it's the same issue, and that is the issue of, Is the State being intrusive in deciding what is teaching about religion and what is religious prayer or religious instruction? Though they could present it as two completely different issues.

I just wonder what your own views are about what the approach should be by public schools. We've been told that in New York if it's a core subject, then the youngster should take that and there's not the opportunity to opt out, as I understood it. If it's not a core subject, then they can opt out. But that seems to be such a gray area. That that's an area where a parent would need to do a lot more thinking. I just wonder what the reaction is that both of you might have to that issue.

DR. HOLMAN. Well, I don't think there's any problem in doing that. Of course, you don't want an entire class to opt out of English 101 or world history. But I think we have to first of all find out—you're actually asking me two questions. The opt out policy could be—I've had parents not want children to read Mark Twain or Oliver Twist because of how certain characters are treated in their stereotypical form.

VICE CHAIRPERSON REYNOSO. And assume that those two books are considered core books in English 101.

DR. HOLMAN. Yes.

VICE CHAIRPERSON REYNOSO. I'm not saying they are. Just assume that. What should happen?

DR. HOLMAN. They're required reading. We would expect our students who graduate to be able to read them. But we would work with the parents. Is there another book in the same genre

or by the same author that would be acceptable to you. There are almost always—well, I can never think of a case where there wasn't an opportunity to allow a student to opt out.

The problem becomes, just as in sex education courses where someone will say, "I do not want my children to be involved in this. I want to teach them at home." It becomes an administrative problem for the school. If you have half the class taking the sex education course and half of the class that wants to opt out and you never know what that is at any given time, then how would we provide a viable alternative? In some cases, people have been sent to the library to work on something. But then again, that's not an equal educational opportunity. So it does become quite complicated, and we don't want to make schools' lives any more complicated than they are now.

But I think that's what I meant by the concepts. If you go through it and the community understands and are involved in the materials and we say, okay, this is an alternative book that people could use, then what are the skills, what are the issues that you're trying to get out? When you talk about a State standard, when I look at the State standards or some of the national standards, I don't see that they really address religious issues that much. We almost ignore it. Which again plays into some of the people that I'm sure you heard from saying that the schools are too secular. And they may be right. Usually we have people who are afraid to say the Reverends are good at teaching their own. It reaches a certain level.

I had the wonderful opportunity one time in a gifted and talented class in Salisbury, Maryland, of having my board president call me up to tell me that the night before his daughter—and he happened to be Roman Catholic—his daughter was given the assignment of men and women who have changed history and she wanted to do Martin Luther and the teacher discouraged her because that might be controversial. And that was 25 years ago. But depending on the teacher, they might do the same thing today. They get very nervous, and ignoring it and staying away from it is one way to approach it. And we try to make them comfortable. We have policies such as you have heard here. We do training of teachers, and we can reassure them that they are allowed to do this. And in fact, if we don't do it in the public schools, how can you have a good his-

tory background as a history major if you don't understand? How do you understand the Renaissance without going into religion? It's impossible. So I think we do a disservice to our students in—their birthright when we don't approach. But it is complicated. I mean, you're always working to get that common ground. But good administrators do that not only in religion. We do it in just about everything else that comes to our classrooms.

DR. HARRINGTON. According to the State commissioner's regulations and our own chancellor's regulations, we have an opt out procedure with regard to HIV/AIDS and sex ed and family living. And it is very seriously adhered to. And we make administrative and/or educational procedures available for children who do opt out. And so we have it in the law, and it really is adhered to. And we do training every year to make sure people understand the rules and the rights and responsibilities of parents and students with regard to that particular type of education.

VICE CHAIRPERSON REYNOSO. How about the hypothetical on English 101 that doesn't come within those exceptions?

DR. HARRINGTON. We do not have an opt out policy because we believe that the curriculum is the curriculum and materials are chosen at the school site. However, the choice of materials changes from school to school. But I know on a case-by-case basis we make accommodations for people by providing alternative reading. And another case I will give you is that we have people who don't want to dissect animals in biology, and we have alternative assignments using computers which would provide for the sensitivity of the child or the parent with regard to that. So that there's a case-by-case accommodation as necessary within the statutes that we are sworn to uphold.

VICE CHAIRPERSON REYNOSO. Thank you. Thank you, Madam Chair.

CHAIRPERSON BERRY. Commissioner Horner.

COMMISSIONER HORNER. I have a question for both our witnesses about dealing with teachers, both from the administrative point of view or from the complaining family's point of view. I don't know how you go about deciding where a teacher's autonomy ends and the rights or the degree to which sensibility of others than the teacher should be deferred to, starting with the students. And I guess my question is, Who's in charge of what a teacher says in the classroom

once you get beyond very obvious questions of law, like the teacher probably isn't allowed to—well, I don't even know whether a teacher is allowed to advocate breaking the law. I'm not a lawyer and I don't know these fine points. But—

DR. HOLMAN. A teacher could not advocate breaking the law.

COMMISSIONER HORNER. A teacher could not advocate breaking the law.

DR. HOLMAN. There are Board of Education policies that the policy is with the board in terms of approving curriculums. There are guidelines for the State that we follow. But the policy is with the board, and the power is to the superintendent to make sure that board policy is enforced. Now, if there is an indiscretion on the part of a teacher, it's up to the principal, and there's a procedure then that would take it all the way up to the superintendent.

In terms of academic freedom, we pretty much tell teachers what to teach by observing the materials. They can pull supplementary materials. But in terms of what they say, if they are—I could use even another example—yelling at students or sarcastic or something else, we would address that if we had a parent complaint. Almost all districts have a parent complaint form or process.

COMMISSIONER HORNER. So if the teacher were either proselytizing inappropriately or showing hostility to religion inappropriately, whatever that means—

DR. HOLMAN. Absolutely.

COMMISSIONER HORNER. Suppose a teacher teaching an honors seminar in the 12th grade and reading various intellectual texts from the 19th and early 20th century tells the students, "Well, I'm sort of like an early 20th century free thinker. I'm an atheist." The teacher is self-describing. Or, "I'm a believing Christian." And the student says, "Why is that? Why are you an atheist?" "Why are you a Christian?" And this kind of exchange, it seems to me, would often arise in the format of a seminar. What's permissible?

DR. HOLMAN. I think that that is an area where a teacher has the right to say what he or she believes in terms of religion. I think that's still a difficult one. They of course could do that. But then it becomes a fine line. I discourage teachers. It isn't as important for kids to know what the teacher thinks or believes. He usually can get at whatever academic objective he is af-

ter without reliance on that. But students will press you. They want to know. And you can become somewhat neutral. When I was teaching history, it was funny because kids will project on to you things that aren't there if you don't tell them. But I discourage teachers, especially early in a course and with very young students or 10th graders or general courses. I would discourage that. But I wouldn't prohibit it.

COMMISSIONER HORNER. Is it possible to identify a teacher as being hostile to religious beliefs?

DR. HOLMAN. I'm sure it happens. It does happen.

COMMISSIONER HORNER. Could you give me just one example? I'm trying to imagine that.

DR. HOLMAN. Well, just an off-handed remark when they are covering something. Let's just say I know the pope was in Frederick, Maryland, I think at the time that I had a situation where it was interesting to me because they were studying the city states and the pope happened to be in Washington giving a mass. And the teacher never even brought it in. But he did make an off-handed remark that could have been seen by some of the students in the class or their parents as being anti-Catholic. And in fact, I can't remember the remark. But actually, I find it's about half and half. You find people on both sides that are either proselytizing and less and less they're the same issues but they're less extreme examples over time as we've done a better job. But yes, I think that making fun of a fundamentalist or making fun of people's—just can be done in a sarcastic manner, a real casual manner. It doesn't have to be terribly blatant.

But again, that's training. You have to deal with people and say, "Let's look at the first amendment again here and let's talk about you" as—let's say it's the cases that I'm talking about right now, world history teachers. And say, "What is our purpose as a social studies and history teacher, and aren't we trying to show respect for the Constitution, the Bill of Rights, and each other?" And it's this uplift model. And turning it around and saying to students, "Why do you want to know what my beliefs are? Why is that important to you?" "Because you are an authoritarian figure." But those are the issues that I see are still very complicated, because often what you hear is in the ear of the beholder and if you'd been hurt before. It's the same thing, but not just on religion but on racial is-

sues. I'm sure you deal with this all the time. There's always that fine line. It's all right for me to call you that name because I'm that color, but don't you call an Irishman in Long Island a dumb Paddy. It's all right for him to go to Ireland and as a compliment be called that.

COMMISSIONER HORNER. It would seem to me the antidote to both violations of what I would call feisty autonomy, the feisty autonomy of give and take by too much constraint and cutting destructive sarcasm by too much liberty would be in good professional education. That is, teachers being people who have been acculturated to their purpose in a very high way. And my guess is that this does not go on in ordinary professional—

DR. HOLMAN. Oh, no. I don't think it does. And I was trying to approach it—did you hurt the student's feeling? Did you hurt his beliefs? Did you mean to do it?

COMMISSIONER HORNER. But doesn't the teacher hurt a student's beliefs every day by a Socratic method, by demanding that—by eliciting from the student—

DR. HOLMAN. And by challenging his ideas?

COMMISSIONER HORNER. Yes. Challenging ideas. Yes. And obviously more as the student gets older.

DR. HOLMAN. I see that again as a line that you have to judge. And as superintendent, I have to judge whether the teacher did go over the line. And sometimes you have teachers say, "Well, part of my academic freedom is I can use whatever methodology I want to reach the objective." And sometimes I guess that. I would sit down and talk with him or her or talk with the principals because they call about those issues. And I would go in and ask the teacher, "What was your purpose; did the child misunderstand your purpose?" And that happens a lot.

But again, we've got to reason through this together. If I had a values committee—and this is what I'm going to leave you, a copy of our religion in the schools policy. But very often when I would have a challenge to—there was a filmstrip I remember that some of the Jewish community thought—the filmstrip was on Christianity, but the Jewish community objected to how they were portrayed in that. Well, I gave it to the values committee. They talked about it, brought the people in, and then we brought in some experts to look at it. And the very teacher and the people who thought it was very silly for

them to challenge it, by the time we had some history professor who said, "You know, some of this content is just plain wrong." It was a process for the teachers to learn. And even though we would go through the process with parents, we wouldn't always agree with them. They would make a recommendation to the superintendent, but they felt they were listened to.

And I think very often that we try not to in public education say, "Yes, this is the policy. This is okay." You have to listen to people and try to work with them. And sometimes it's not the very issue that's on the paper that they're objecting to; it's something else. They distrust the school, or they've had other bad experiences. And you have to work through this with your community. But it's hard and it's going and it's difficult. And it will always be that way because we're a public education system. That's part of our job to work through this process and to deal and bring together our student body as one and our community as one. And anything that you can do to help us and help the training will be appreciated.

COMMISSIONER HORNER. Well, it's nice to know you have undertaken this labor for so many years.

CHAIRPERSON BERRY. Does anyone else have questions for the panel?

COMMISSIONER HORNER. Just one really quick one.

CHAIRPERSON BERRY. Yes, please.

COMMISSIONER HORNER. Dr. Harrington, you mentioned a list of secular holiday symbols that was permissible, and I thought I caught—correct me if I'm wrong—I thought I caught the menorah as within that list. Now, does the menorah not represent the 8 days during which the oil miraculously lasted? And why is that not a religious symbol?

DR. HARRINGTON. Because there's a Supreme Court decision to which we made our school policy responsive to with regard to the menorah, the crescent and star, et cetera. And that board policy was accepted after it was adjudicated in the courts.

COMMISSIONER HORNER. Did the Supreme Court say that it was a secular symbol?

DR. HARRINGTON. Yes.

COMMISSIONER HORNER. Very bizarre. Thank you.

CHAIRPERSON BERRY. Commissioner George.

COMMISSIONER GEORGE. Just a quick information question for Dr. Harrington. About a year or so, maybe could be as long ago as 2 years, there was some question in New York City about an offer from the parochial school system. It might well have been from Cardinal O'Connor himself, to take a certain number of very difficult cases, children from the public schools and give them some sort of scholarship or right to attend the parochial schools. Did anything ever come of that? Where does that stand or what happened or is there some litigation in connection with it or where are we?

DR. HARRINGTON. There was a private fund-raising external to the New York City public school system that raised the money for scholarships, and there was a lottery system where people could apply. Children were selected and I believe as of last September began attending parochial schools. But it was not addressed at children in need rather children who won the lottery.

COMMISSIONER GEORGE. Children who are—

DR. HARRINGTON. Won the lottery.

COMMISSIONER GEORGE. Who won the lottery?

DR. HARRINGTON. Yes.

COMMISSIONER GEORGE. Okay. So there's something happening. There's something in place.

DR. HARRINGTON. There were a thousand children who were selected. There has been no public story since school began.

COMMISSIONER GEORGE. Thank you.

CHAIRPERSON BERRY. If you have a question, you may ask it, Commissioner George.

COMMISSIONER GEORGE. Well, if could just follow up with one. Thank you, Madam Chairman. At our Washington hearing on this subject, Charles Haynes and Buzz Thomas, Warren Nord raised a very interesting question of whether we have a problem with religious ways of looking at the world, not being well represented in public education, at least in some parts of the country. Now, in discussing that, I believe Dr. Haynes or Dr. Thomas stressed the important respects in which the schools of education around the country influence the approaches that are taken in the schools. And they took the view that the work really needs to be done there to educate people while they're in schools of education in the distinctiveness of different religious ways of looking at the world and that those should actually be understood well for people who are going

into the schools so they'll actually, whether they themselves are religious or not, have a more sympathetic understanding of what it is to be a religious person. And from that can come not only a greater sensitivity to the rights and feelings of religious people but also the educational benefit of being able to more accurately convey to students of all the various faiths what the various religions of the world and those particularly in their community are like. Do you share that view, Dr. Holman?

DR. HOLMAN. Well, far be it for me to disagree with anything that Charles Haynes and Buzz Thomas said. They came to—where I was developing it and had no money for Wicomico. But yes, not only do I agree with it. But remember a school system or a school or a classroom is only going to be as good as the mind that's leading that. That means the teacher or principal or superintendent in the district. So the more you know and the more you know about—how could you understand what's going on today and the major conflicts in the world if you didn't understand religion? Northern Ireland. Just turn on the nightly news. So, in order for any teacher to address those issues, if he or she does not have a strong background in the various theologies and those other political things that affect why people believe what they do, then it's going to be very difficult to approach the issues.

So, yes, I agree completely. And if we could clone Charles Haynes and Buzz Thomas and get them to every State in the union, you would have fewer problems that you have heard of today. They are wonderful. I've seen them take just very difficult issues in communities and work through a process. And that's what we need to do. We need to have people.

Buzz Thomas was in my district the day that the graduation prayer ruling came up. At the time, they weren't going to allow students to pray at graduation. Well, it just hit the community and those high school principals especially were very upset about it. Some less so than others. And we asked Buzz to address it, and he went to one side of the table and gave all the wonderful reasons why you should do it and walked to the other side of the table and gave all the wonderful reasons why you shouldn't do it. So it was the quality of the mind and the presentation enabled people. Each time he was arguing their point of view, of course, they started to see how complicated these issues are. And we're still

working through those. Was it student-initiated prayer at graduation, or did someone else encourage it? I mean, you know all these. We face them all the time. Graduation is coming up next week. I'm still facing it every year for 30 years.

COMMISSIONER GEORGE. Dr. Harrington, did you have any thought about it?

DR. HARRINGTON. Some of my responses were similar to the responses to the question asked before. I personally believe that teacher education needs to be totally overhauled, as do most of the people in the New York City Board of Education. And we need to have more indepth content in education. But in history and literature for our teachers at all levels. Because if one has a good grasp of multicultural full world literature and history, one has an appreciation for the forces that have created those societies. And those include religious forces in history.

I see them in an historical context to provide a basis of understanding so that people are more sensitive when they come into the classrooms. We do training with—teacher education with universities. Used to do our own training with regard to multicultural sensitivity, et cetera, with the idea of building respect for all. You mentioned it before. It's a goal of public education. Respect for means an understanding that each group brings something to the table, if you will. And in order to have a full worldview, one has to be able to walk in the other person's footsteps.

And the answer to the question before reflects that. The teacher who is proselytizing says I believe, I have a concern about, because one needs to have a balance of presentation. There is not one worldview. There's a multiple worldview in this city. And in order to function in urban areas today, I think one needs to have more than one view and a variety of views. And the classroom is the place to say if you are a strong Christian, this; if you're a strong Muslim, this. And people choose for a variety of reasons, but we should have equal respect for all. And I think that it needs more training on the part of teacher preparation and content to really have that appreciation to be able to convey to children without appearing to proselytize.

COMMISSIONER GEORGE. I think that's an excellent answer. Probably right. But there's just something that really honestly troubles me. And it troubled me during our last hearing. I just genuinely don't know what the answer to this is.

And that is—yes, it sounds very good to have our teachers really alert and understanding of the various religious traditions of the world and therefore in a position sympathetically to present to students the content and just the sense of the world that's connected with that religious viewpoint. But on the other hand, we have the very phenomenon of the teacher presenting the various viewpoints from a putatively neutral perspective. I mean, there is a stance even in the idea that one ought to choose religions based on considerations that can be presented from a putatively neutral perspective.

I don't know the way around that philosophical problem. The reason it's really troubling goes to the point about neutrality, which I've been really stressing all day. If it isn't possible really to find a genuinely neutral viewpoint for the schools to stand on with respect to religion, then it looks like we're down to either teaching the three Rs or to raising the question about whether public education in a truly multicultural society is viable. Now, I want it to be viable. I'm sure you want it to be viable. I think most Americans want it to be viable. We value our public education system. But it really does hinge on us being able to find a genuine neutrality. And my one little worry about this menu approach, even with the good sympathetic teacher, is in the very presentation there seems to be a position.

DR. HOLMAN. Well, you're absolutely right. I'm not sure that I would want my religion presented in the classroom as to what I believe, because am I sure that person who's presenting it no matter what the training is going to give it the sympathy and the belief that I would give it? That's what makes it so difficult. But I would say to you we don't have any choice. You're saying: I think the public education system is the backbone of this country. I think that Jefferson was right when he put on his grave in Virginia that he was present at the founding of the University of Virginia. Without strong education, without strong public education—and of course I want strong private education as well, we don't have a country.

I'm fully committed to strong public schools. That's why I've spent so much time trying to get a consensus as a community. Forget the—and the policy. We have to be able to do this. And if I can't present as well—I mean, I'm sure each of you can think of a topic that you feel so strongly

about even in the secular world, maybe civil rights or what is going on in Ireland if you come from a perspective and you do not—there are very few teachers that can present that exactly the way you would. But you still have to have teachers who have at least a strong understanding. No literature teacher is going to teach Virginia Woolf the way I wanted to teach Virginia Woolf.

COMMISSIONER GEORGE. I certainly agree. Thank you, Madam Chairman.

CHAIRPERSON BERRY. All right. Thank you very much. I want to thank the panel very much for being with us, taking time to testify. And someone from our staff will give you the sign-out procedures. And we thank you very much for being with us.

Panel 4: Public Officials, Part II

CHAIRPERSON BERRY. We have one other witness and then we will come to the public comment section. That one other witness is from the Department of Justice. Commissioners indicated a desire to have witnesses from the Department of Justice. We did not have one in our Washington hearing and do have one now. Could the witness from the Department of Justice who is counsel to the Assistant Attorney General in the Civil Rights Division, Stuart Ishimaru, come forward. Could you please stand—find your place. Raise your right hand.

[Whereupon, an oath was administered to the witness.]

CHAIRPERSON BERRY. Thank you, Mr. Ishimaru. Please sit down. Counsel, please proceed.

MR. HAILES. Thank you very much, Madam Chairperson. At this time we're going to ask our witness to further identify himself for the record, and then I understand you have a brief statement that you wish to present. And following the presentation of that statement, I will turn it back to the Chair.

Stuart Ishimaru, Counsel to the Assistant Attorney General, Civil Rights Division, Department of Justice

MR. ISHIMARU. Thank you, Mr. Hailes. My name is Stuart Ishimaru and I'm counsel to the Assistant Attorney General, the Civil Rights Division, at the Department of Justice. I've been there now for 4 years. Prior to that, I served for a brief time at the Commission on Civil Rights. I know most of you from various guises from over

the years. It's nice to see you. Prior to that, I was a staff member on Capitol Hill. One of my duties as a staff member for part of that time was working on religious freedom issues. I was part of the staff work that helped draft the first bill, the first Religious Freedom Restoration Act bill responding to the *Smith* case, where I had the opportunity to work with a wide variety of people from all sides of the spectrum. It was absolutely fascinating. But that's a bit about my background.

It's interesting for me to be here with you in New York City. As I told Mr. Hailes, however, I'm not sure why I'm here on a lot of levels. The Department of Justice has very little jurisdiction in the core issue that you've been talking about at this hearing and at the previous hearing. We do not have authority to enforce the Equal Access Act. There is a private right of action that was given under that act as passed by Congress.

We do have jurisdiction in a number of other areas that I'll touch upon briefly, and also touch upon how other parts of the Department of Justice interact in this area. We do have jurisdiction in the hate crimes area to deal with hate crimes based on religion. So if a hate crime happened in a school, we would have possible jurisdiction to deal with that. We would not have jurisdiction under title VI of the Civil Rights Act, that I know that the Commission has studied the enforcement of. We do have jurisdiction under title VII of the Civil Rights Act of 1964 that deals with discrimination in employment. That also covers religion.

The Department of Justice, however, deals with discrimination by State and local governments. Therefore, we could address issues of discrimination in employment based on religion in the public schools. It's my understanding from talking to our lawyers who deal with this issue that they do not recall a case in recent years where they've dealt with this. Most of our cases come on referral from the Equal Employment Opportunity Commission. We have not to my understanding received any referrals in recent years in this area.

And finally, title IV of the 1964 Civil Rights Act also gives us some jurisdiction to deal with religion in schools. Part of title IV allows us to investigate a complaint that the person has been denied admission to or continued attendance at a public college by reason of religion, among other factors. We can also—we would also have

jurisdiction in elementary and secondary schools where we receive a written complaint from a parent or group of parents to the effect that their children are being denied the equal protection of the laws. Our involvement, however, would be limited by title IV to instances where the bringing of a lawsuit would result in the orderly desegregation of the public schools, which is defined by title IV to mean the assignment of students to public schools, and within such schools, without regard to race, color, religion, sex, national origin.

That's the jurisdiction of the Civil Rights Division. There are other components of the Department of Justice. The Office of Legal Counsel opines on whether various actions of the government are constitutional or not. I know at your earlier hearing you heard from the Department of Education talking about their guidelines. It's my understanding that the Office of Legal Counsel worked with the Department of Education to make sure that the statements in those guidelines were correct and follow constitutional guidelines. The Civil Division of the Department also defends statutes enacted by Congress if they come under a constitutional challenge. And that has happened in a number of instances, and the Civil Division has been in court defending the constitutionality of the Equal Access Act. We have a statutory obligation generally to defend the constitutionality of duly enacted laws. So with that, I'll stop, because my guess is you'll have more questions than I can provide answers to.

Discussion

CHAIRPERSON BERRY. Maybe you've already answered them. Counsel, do you have any question for the witness?

MR. HAILES. I have no questions.

CHAIRPERSON BERRY. Does any Commissioner have any questions about the Justice Department and its role in these issues for the witness? Commissioner Horner.

COMMISSIONER HORNER. Yes. And again, we did want someone from the Justice Department, and I guess you're it. And therefore, you have to do your best here. I'm interested in the coordinating role of the Department of Justice with respect to the offices of civil rights in other Departments, such as the Department of Education, and the degree to which legal policy and

civil rights policy is coordinated, influenced, convened, or determined at the Justice Department.

MR. ISHIMARU. There is an executive order, as you know, that places a duty on the Department of Justice to coordinate civil rights activities across government agencies. This, I believe, came up in your title VI investigation. And we convene a multiagency group every so often to talk about and coordinate title VI issues. I am not sure how far our coordination has gone beyond the title VI Federal financial assistance area.

COMMISSIONER HORNER. When I was in a number of different Federal jobs, the Justice Department always loomed very large because, at least in the Reagan and Bush administrations, there was a lot of back and forth before any decision was made that was viewed as consequential, a lot of back and forth with various offices of the Justice Department. And I guess my interest with respect to the issue of religion and schools is simply to ask whether the Justice Department is a strong participator—participates strongly with the Department of Education in whatever activities are appropriate to make sure that these civil rights are being protected.

MR. ISHIMARU. Right. But what laws are you specifically referring to?

COMMISSIONER HORNER. It would be across any legislation that would apply in either obviously or in the creative imagination.

MR. ISHIMARU. But take the Equal Access Act, for example. I know during the Reagan-Bush administrations the policy was that the Department of Education and other Federal agencies had no jurisdiction. I recall seeing a letter from Mr. Wilkie I believe who was the general counsel at the Department of Education who basically said this. He said we have no jurisdiction here. It was envisioned by the Congress that enforcement of the Equal Access Act will be done by the local level. There are discussions that go on.

COMMISSIONER HORNER. Would the current Department of Education hold that view?

MR. ISHIMARU. I do not know.

COMMISSIONER HORNER. You don't know?

MR. ISHIMARU. I don't know, no. I would assume, though, that the policy has not changed. That because the statute does not provide any part of the government with enforcement authority, I would—I don't foresee how the policy would have changed. As I've learned from my

tenure in the executive branch, there is a lot of back and forth that goes on between various agencies on a lot of issues. But I've also learned that sometimes you find out about it after the fact, as well. That no doubt happened during the Reagan and Bush years and it happens as a general—

COMMISSIONER HORNER. That the Justice Department found out after the fact? Never. [Laughter.] I really don't know that it was never the case. As an agency head or Assistant Secretary or something, it was not my impression that they didn't know before I even knew. I hope you have not been brought here gratuitously all the way from Washington. You may have been brought here because I said at one of our meetings, maybe two meetings ago, Why isn't there someone from Education and Justice on our schedule? And we didn't go through much of a discussion then as to the relevance of that. I just assumed, frankly, that any major issue of this sort would involve the Justice Department in legal policy, for instance. If that's not the case, I'm sorry.

MR. ISHIMARU. No, no. The Office of Legal Counsel would give counsel on whether various policies being contemplated are constitutional and reach those standards. That happened on the guidelines back in 1995, just as reissued by the President a number of weeks ago. That back and forth does happen. I come from the Civil Rights Division and not from the Office of Legal Counsel, so I have not been privy to those discussions. I do know that that sort of coordination goes on.

COMMISSIONER HORNER. But I don't think you're the person to give us inside information or insight into this. But thank you anyway.

CHAIRPERSON BERRY. Stuart, I think—does anyone else have a question?

COMMISSIONER GEORGE. Yes, I have a couple.

CHAIRPERSON BERRY. Go ahead.

COMMISSIONER GEORGE. Do you want to go ahead?

CHAIRPERSON BERRY. Go ahead.

COMMISSIONER GEORGE. Stuart, the President's speech announcing that he was going to instruct Secretary Riley to work on the guidelines also included the statement of his views that religion—that schools should not be religion-free zones. And he stated that he disagreed with some Supreme Court rulings. Agreed with others in the area of religion in the schools. Now,

one of the areas does have to do with prayer in school and opportunities for student-initiated prayer in schools. Out there percolating now in the aftermath of the *Lee v. Wiseman* case, the case involving the rabbi giving the prayer at graduation is the question—out there percolating are cases that are going to raise the question, that are raising the question of whether the students invite the rabbi or the students do the prayer themselves or what have you.

Do you have any knowledge that the Justice Department, the Solicitor General, has been involved at any level or intends to be involved as amicus curiae on behalf of the United States in any of this litigation? I raise this because I believe that's one of the cases where the President stated that he thought that the Supreme Court got it wrong.

MR. ISHIMARU. I have no knowledge. I would suggest that you contact the Solicitor General to see whether there has been contact. I know that various components of the Department of Justice meet with outside groups to hear their arguments of whether the U.S. should participate as amicus in cases. We do that in the Civil Rights Division, and I know the Solicitor General's office does as well. So it's probably best to direct it directly to them.

COMMISSIONER GEORGE. We had before us earlier one of the parties in the *Bronx Household of Faith* case. Now, of course, that issue is going to be litigated because it does appear that there's a conflict in the circuits and will have to be resolved by the Supreme Court of the United States. Do you know if the Administration has any position on that issue?

MR. ISHIMARU. I do not know.

COMMISSIONER GEORGE. On the issues that have now been raised in view of the Court's reversal of its former position in the *Agostini* case, it has been reported to me that in the implementation of this ruling the instructors who were going into parochial schools in order to provide the congressionally mandated remedial education have to have the rooms, the schoolrooms, stripped of religious symbols. Let's saying a parochial school, a crucifix or something like that.

Do you know anything about this—whether the Administration and the Justice Department in particular has offered any counsel as to whether (a) the stripping of religious symbols from the rooms is constitutionally required, or (b) is in fact constitutionally impermissible, or, of

course, the middle position. I'm sorry. Forbidden, permitted or required. Do you know if the Justice Department has opined about this?

MR. ISHIMARU. I'm not aware of an opinion one way or the other. I do know as a matter of policy that the Department does not give advice to outside entities. It gives in-house legal counsel as to whether something is appropriate or not. I'm not aware of any activity in this area—

COMMISSIONER GEORGE. Well, here, of course, you do have this interesting question because it's the provision of congressionally mandated—government mandated remedial ed.

MR. ISHIMARU. As you know, Commissioner George, the Department of Justice litigates its cases in court, and we deal with questions when they're raised through the Federal courts. We're not in the business of giving advisory opinions.

COMMISSIONER GEORGE. Okay. Thank you, Madam Chairman.

CHAIRPERSON BERRY. Let me just ask you, Stuart, a followup on the last question. To put it more precisely, has the Department of Education asked the Civil Rights Division [CRD] whether it should do anything about this situation that Commissioner George described? Because what we're talking about is the distribution of title 1 or chapter 1 funds and other kinds of services which the Department of Education has jurisdiction over. And have they raised any issues—and I know from being in the Department of Education or when it was in HEW but it was Education running it, that in fact one would ask the Justice Department Civil Rights Division when one had some issues like this. So I'm just wondering if any issues have been raised from Education as far as you know with CRD?

MR. ISHIMARU. As far as I know, nothing has been raised. It could have been raised with other parts of the Department, but I have no knowledge.

CHAIRPERSON BERRY. Well, could you check for us on that one and let us know. And staff will follow up with you on that. And I want to say that I do think it was important that you be here because even telling us what the Justice Department doesn't do was important for the record, in order to fill out the record. So it was not in vain, and we now have a better picture. I at least do. And I think for the record, it has a better picture of where all these things stand. If there are no further questions for you, I want to thank you very much for coming to testify. And there are certain sign-out procedures that will be followed through with the staff. Thank you very much, Mr. Ishimaru.

We now are supposed to begin an open session for witnesses to testify and who have signed up. And I understand from the deputy general counsel that no witnesses have signed up. That being the case, I would like to say that that concludes our hearing. And as is customary with Commission hearings, the record will remain open for 30 days, during which any of the witnesses can submit any witness statements that will aid in our interpretation of the testimony received. In addition, any member of the public may submit any information helpful to our proceedings. We appreciate the attendance and participation of all who were here today and this hearing is adjourned.

[Whereupon, the proceedings were concluded at 4:45 p.m.]

PROCEEDINGS

Seattle

August 21, 1998

Opening Statement, Mary Frances Berry, Chairperson

CHAIRPERSON BERRY. This briefing of the United States Commission on Civil Rights will now come to order. Good morning and welcome. I am Mary Francis Berry, Chairperson of the Commission, and I will be presiding over this briefing. Scheduled testimony will begin at 9:30 a.m. and conclude at 4:45 p.m. as indicated on the agenda.

Before I detail the purpose and scope of this briefing, I would like to introduce myself further and then allow the other members of the Commission to introduce themselves. In addition to serving as a Chairperson of the Commission, I am the Geraldine R. Segal Professor of American Social Thought, professor of history, and adjunct professor of law at the University of Pennsylvania in Philadelphia, PA. Joining me today are Commissioners Carl Anderson, Constance Horner, Robert George, Yvonne Lee, and the Vice Chair of the Commission, Cruz Reynoso, who will now further introduce themselves, beginning with Commissioner Anderson.

COMMISSIONER ANDERSON. Well, thank you very much, Madam Chair. I am vice president with the Knights of Columbus and the vice president of a graduate school of theology in the Washington, D.C., area, the John Paul II Institute for Studies on Marriage and Family.

COMMISSIONER HORNER. My name is Constance Horner. I am a guest scholar at the Brookings Institution in governmental studies.

COMMISSIONER GEORGE. I'm Robert George. I'm a member of faculty of politics at Princeton University, where I teach legal and political philosophy, and I'm of counsel to the law firm of Robinson & McElwee in Charleston, West Virginia.

COMMISSIONER LEE. Good morning. I'm Yvonne Lee. I'm a principal of a consulting firm in San Francisco specializing in Asian community affairs.

VICE CHAIRPERSON REYNOSO. And I'm Cruz Reynoso, Vice Chair of the Commission. I teach law at UCLA, and I'm associated as special counsel with the law firm of Kaye, Scholar, Fierman, Hays & Handler.

CHAIRPERSON BERRY. And then I would like to introduce our deputy general counsel, Eddie Hailes, who is standing out there and who had oversight of this project. And then I would like to introduce our Staff Director who is to my left, Ruby Moy.

Today the Commission will focus on civil rights issues growing out of religious discrimination as it relates to the Nation's public schools. In other words, we are concerned with those acts which deprive individuals of certain rights because of their religious beliefs and practices. This Commission has a responsibility to ensure that the Nation's civil rights laws with respect to schools and religion are being applied and carried out in a nondiscriminatory manner. Through this proceeding, we also seek to determine if further actions are necessary to ensure nondiscrimination.

Within the broad area of religious discrimination as it relates to public schools, we will concentrate on student and teacher rights within the schools, the right of equal access to school facilities for religious groups, and curriculum issues. This is the last of three proceedings which have addressed these issues. The first was held in Washington, D.C., during May. And the second was held in New York City in June. While the first proceeding addressed these issues from a national perspective, these last two proceedings examine the issues at a local level.

This authority of the U.S. Commission on Civil Rights to conduct these briefings emanates from the 1957 legislation which establishes it as an independent, bipartisan Federal agency of the United States Government. The Commission submits reports containing findings and recom-

mendations for corrective legislative and executive actions to the President and to Congress.

The Commission has scheduled 16 witnesses. These witnesses have been selected due to their knowledge of and/or experience with the issue on which this briefing will focus. We will hear from public officials, civil rights and religious advocates, academicians, and other concerned individuals.

I am certain that my colleagues join with me in the hope that this briefing will lead to open dialogue and will educate us about existing civil rights problems, encouraging sensitivity in our continuing effort to resolve these problems and generally increasing religious discrimination that may exist in the public schools.

I want to thank you for your attention and indicate that I intend to adhere strictly to all times—to the times set forth in the agenda to the extent that I find it possible to do so.

We will begin with the first opening statement, a welcome by Mr. Bill Wassmuth who is Chair of our Washington State Advisory Committee. Could you please come forward. We want to tell you how much we appreciate your work. Our advisory committees constitute people who are volunteers who act in the public interest and we're just so grateful for your work and welcome.

Welcoming Statement of Bill Wassmuth, Chairperson, Washington State Advisory Committee to the Commission

MR. WASSMUTH. Thank you, Chairperson Berry. I appreciate it. Ladies and gentlemen of the United States Commission on Civil Rights, the Washington Advisory Committee welcomes you to Seattle. My name is Bill Wassmuth. I chair the Washington SAC. We are pleased that you are here, and we hope and expect that today will be a productive briefing on this most important subject. And while discussion on the matter of schools and religion is very necessary, it is also important to clearly define where the discussion may not go.

Some in our society misuse religion to establish a basis for anti-Semitism and racism. Under the label of Christian identity theology, they preach hate in the name of God. Obviously, such a position does not need to be included in this discussion.

And those who value the civil rights of all and believe that the separation of church and state is

crucial to maintain those rights for people of all faiths must be even more watchful of that segment of our society who have as their agenda the establishment of a theocracy. It is within this larger theocratic agenda that they have set their sights on the public schools with in some cases the stated goal of taking over the entire educational system one school board at a time. To discuss core values in the schools is valuable. To do so in the context of a theocratic agenda should concern all who respect diversity of religion and the separation of church and state. Whatever is wrong with America's public schools, we may not fix it by sacrificing the separation of church and state.

To be critical of the faith-based conclusions of someone does not threaten that person's religious freedom. To counter a group that attempts to impose its faith-based values on the whole of society does not violate their rights of free speech and freedom of religion. To be complacent, however, in the face of the promotion of the theocratic agenda is to risk the erosion of the separation of church and state and the denial of the rights protected by that wall for people of diverse faith beliefs.

The subject for today is schools and religion. The context for today is the separation of church and state and attacks on that principle coming from those who are more comfortable living in a theocratic society than living in one which welcomes the diversity of religious beliefs.

It is the task of the Commission on Civil Rights and the State advisory committees to work to protect the rights of all people in this country. We need not and may not sacrifice the rights of anyone, even in the name of security or as an attempt to return to certain core values.

So again in the name of the Washington Advisory Committee, I welcome you to this great part of the country. I am sure that you will find your time here enjoyable, productive, and worthwhile. And at this time, I'd like to relinquish a few minutes of my remaining time to State Representative Kip Tokuda from Seattle.

CHAIRPERSON BERRY. Good morning.

REPRESENTATIVE TOKUDA. Good morning.

CHAIRPERSON BERRY. How do we spell your last name? Kip, I heard.

REPRESENTATIVE TOKUDA. T as in Tom O-k-u-d-a.

CHAIRPERSON BERRY. Okay. Go right ahead.

Welcoming Statement of Washington State Representative Kip Tokuda

REPRESENTATIVE TOKUDA. Okay. Thank you. Thank you, Bill, and thank you for all the great work that you have done in this area of championing civil rights and nonviolence. It's a privilege here sitting with you. And Honorable Chairperson and Commissioners, thank you for this opportunity to also welcome you to this wonderful city of Seattle, which is also the home of the first Chinese American governor in this country, home of Ken Griffey, Jr., home of beautiful trees and rain. [Laughter.]

I would like to thank you, panel members, first of all, for conducting these valuable forums across this country. Your task is indeed daunting. You're reviewing such issues as the application of the Equal Access Act, I understand that, protection—constitutional protections, freedoms of speech and religion, and at the same time, being mindful of such issues as separation of church and state.

Just by way of background, I am a third-generation Japanese American. I have served two terms in the House of Representatives. I was prime sponsor of the alternative to Initiative 200 which is here in this State, as you are probably well aware of. I should also say that I grew up in a household where one lineage, my father was a Christian and my mother was a Shinto—comes from a Shinto Buddhist background.

So in my opinion, to make it very short, the strength of this constitutional separation of church and state becomes obvious in a country and in a society that is committed to diversity and mutual respect. This value of diversity and constitutional requirement of separating religion and state becomes very important, especially when we become mindful of the diversity of our demographics. The changing demographics of America indicates that we are in fact becoming more diverse and differences will only increase. A trend that I suspect will only strengthen—that I know will only strengthen our position in the world community as a leader of democracy and tolerance.

I represent a district that is indeed the most diverse district in the State, diverse in the sense of race, diverse in the sense of ethnicity, and diverse in the sense of religion. I grew up in a home and in a community respecting each religion in my household, and appreciated the fact that in my K-18 educational career in public

schools, that I was not in fact preached to, pontificated to by any one religious interest.

I certainly hope that—as I look across the audience when I talk about diversity, I don't see a lot of—it's not diverse. There are no other Asian Pacific Islanders here other than Representative Velma Veloria, and I certainly hope you do not construe that as a lack of interest or commitment to the principles that I have spoken of. These principles of mutual respect and diversity are firmly entrenched into many of our histories and makeup.

Again, I welcome you to Seattle. I thank you for this wonderful opportunity to say these words in front of you. I wish you well as you continue in this endeavor to take on this most daunting task. Thank you.

CHAIRPERSON BERRY. Thank you very much, Representative Tokuda. And thank you very much, Chair Wassmuth.

REPRESENTATIVE TOKUDA. Thank you.

Panel 1: Overview

Part I: Schools and Religion in the Pacific Northwest

CHAIRPERSON BERRY. Are the panelists here for the next panel? Okay. We will just go ahead with the next panel which is Overview, and could the panelists, Richard Wilson, Julya Hampton, and Theo Vander Wel please come forward. While we're doing that, let me ask the interpreter to ask if anyone in the audience needs sign interpretation. Was there any answer? Did anyone? Not that we can see. Okay. Thank you very much. So at this time, we do not.

All right. Let me thank you very much for coming today. We very much appreciate it. And we will begin with Mr. Wilson or Dr. Wilson, who has served as counsel to the superintendent of public instruction since 1987. Before serving in that capacity, Dr. Wilson worked in a private firm where his clients included various school districts throughout Washington State. He has also served as a faculty member at Heritage College and Saint Martin's College, where he continues to teach graduate courses in law and education. His dissertation that he wrote for his Ph.D. is very relevant to this issue, "Supreme Court Religion and Education, an Investigation of Intention." Dr. Wilson received his law degree from Gonzaga also, so he's a Ph.D. and a lawyer. Please proceed, if you have an opening state-

ment you would like to make and then we could ask you some questions.

Richard Wilson, Counsel, Office of the Superintendent of Public Instruction

DR. WILSON. Thank you very much, Commissioner, and thank you very much for this opportunity to the rest of you. I want to thank you for giving me the opportunity to discuss Washington State schools and religious activities. And I've been asked to at least somewhat set the stage for this State.

As we look at religious situations in Washington State schools, we basically need to remember three important procedures. The first is that the United States Constitution, the Washington State Constitution, the decisions rendered by the courts govern our schools relative to religious activities and practices in this State. The second principle is that the schools in Washington serve an instructional purpose and must neither promote nor disparage religion. And the third is that schools in Washington State carry out their legal mandates by the adoption of policies.

Now, how does the school district in this State develop policies? Well, as in all policy formulation, the district has to be cognizant of the law and its interpretations. In religion we give particular emphasis to the United States and Washington State Constitutions. For interpretation of the law, we examine court decisions, U.S. Supreme Court, Washington Supreme Court, the subsidiary courts. From time to time for those issues where they haven't been clearly resolved, of course, we'll give credence to opinions by our Washington State attorney general and look for other evidence as well.

While the 10th amendment delegates the responsibility for education to each individual State, under the 14th amendment, each State must operate within the framework of the United States Constitution. State constitutions are subject to Federal supremacy, and a State may not take legal action which conflicts with the Federal Constitution or the Federal law. State's constitutional laws may be more protective of individual rights of citizens so long as it doesn't violate that U.S. Constitution or Federal law.

And here in the State of Washington we have two provisions which I feel are particularly relevant to our discussion. Article I, subsection 2 of our Washington Constitution provides in perti-

nent part that absolute freedom of conscience in all matters of religious sentiment, belief, and worship shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion. But the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentious or justify practices inconsistent with the peace and safety of the State. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction or the support of any religious establishment. Further, article IX, section 4 of the Constitution states all schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

Now, our State has 296 different school districts that conduct business through the use of policies. Many of the districts use a policy service of a statewide organization called the Washington State School Directors Association. That's the various school directors' blanket organization. And what I've done is I've attached a copy and brought some copies of their policy for your review.

Additionally, the superintendent of public instruction tries to provide assistance as well. Our most recent effort is the brochure on student religious rights. And again, I have those and actually this is dated August 21, 1998, so it's fairly timely. We're sending this out to every single school in the State as well in an effort to make sure that our administrators and our faculty are educated on the rights of students in schools. So we try to be somewhat proactive in that. This is a local-control State. Each school board is in essence its own separate legal entity, and we try to work, try to provide education, try to provide guidance. And I'd like to thank you for the opportunity to at least share some of those things that we do today.

CHAIRPERSON BERRY. Okay. Thank you very much. And there will be some questions for you. We'll go on with the other panelists first. Ms. Hampton has been with the ACLU of Washington since 1980, and during that time, she has monitored a wide variety of schools and religion disputes that have occurred throughout Washington State. She is a graduate of Seattle University in 1980, so she is a home-grown product here in the community of Seattle. Thank you very much for coming, Ms. Hampton, and please proceed.

**Julya Hampton, Legal Program Director,
American Civil Liberties Union of Washington**

MS. HAMPTON. Thank you. I appreciate the opportunity to participate on this panel and answer any questions that the Commission may have about religion and school issues here in Washington State.

Rick Wilson referred in his remarks to the fact that we have 296 school districts in the State of Washington. I think at one time, we had more, closer to 300. Many school districts, both large and small, urban, rural, reflecting a wide variety of community values.

The American Civil Liberties Union [ACLU] has been a presence in this State for several decades. One of the areas that we have always taken special interest in is the area of religious freedom. We have over the years responded to a number of complaints from parents and students and teachers who have concerns about activities occurring in their own schools, either because they believe that those activities unconstitutionally promote or advance religious beliefs or because their own religious liberty has been stifled in one way or another.

We have witnessed an increase in those kinds of complaints in our office. And in response to our concerns about the numbers, we decided to undertake a survey of school districts to learn more about both the kinds of activities that were occurring in those districts and whether those districts had written policies that addressed the broad range of activities that fall within this area. We were, I don't know, necessarily surprised to find out that of the—I think at that time, 297 school districts in the State of Washington, there were probably only about 13 percent to 20 percent of the school districts at that time had what you could call a comprehensive set of written policies to address issues that arose year after year after year.

As a result of the documentation that we had received about practices occurring in the schools, including prayer activities, including denial by school administrators of parents' requests to have excused absences for their children so that they could attend religious celebrations that did not happen to coincide with the religious holidays recognized in that school district, we decided that the best approach at that time would be to see if we could get the Office of Superintendent of Public Instruction to undertake an effort to adopt statewide rules, statewide policies

that would address all the areas where we saw year after year the same kinds of complaints arising.

It was an effort that took a number of years, but I think that it has paid off for all those who have been involved. We were particularly pleased when the Board of Education, rather than adopting statewide rules, adopted an administrative regulation that required each one of the individual school districts to adopt local policies. They were not told what kind of policies to adopt. They were simply told that you must adopt some written set of policy that would address these issues. It was an undertaking that took, I think even a year and a half to finalize. In that process, there was a considerable amount of education that occurred. The Washington State School Directors Association had taken the time to try to develop a set of policies that could be looked to as model policies by the local school districts. I think it paid off in the end, because I talked to Rick Wilson earlier, and he informed me that his understanding is that probably 95 percent of the school districts ended up adopting policies suggested by the school director of the association. The process for adoption of policy was useful I think for the local communities that provided an opportunity for parents, teachers, administrators, other members of the community to step forward and express their opinions, to make clear to school administrators that this was a very important issue to them.

In the end, there may not have been total agreement as to the policies that were eventually passed, but I think that it went a long way towards educating superintendents, educating members of the school boards, educating teachers and community members about what were constitutionally acceptable policies, reasons why it's important to have policies in place, and that there are, within their own communities, individuals who may not necessarily belong to their church, who may not belong to the established mainstream religion in that community, but who were nevertheless students in that community and who wanted to have their religious liberty respected by the schools.

CHAIRPERSON BERRY. Could you sum up, and then we'll have some questions for you.

MS. HAMPTON. We noticed a marked decline in complaints from parents and students after school districts adopted policies, not to say that there aren't problems that still occur in the dis-

tricts, but I think that it has significantly diminished, and I think it's been in large part due to adoption of those local policies. Thank you.

CHAIRPERSON BERRY. Thank you very much. Mr. Vander Wel has served as a pro bono attorney for the Rutherford Institute in Washington State since 1989. The institute, founded in 1982 by John Whitehead, brings lawsuits on constitutional issues and provides representation free of charge through pro bono attorneys. The Rutherford Institute previously had a State chapter network in Washington State, and Mr. Vander Wel was the president of that network while it was in operation. He has been involved in hundreds of disputes involving religious rights in the State, including an estimated 150 to 200 disputes on religion in public schools. In his law firm of Vander Wel & Jacobson, Mr. Vander Wel is a civil litigator concentrated primarily in matters not related to schools and religion. And his law firm represents individuals and businesses throughout Washington State. He is an honors graduate of Drake University Law School. Please, Mr. Vander Wel, proceed.

Theo Vander Wel, Attorney, Vander Wel & Jacobson

MR. VANDER WEL. Thank you members of this Commission for this opportunity to address you. I consider this a real honor to discuss these various issues and share my experiences with you on the respect for and violation of civil rights, religious rights in particular, in the public schools in the State of Washington.

I would agree with the previous panelist regarding a marked decline in the number of disputes in the State of Washington. I too have witnessed that in the number of complaints that I receive from students, parents, and teachers. And I don't know if it's attributable to the adoption of policies by the respective school districts, or whether the school administrators and the school districts have become better informed, or whether its people have given up regarding the discrimination that they face and they simply choose to move out of the public school system or move into a private school system or homeschooling.

Most of the religious rights complaints I receive arise out of public schools. I deal with discrimination in employment contexts and other contexts as well, but most of them arise out of public schools. Over the last 9 years, I have be-

come involved in addressing many, many problems that students, parents, teachers, school administrators, and school districts have faced in the State of Washington. I'm not always the one opposing the school districts. Sometimes, they're asking me for information and for assistance.

I trust that the Commission will take the information that I have to recognize and try to alleviate the discrimination that unfortunately all too often occurs. I'm submitting here information related to our battle against the Impressions curriculum in the early 1990s. You may be shocked to discover that schools were and I believe still are teaching students fundamental wicca activities. Wicca is the religion of witchcraft, and they would actually have students engage in such activities as casting spells under the guise of a reading course.

I'm also submitting a one-page project prepared on a prescribed form by a 10-year-old student. One of the teachers at his school instructed him to change his answer to a wish list, which has been prescribed—that she had required all the students to complete. When the student expressed his religious beliefs on the paper, however, the teacher directed him to qualify his response. In our opinion, the school district gave blatant censorship, and the teacher's actions in having the student revise his response constituted a violation of civil rights.

Another example is of a school district promoting religion, and here the Puyallup School District sponsored a religious activity. I have here a copy of a brochure that was distributed to teachers for them to participate in an after-school activity, clearly stating it was sponsored by the Puyallup School District. The backside of the flier emphasizes that yoga is not necessarily just another workout, but that the person who was to lead the activity believed the aim of yoga is to establish harmony between the everyday self and a spiritual source. And the word spiritual was used on the flier. My client was a teacher who objected to sponsorship of this Hindu activity.

A current example of a dispute involves the Edmonds School District, where a 10-year-old—well, the parents of a 10-year-old object to a teacher's requiring the student to participate in an exorcism ceremony called Oni wa soto, which is associated with the Japanese New Year. It's the most significant holiday in the religion of

Shintoism. As had apparently happened for several years, the Japanese volunteer there had led the ceremony. After being required to make demonic-looking masks, the 10-year-old and another Christian 10-year-old requested to leave the room prior to the rite, the religious rite, but were prohibited from doing so. They and other students have since experienced nightmares and worse. The parents' desire among other things is to ensure that this religious ceremony is not repeated in the school.

Regarding equal access, I was amazed at the various contortions that various school districts went through to avoid the provisions of the Equal Access Act and protection thereof. Students were charged fees, given rooms next to noisy streets, and only permitted to meet at inconvenient times, very, very early in the morning. Some school districts have discriminated against religious groups outside of student groups that desire to lease their facilities by classifying them as for-profit groups and then charging them rental rates higher than those charged for other nonprofit groups that similarly lease the facilities.

For a few years, I also received complaints on the first day of school from students, parents, and teachers because school administrators tried to stop an annual prayer around the flag pole event held by students before school. I believe at this point most of the administrators understand that this is within the students' rights to hold such activities.

And many other examples, for example, teachers requiring students to remove T-shirts with religious symbols on them when other T-shirts were not prohibited in the school. I heard of one instance where a 10-year-old boy was sent to the principal's office for using the word Jesus in a respectful tone.

I wish that you're able to and would be successful in ridding our country of all religious discrimination in public schools but seriously doubt that it will ever occur. The problem is complex because of the great variety of school administrators' knowledge of constitutional rights, and respect for constitutional rights vary. In addition, the harm is often done before the parents even know the discrimination is occurring. From a legal standpoint, moreover, evidentiary problems arise when school administrators are untruthful or deceptive. I'm pleased to answer any questions that you may have.

Discussion

CHAIRPERSON BERRY. Thank you. Thank you very much. Does any Commissioner have any questions for members of the panel? Yes, go ahead, Vice Chairman Reynoso.

VICE CHAIRPERSON REYNOSO. I hate to say I have all kinds of questions, but I'll limit them to a few.

CHAIRPERSON BERRY. Ask as many as you like.

VICE CHAIRPERSON REYNOSO. Thank you. Mr. Wilson, you're both a Ph.D. and a lawyer, a double whammy.

DR. WILSON. Now you have two reasons not to like me.

VICE CHAIRPERSON REYNOSO. That's right.

DR. WILSON. A law professor and a lawyer.

VICE CHAIRPERSON REYNOSO. I was interested in your quoting from the State constitution, particularly, in light of some of the discussions that we've had and some of the testimony we've already heard before today. For example, you mentioned that article IX says that there should be no control or influence from sectarian groups, yet there's been the suggestion in some of the testimony that to the extent that public schools exclude discussion of religion, don't we have a public policy of teaching our children that a society can exist and profit without the impact of religious thought, that in some ways, though perhaps not meaning to, we're teaching in our public institutions the nonimportance of religion? I just wonder what your own—obviously, you aren't going to change the constitution, but I just wondered how you have seen the school boards worry about that, that is not to have a sectarian group influence schools and yet not have the schools thereby appear to be antireligious. That seems to be one of the quandaries that we have.

DR. WILSON. Thank you for the question. I try to reduce it down, especially when I'm talking to board members and educators, and this is a very complex area and there is—and it's a human enterprise. So the type of things that Mr. Vander Wel frankly mentions, I agree with them. I'm not sure if we'll ever be able to get rid of them. The last time I talked to the Washington State Legislature, I told them we don't need to legislate; we need to educate more and more. And I think that is what moves us towards solving a lot of these problems.

But in the State of Washington what at least what we try to, and what I think the counsel's school attorneys try to do with their member schools is let them know that it's okay to teach about religion and about all the things you talk about, but you cross the line when you start preaching about religion and preaching your own particular religion. So we—and in the State of Washington, there are cases under our own State constitution that says it's perfectly acceptable to use the Bible and teach the Bible as literature. It's also fine to teach comparative religion classes in our high schools across the State. And of course, if you're talking about current events, to eliminate certain parts of the world where they're clearly involved with religious struggles to avoid the under meanings of that would be to short shrift our students, and no one is saying that. But what we're trying to avoid here in this State is clearly where you have a teacher or an administrator who is trying to project their own viewpoints, and by doing that discriminating against the type of students in the population here.

VICE CHAIRPERSON REYNOSO. We heard—I guess it goes back 2 or 3 years, we had a broader discussion of the issues of religion. And I still remember the testimony of one of the witnesses who said that it was his impression that in some ways we think, we as Americans think of ourselves as tolerant on religion, principally, because we won't talk about religion in public institutions, particularly. And that he's not—he wasn't sure that that really was teaching us to either understand other people's religions or be tolerant of it. We simply excluded it from our thoughts. Do you think that's been the approach of the public schools generally or not?

DR. WILSON. Well, in this particular State with the 296 different school districts, unlike other States, we don't select textbooks from the State level, so we allow a lot of those curriculum decisions to clearly be made on the local level, so this is really more anecdotal. When I had discussions with school superintendents, with school boards, it doesn't seem like again they're trying to shy away from a lot of these issues, but they are very, very careful and sometimes overly cautious in these areas, and that itself can create additional problems.

So clearly I see where your question is coming from and, yes, I'm sure that there are remnants of those problems. As people who are well

meaning and who have sworn to uphold the Constitution do it in such a conservative manner, that it may have a backlash.

VICE CHAIRPERSON REYNOSO. Ms. Hampton, I just wonder, you mention it and I was very interested in the efforts to get schools to sort of face up to the issues ahead of time by thinking about them and in passing regulations. What has your experience been? And I was interested in—Mr. Vander Wel mentioned the number of complaints seem to have gone down. How influential do you think the process of having school boards think about these things ahead of time, how influential has that been in cutting down the complaints?

MS. HAMPTON. I think that that's played a very significant role. In 1985, when the school districts were undergoing the whole process of holding public hearings, public meetings, inviting in individuals to provide educational materials with their work with the Washington State School Directors Association, there were I think at least three or four different suggested policies or sets of suggested policies that groups brought to school districts to consider when they were going through this process. It was incredible, actually, particularly, in the following, I think 2 or 3 years, because the public meeting process, the requirement that each school board member have to look at all the written materials that had been submitted as part of the process was an incredible educational experience. I don't think they had ever undergone that previously.

VICE CHAIRPERSON REYNOSO. What did the regulations require in terms of flexibility of meeting activity that's related to a person's religion? You know, I can't help but recall that when I was a youngster, I grew up in a very Catholic family, and my mother thought it was sinful to take showers in the nude with other people. And so she complained about that to our grammar school, and the grammar school honored her request that we not be required to take showers with others. Would the regulations require that sort of sensitivity, or would they say, "Hey, showers for everybody"?

MS. HAMPTON. I don't know. Actually, I don't know whether the policies would—are specific enough that they would address that, but interestingly, we did deal with such an issue.

VICE CHAIRPERSON REYNOSO. No kidding?

MS. HAMPTON. We did.

VICE CHAIRPERSON REYNOSO. How did it come out?

MS. HAMPTON. It came out well. We were able to convince the district that it was appropriate for accommodations to be made for this particular student who was Mormon and who had been taught to be very physically modest and who objected to the practice in that school requiring the students to approach the shower stalls, basically, to undress entirely, take a towel, go to the shower stalls which had no privacy curtains. She had refused. They suspended her. We were able to intervene, and they recognized that it was not unreasonable to make an accommodation, that she had very strongly felt views about her personal privacy that had to be respected.

VICE CHAIRPERSON REYNOSO. Thank you. Mr. Vander Wel, we had testimony on some of these issues on a statewide basis, and I was interested that we had—nationally, we had gone a little bit through the same process that Washington has gone through from the point of view that the Department of Justice and the Department of Education had issued a document summarizing the state of the law in terms of Supreme Court rulings and so on. And the representatives from all of the organizations, including Rutherford, indicated that those—that explaining what the law was had helped them resolve, and this is both sides of the issue, I forget, 90, 95 percent of all the issues that came up. And very often the remaining issues were sort of individualized issues that would come up very much as you described them.

Apparently, our education needs to go beyond school board members. One of them mentioned that it was not helpful to have national leaders. And just last night he said, "I heard Representative Gingrich say that a child can't even say grace in a school cafeteria." And he said some schoolteacher will maybe hear that, will believe it, and then admonish a child for saying grace in the cafeteria even sometimes without any school policy on it. So what's your reaction to that sort of analysis of what happens?

MR. VANDER WEL. I think you're right, and I think the educational process is extremely important. I think there are a lot of rumors out there. In fact, one of the reasons I went into the practice of law was people would always tell me oh, that's against the law or this is lawful or this isn't lawful, and they never had any proof for what was lawful and what wasn't. So I thought,

well, by golly, I'm going to go to school, and I'm going to learn what's lawful and what isn't lawful so I'd know for myself.

VICE CHAIRPERSON REYNOSO. Then you got to school and you asked questions and they would say it depends. [Laughter.]

MR. VANDER WEL. I've got more questions now than when I started. But to answer your question, yes, the educational process is extremely important. However, I do find instances where an individual school administrator or an individual teacher may have an agenda, may have a certain antireligion bias or may have a proreligion bias, and no matter how you educate that person, at times, they would rather lose their position than succumb to what the policy is or what the regulation is. Now, fortunately, that doesn't occur a lot, but it does happen. And I'm not sure there's anything that anyone can do about it but address them as they come up case by case.

VICE CHAIRPERSON REYNOSO. Be vigilant.

MR. VANDER WEL. That's right.

DR. WILSON. If I could jump on that too. Along with being the counselor or one of my duties of being the counselor for the State Education Office, I have the Professional Practices Office and the Fingerprinting Office, which has an investigative unit that investigates complaints against educators that may have violated a code of conduct. And we've actually only had one religious case, one case involving religion, which did involve a teacher who recruited—was a Christian teacher who recruited a seventh-grade girl to try to get that young girl to go to that teacher's church saying that "you really need to go. To be of this religion, you need to go to this church." And her parents were Jewish. And that was turned in as a code violation, and that person's license was suspended because of that clear violation of the parents' rights. And that child, that happened 2 or 3 years ago, is still undergoing counseling because of that type of bombardment. So it's very rare, but I just want you to know that when things like that happen, do come to our attention, we certainly try to deal with those and deal with those correctly.

VICE CHAIRPERSON REYNOSO. Thank you, Madam Chair.

CHAIRPERSON BERRY. Any other questions?

COMMISSIONER LEE. My question is for Dr. Wilson, but other panelists can also jump in. I understand in Washington State, it is a top five

State to receive Southeast Asian refugees during the 80s, so I imagine a large number of students in this State will be Southeast Asian children. And I also understand there are several school districts that close to 50 percent, if not more, of your students are Southeast Asians and Pacific Islanders. Chances are these students are from families whose parents may not know about how to reach the school district for concerns or what have you. So when you were developing these policies, what kind of outreach efforts have you tried to reach all parents, especially this group of patients, so that they would understand the policies on these important issues? And also, during the process, was there any effort to get the inputs in when you were developing these policies?

DR. WILSON. Okay. The policies that are in place now, what the State did was we basically legislated that you had to have policies for the 296 different districts. The reason why we do that is because this is a local-control State where we value exactly what the basis of your question is. We want the Spokane community to look at what's right for them, the Seattle community, the Wenatchee community, so the policy process, and there's actually a sample policy here that I'll hand out, I'll be able to provide to you if you'd like to look at it later, that comes from another State agency representing the School Board Association. But that's sent to the school district and they hold public hearings and they try to bring the parents in and the community in an open public meeting with discussion.

And I used to represent districts in the central part of this State where we have a large Hispanic population. And we really wanted to bring those people in, where migrant workers are very important to our economy. So we would try to hold meetings at special times where we knew we could make sure we had interpreters set things out in their native language. And literally sent people to their community groups saying, "Would you please come and participate in this." And I don't think that's unusual in the State of Washington. So whatever type of policy they're working on, they're always like you are trying to get public input.

COMMISSIONER GEORGE. Thank you, Madam Chairman. I'd like to follow up, Dr. Wilson, on Vice Chairman Reynoso's initial question about the constitutional language. Do you happen to know the historical background to the adoption of that language? Was that language made part

of the Constitution in the late 19th or early part of the 20th century?

DR. WILSON. The constitutional language has been with our Constitution since its inception, and you'll find a lot of western States in particular that had that language basically imposed by the Federal Government as a condition to become a State. And there's historical stuff about they were concerned about maybe an influx of Catholics or Mormons and what it would do, and actually with States out here because we're so far away from the seat of government that maybe we needed to be constrained a little bit more.

So it creates for an interesting quagmire because I'm from New York State originally and went to schools there and actually went to parochial schools there where I was provided school transportation, school lunches, diagnostic testing, and a variety of things that I now have to tell my State as their counsel, "You can't do [this] based on this language," even though I benefited from it as part of my education when I was growing up.

COMMISSIONER GEORGE. Well, that's very interesting. Do you happen to know when the State constitution was adopted? This language was part of the original—

DR. WILSON. Right.

COMMISSIONER GEORGE. What are we talking about? And you've made mention of an historical background that a number of historians of American religion have pointed to that involved—I wasn't aware of the Mormon issues, but certainly anti-Catholic sentiment connected to the adoption of late amendments and late amendment-type language in State constitutions. And as you may know, there are challenges to late amendments now around the country being spearheaded by religious liberty advocacy groups such as the Becket. I think Becket has really taken the lead here. Do you have any sense that the breadth of that language which goes all the way, as Vice Chairman Reynoso pointed out, to even purporting or attempting to ban the influence of religion on the schools, in fact, reflected anti-Catholic or anti-Mormon feeling?

DR. WILSON. Well, the last panel that I was on for the legislature [had] a scholar who had researched that, and he spent about 30 or 40 minutes I think convincingly demonstrating that

that was clearly part of the under meaning going into some of the writings at the time.

I will say that about maybe 20 years or so ago, we actually had a statewide initiative to try to take the language that we had and try to basically change it to run—to be parallel to the constitutional language involving religion in the U.S. Constitution, and that failed with the voters of the State. So that was actually tried about 20, 25 years ago. It was a statewide initiative. So it's not that the residents haven't tried to reconcile those things, but at least it didn't work in that process.

COMMISSIONER GEORGE. Okay. Good. Thank you. I wanted to ask about the procedures for disseminating the information that you do make available to school superintendents, and I appreciate your points about it being a local-control State, which of course has advantages that you've pointed to. But is there a way or would it be appropriate to attempt to ensure that the information that you make available to superintendents actually gets into the hands of teachers?

DR. WILSON. Well, there are, for example, this latest bulletin that we're sending out, we are sending it out to basically Educational Service district superintendents, and that's an umbrella organization helping schools in each region and the chief school administrators which is going to be the superintendent. And we ask through our partnership that they then share that with building administrators and the teachers. So part of that is probably a cost reason why we wouldn't want to send out this bulletin to the 110,000 people that literally work there and would cut it down.

We do other things besides this. We're in the process now of we just hired or we're recruiting a full-time Web master for our agency so we'll have a Web site that will have this sort of stuff on and try to educate educators to get on there and get that type of information. We have sponsored for the last 50 years or so with the University of Washington several seminars specifically on religion to reach educators throughout this State, and then now more general ones where we clearly cover this as a topic at least yearly. And we've educated probably 10 or 15,000 people on that very subject.

And I think that also goes to probably help us give a principal that knows this sort of stuff that can take care of the problem when you can't

reach a teacher. What I'm finding is that I'm getting a lot less calls on this sort of stuff. And when people have complaints that a teacher may have done something, they've gone to an administrator who says, "Wait a minute, I don't think we can do that. I need to call here or there." There being a result at a local level, whereas at one time they were being resolved on the Rutherford Institute level or the ACLU or the State level. So I think that's a hopeful and a helpful trend.

COMMISSIONER GEORGE. Do you have any data about the relative proportion of students in private as opposed to public schools in the State? Has there been any movement one way or another, shifting of proportions in the period you're talking about in the past half decade?

DR. WILSON. I don't have that data. I have a sense that the—especially, because of the rise in population and growth coming into Washington and the huge influx we have that's resulting in a lot of school discussion, that those percentages are probably equivalent to where they were. I will say though, and I think this goes to your question, that there's been an increase in home-schooling, so I think there has been somewhat of a dissatisfaction, but rather than the private schools getting the bulk of that, we've seen an increase in people who are home-schooling, and we're trying to give an outreach to those individuals so we can reach them with services as well.

COMMISSIONER GEORGE. Is it your sense that they feel that the public education cannot accommodate their religious needs? Is that the principal motivation?

DR. WILSON. Yes, yes. There are two groups that I tend to deal with [on] home-schooling. One is just frankly unhappy with the level of challenge given to their kids. It has nothing to do with religion. That tends to be a smaller group. The other group tends to be a group that, for whatever reason, feels that the type of moral education they want to give their children just can't be accomplished in the public school. That tends to be a much larger group. And we're trying to deal with both of those by providing many alternative services. And actually I've been to meetings over the last several months trying to change our funding system so we can give as many services that we can to those parents so that they feel that the public schools aren't turning their back on their children.

COMMISSIONER GEORGE. Do you have any data that would indicate any significant increase in the number of Islamic families in your jurisdiction?

DR. WILSON. I wouldn't know.

COMMISSIONER GEORGE. Can I shift to Mr. Vander Wel. You made mention in passing, I believe, to resistance to the Equal Access Act or attempts, if not to resist it, to subvert its application by charging fees to groups that shouldn't be charged fees, assigning bad hours, and so forth and so on. Can you give us anything more concrete about that, or can you give us any sense of the scope of that problem? Is that just an isolated case here or there, or were you suggesting that there's something more, something broader, or perhaps even more organized than that?

MR. VANDER WEL. I think when the Equal Access Act was first passed, the school districts out there received it for information and had to determine what are they going to do with this. And I believe that some of them systematically tried to get around it. For example, when students would want to hold prayer groups or Bible groups, Bible study groups in the schools, I received a number of complaints, and I think of one particularly on the Eastside, and I don't remember specifically what school district it was. I could look it up in my files. But where they placed the students in a room at 6:30 in the morning next to the very busiest, noisiest street with commuter traffic going by, and they said, "That's where you're going to meet," even though there were other facilities available, even though there were other times available. So in essence they were making it extremely difficult for your typical student to get up and go to that type of activity and then actually to hear each other speak or hear each other pray or whatever during that activity.

COMMISSIONER GEORGE. Is there any evidence that that sort of thing goes on now anywhere?

MR. VANDER WEL. In my experience, it's going on less if it is going on. Obviously, I'm not the only one that receives complaints. I don't receive, you know, all of the information on what's going on across the entire State. I'm receiving less complaints in that area. What I am seeing is when those complaints come up, the school districts are more responsive, favorably responsive. I think they understand now that

the Equal Access Act has teeth to it and we need to comply with the Equal Access Act.

COMMISSIONER GEORGE. A final question both for Ms. Hampton and Mr. Vander Wel, and it arises out of two points that have been made by the panelists. One, are Mr.—has to do with Mr. Vander Wel's cases in which students were invited or required to become involved in religious rituals of religions that they were not themselves associated with, and the other has to do with the question of teaching about religion as opposed to preaching or proselytizing or teaching religion. I wonder how we handle the issues there at the margins. If we agree that the public schools ought to teach about religion, but not teach religion, how can we effectively communicate to students in public schools what it is like to be a member of a religion that might be alien to them or one that they have very little familiarity with without inviting them in some sense to step into the shoes of a person in that religion, perhaps even to experience something of the ritual or ceremony?

The way—for many years in this country, Christians have been invited to Jewish homes at Passover, not with the view that the Jewish family would convert the Christian family to Judaism, but rather so that there could be an understanding and appreciation of the one religion by people in the other religion and vice versa. Or is it simply, Mr. Vander Wel, in your opinion, and Ms. Hampton, in your opinion, is it simply at the end of the day impossible for that sort of teaching about religion to go on in the public schools because it will inevitably shade over into a kind of requiring people to engage in religious practices that violate their religious freedom? Is there any hope of a kind of golden meeting here, or is the only possibility really just to stay out of religion and perhaps to—and perhaps make the schools religion-free zones, as President Clinton said they should not be? Maybe Ms. Hampton could go first this time.

MS. HAMPTON. That's an interesting question. I don't think that it's necessary to create an educational exercise where students are asked to actually participate in and undergo a particular religious ceremony in order to learn about that religion or to learn more about what kind of experiences members of that religion have had in our history. I think that you do—I think that in many instances, we cross the line. I think it would be very difficult for a teacher to design a

program and execute it in a way that did not make many students feel very uncomfortable.

COMMISSIONER GEORGE. Would even teaching about religion if you didn't involve students in actual exercises, a Shinto rite or a Christian rite, whatever, would even teaching about religion in itself violate the rights of religious freedom of students and families who would prefer school to be about the three R's and would prefer their children not to be taught anything about other people's religions for fear perhaps that it might lead them away from the religion of the family? Do you see my point, even teaching about religion?

MS. HAMPTON. I see your point. I suspect though that parents who are that hypersensitive, who are that concerned that their child be exposed to information about other religions would find it very difficult to keep their children in the public schools and probably be part of that group who choose to engage in home-schooling. I don't think that's a typical scenario or a typical parent.

COMMISSIONER GEORGE. Mr. Vander Wel, would you please—

MR. VANDER WEL. Yes. Well, there's two aspects to your question. One is really a philosophical question, and one is practical solutions. From a philosophical standpoint, it really comes down to your definition of what a religion is, which I define as someone's world and life view. In my opinion, no matter what you do, there's going to be a religious nature to the educational process. There is going to be a world and life view that is going to be taught. Now, that world and life view in one instance may be Jewish. It may be Islam, or there may be a leaning towards that. It may be Christian or may be something else. It may be humanism whereby someone believes that people could reach their own solutions without a higher being. So it really comes down to your definition of religion. In my opinion, if you take one religion entirely out of the process, you've created a vacuum, and that vacuum is going to get filled by something. Okay? And it's going to be filled by some type of world and life view, so you can't have a sterile environment where no world and life view is taught. It's going to happen in my opinion.

Regarding the exercises and whether it's necessary to have the students engage in the exercises, in my opinion, I—I'm a Christian, and I'd be offended if a teacher, for example, were to

have the students engage in the Lord's Supper or some type of baptism in the classroom. I think that would be totally inappropriate, as I find it's inappropriate to hold a Shinto ceremony or to hold a wicca ceremony or any of these ceremonies.

What you're doing, is it's not just a physical process that you're going through. It's not simply movements. There's a spiritual element to it, and there's high danger with these students that they're being exposed to that spiritual element. If that element isn't consistent with the student's and parent's religious beliefs, I believe the school has crossed the line and has violated religious rights.

In my opinion, the pendulum in Washington has swung and that is many schools in Washington are now anti-Christian where the word Christmas is not used. It's called "happy holidays," and teachers and students are reprimanded if they use the word Christ in Christmas. However, by the same token, they are doing more teaching on, for example, Hanukkah and other religious beliefs. And in doing that, they're not simply teaching the religion, they're engaging in the exercise. They are having students engage in the exercise.

To me, to answer your question on teaching religion, there's two elements to it. One is the school should teach moral values. Sometimes you hear the idea that, well, you can't legislate morality. Well, what are our laws? Our laws essentially are to tell us what is right and what is wrong, and that is morality. So the schools do need to teach some fundamental moral values, and if the school doesn't proactively and affirmatively teach that, they're going to be teaching something else, and it's going to result in drug use, violence, and that type of thing.

Secondly, I believe that the various religions need to be taught, particularly, from a historical perspective, because the history religion—

COMMISSIONER GEORGE. You say needs to be taught. If I could just interrupt, you mean, need to be taught about?

MR. VANDER WEL. Need to be taught about. I'm sorry. Need to be taught about from a historical perspective, particularly, because religions have shaped and molded our world, have shaped and molded the history of our world. And if you try to divorce religions from, for example, from the teaching of history, you're losing a

great element of what's happening in the historical context.

COMMISSIONER GEORGE. Thank you, Madam Chairman.

CHAIRPERSON BERRY. Any other questions? Yes, Commissioner Horner.

COMMISSIONER HORNER. Dr. Wilson, is it your sense that textbooks, which I gather from the comments are locally bought, decided upon, are no longer much of an issue that they at one time were, but aren't now, or are they still an issue? It's hard when you're outside a situation as we are to get a handle on how much is just the normal human nature, rough and tumble with life in any administrative system, and how much are some serious political questions.

DR. WILSON. We still get calls occasionally from parents who are concerned about the passages in a text or even the use of—although this has been falling down a lot in recent years, a series of texts that they felt had things that were promoting witchcraft or something else by the reading series. And in some ways schools, you know, have been worn down because they're not there picking those materials to be controversial. They're trying to pick materials so that they can educate, and if they generate controversy and administrators are spending so much time on that rather than the business at hand, I think there's just a natural push to try to find something else.

There is a procedure in Washington in our statutes on how to select textbooks in each of the districts that requires a great deal of public participation in hearings. So we hope we front-loaded that so that we can avoid those sorts of issues.

If you look at the sample policy that we have here that at least 280 of the districts subscribe to directly and then the other 16 or so that are left have consultants that subscribe to it. So in my research before coming here, I'm confident that every school district in the State has this or something that is extremely similar, maybe a word or two. They talk about "instruction, about religious matters, and/or using religious materials shall be conducted in an objective, neutral, nondevotional manner which shall serve a secular educational purpose. History, sociology, literature, the arts, and other disciplines taught in school may have a religious dimension. Study of these disciplines, including the religious dimension, shall give neither preferential nor dispar-

aging treatment to any single religion or to religion in general and must not be introduced or utilized for devotional purposes." It goes on to some criteria about the selection and inquiry, but the next thing after this first section, the next policy statement says, "A student may decline to participate in a school activity that is contrary to his or her own religious convictions."

So if you put the type of guidance we have in the selection of the materials and what you use the materials for with the fact that the statement is here that the student is confronted with some sort of moral dilemma that again, according to this board policy, they should have the right to decline from participation.

The problem is that it's a human enterprise. The board knows this. They passed it last Tuesday night. Does the teacher in the high school classroom know it? That's the difficulty we have over and over again.

Julya and I were talking before this meeting that we don't select or approve curriculums, but someone submitted to me a wonderful Bible literature curriculum that a national group has done that uses almost that direct language by using it in a nondevotional way for, you know, objective, neutral study. But that, like so many other things, you can give that to someone who can use it either to promote religion, or you can give it to someone who would disparage religion, the same thing because of their personal bent. And that's why when we get down to it, it's that person in the classroom that's so crucial to this equation.

COMMISSIONER HORNER. And even the imputation of a judgment to language that's on its face neutral or a long-range effort to take language which is pejorative or make it benign or vice versa. I recently had the experience of encountering a very old friend whom I haven't seen in a number of years, and during the course of our conversation she said to me—I said something—I said something was pagan or used the word pagan. And she said, "Why do you use that term as a pejorative?" And then she proceeded to inform that she had left the Presbyterian church some 53 years and become a pagan. Not only a pagan, but I think a somewhat militant pagan. I didn't press—

COMMISSIONER GEORGE. Which denomination? [Laughter.]

COMMISSIONER HORNER. I just have one last question, and it will go to Mr. Vander Wel and

maybe to Ms. Hampton. Mr. Vander Wel, you mentioned a curriculum or textbook series called Impressions. I'm not acquainted with it, if it's still in use. If it's not, I won't proceed any further.

MR. VANDER WEL. I can't answer that directly.

COMMISSIONER HORNER. Okay.

MR. VANDER WEL. I can tell you there are different additions of the Impressions curriculum, some that I would find objectionable and some that I would not find objectionable. And what we did in the early 1990s was we objected to the ones that were most objectionable. I can't tell you today if those are still being used or not. In response to one of the last dialogues here, the curriculum specifically told the teacher to have the kids cast a magic spell and engage in certain chants and gave the words. So when you talk about subjectivity, and maybe a teacher promoting something that isn't contained in the curriculum, the curriculum itself contained that type of language, telling the teacher how to teach a magic spell or cast a spell.

COMMISSIONER HORNER. You know, I could see that event or that recommendation as easily interpretable by some people as just a kind of silly and engaging and interesting, fun thing to do, imaginative. I could also see it as part of a long-range and very serious plan to transform Christians into pagans like my friend. And so I would take something like that seriously. But I'm wondering if the old system before people went to court so often or went to national—went to the assistance of national organizations like the Rutherford Institute or ACLU, if the old-fashioned methodology of speaking to the Board of Education is still in play on issues like this.

MR. VANDER WEL. We will explore all possibilities.

COMMISSIONER HORNER. No, I don't mean you. I mean the offended parent. Does the offended parent go first to the Board of Education and then either to you or to the ACLU, or does it go directly to the national organization?

MR. VANDER WEL. It really depends. I mean, some people are very upset right away. They yank their kid out of school, and they're in my office the next morning. Other people will take the time—they have the time, they have the luxury of taking the time, to talk to the school board or to talk to the teacher, that type of thing. So it really depends.

COMMISSIONER HORNER. It's really an efficiency thing.

MR. VANDER WEL. Efficiency or effectiveness.

COMMISSIONER HORNER. I'm concerned about the atrophy of local political institutions, and I understand why busy parents might for efficiency or effectiveness turn to national organizations. And I probably would myself. It's a quick, easy way to get experienced assistance and effective assistance. But I think if I were either in the ACLU or the Rutherford Institute, I would urge parents to show up themselves in the first instance and make use of the traditional democratic institutions. One other question—

DR. WILSON. Commissioner, could I just add to that answer?

COMMISSIONER HORNER. Sure.

DR. WILSON. I'd just like to say that in the State of Washington that the strategy that we try to provide to the parents that call us, because a lot of them call us directly before they get there, and in some instances, I've referred them to these sorts of groups, generally the ACLU or ACLJ [American Center for Law and Justice]. It's surprising how many, when you ask the question, "Have you talked to the teacher yet?" where they say, "No." "Have you talked to the principal?" "No." "Have you talked to the superintendent or another administrator?" "No." "Have you talked to the board?" "No." And so we try to send them back, and we find there's a lot of them who call back and say, "You know, I did talk to the teacher; they didn't realize it was offensive."

COMMISSIONER HORNER. Right.

DR. WILSON. It's gonna stop. So I think you're right in the under meanings in your question of how litigious we are. Sometimes they want to jump right to the top, but they haven't used some common sense that maybe they can solve it. And sometimes I understand that they think, "Oh, no, this person's never going to listen to me" or "This school district is out to get me." But sometimes, they really are there to help, trying to be doing the well-meaning thing.

COMMISSIONER HORNER. Thank you. Thank you. Ms. Hampton, would the ACLU or did the ACLU intervene to prevent the witchcraft exercise as an exercise of religion, inappropriate exercise of religion in the classroom, and if not, why not?

MS. HAMPTON. I'm trying to recall this incident. Do you recall when this occurred?

MR. VANDER WEL. It would have been about 1990 to 1992.

MS. HAMPTON. I don't think we were involved in that incident.

COMMISSIONER HORNER. Would you be in something like this, or are you only—I don't want to ask something too provocative. Would you be interested in something like this?

MS. HAMPTON. I think it raises some issues, and I think we'd want to take a look at the context and try to get an understanding of what the teacher was attempting to do through this exercise. I think your statement—I think it was your statement earlier that some people could interpret the exercise as something entirely, I think, out of the realm of religion and simply a play, a type of play that children engage in that I don't think they recognize or their parents recognize as something that might be associated with a particular religion. I really don't know enough about the controversy.

COMMISSIONER HORNER. I think it's often the case that people who devise such exercises and attempt to disseminate them nationally know exactly what they're doing and have an antireligious, if not anti-Christian, purpose and that the teachers who use those exercises are not educated to a national, philosophical, and political and ideological debates, are educated to classroom exercises, and simply take it as it's stated to be, not as it's intended to be. And I think that when parents raise a concern about something like that, they're called extremists or ideological or off on the fringe when, in fact, they're seemingly seeing more clearly what a long-range plan is designed to do. Thank you.

CHAIRPERSON BERRY. Any questions, Commissioner Anderson?

COMMISSIONER ANDERSON. Quick question and observation. First, about the standards which I think are very good. I'd like to talk a little bit about the term "devotion," as used in the standard, and I think what it gets at, it's a necessary term it seems to me, but it's not a totally adequate term because it seems to me what the term devotion gets at is the fact that when we deal with religion or the exercise of religion, we're dealing with a spiritual reality.

Okay. So parents might be concerned and take the example of the witchcraft ceremony, and they may not be concerned that their son or daughter is going to come home from school having become a witch, but they may very well

be concerned that there are spiritual realities present in that involvement that is not really protected against by the term devotion as a safeguard.

A Jewish parent may very well object to a Jewish—his Jewish son or daughter participating in a Christian rite of baptism, not because the Jewish child may actually be devotional in that participation, but because the Christian may claim that there's a spiritual reality occurring there that the Jewish parent says that he doesn't want or the Jewish child says he doesn't want to any part to participate in. And see, so it's not exactly reached by the term devotion. The same thing with the Shinto exorcism, for example, rite. And so a teacher or a school administrator who is looking at the standard in terms of devotional activity or devotional frame of reference or attitude, may miss something else that's very important in terms of accommodation. So that would be a comment in terms of the standard, which you can respond to if you'd like.

The other comment or question I would have is given the standard as I understand it, it's a pretty good standard, what could be improved procedurally so that we don't have to go through the routine that we hear so much about: Student seeks accommodation. Accommodation is denied. Student refuses to participate, is suspended, and then goes through this long procedure to get readmitted or overcome the suspension. How do we avoid the suspension? Is there a way that we can tell teachers, administrators, "Look, when you have a claim of religious liberty here or religious accommodation, that requires a heightened standard of maybe review before a penalty is imposed such as suspension." Could the panel relate to both of those?

DR. WILSON. If I could just talk about the inadequacy of the words. In my experience now, while looking at these sort of things, that I've never been able to get adequate guidance from the United States Supreme Court on what some of those words mean, and I've had to pass that on to my clients over the years. This is an area that's ripe for discussion about the meaning of several things, whether it be exercise, freedom. That doesn't mean we can't try better and, for example, the bulletin that we have, we reduced it to school prayer, teaching religion, student expression, classroom discussion, distribution of religious literature, religious clubs. So you try to, you know, even within the context of that, nar-

row it to try to give as adequate guidance as you can. But these policies are certainly subject to reworking, and we're trying to do the best as we can on that forefront, not perfect by any means, but we think taking us down the road in a direction that we want to go to.

MR. VANDER WEL. Well, I had one on curriculum, and that is I believe the curriculum needs to be available to the parents to review. I've run into several instances where books or teacher work material has objectionable material in it. The students do not have materials that they can bring home that the parents can review. At times, students are told, "Don't tell your mom and dad about what you're being taught here." In those instances, I get very concerned, and I would like to see that type of curriculum made available to the parents and readily available to prevent any harm from being done.

DR. WILSON. Again, there are procedures for curriculum review in the State, and there are meetings and committees that, you know, you could roll the bowling ball down through the meeting when you're doing that sort of stuff and not hit anybody. It's not until someone says that there's something objectionable that you fill the room. So again, there are procedures in place to get that done and accomplished.

COMMISSIONER GEORGE. Are the procedures State procedures, or is that—

DR. WILSON. They're State procedures about selection of textbooks and other materials and it has to be open to the public and they're adopted in public meetings that secular—

COMMISSIONER GEORGE. Is this in every discipline or just in sex ed and controversial subjects?

DR. WILSON. No, actually, there's textbook selection procedures in place. Now, what the problem is that I can give for an example is then you have that and then under this local control, you may have an English class where you allow a lot of flexibility to the teacher on what books they select and these are going to be the 10 or 12, under 12. And so then it may break down a little bit there, and they don't have the opportunity to look at it beforehand. But there's at least some broad procedures but, again, not perfect.

MR. VANDER WEL. Part of the problem is that the school districts are an establishment. I mean, they're there. They have their curriculum in place. They have their people in place, their

procedures in place for if an issue comes up, they know how to deal with it. The parents are not organized like that. The parents and their students are moving through the school system so whereas a curriculum may be adopted today, the parents of the 3- and 4-year-olds today did not review that curriculum. And when they come up—when their kids come up through the educational process, all of a sudden they hit eighth grade, for example, and they're taught these materials. They really didn't have the chance to review that material ahead of time before it's adopted.

DR. WILSON. And I think one of the issues you raised that is a problem, and a legitimate problem, it kind of goes back to the board knew on Tuesday what they said, but does the teacher know it on Wednesday or Thursday?

The school district I live in does a masterful job of letting us know all sorts of things. I live in the Olympia area, which is fairly activist because it's our seat of local government. We get a calendar from our school district that has all of these things listed and there are committees and when they do these things and everything. And it's just amazing. But there are other school districts in the State, sometimes smaller, that really don't do as good of a job at publicizing as this. So we're constantly trying to work with them and to encourage them to let them know that there are all sorts of incentives for the public to know what they're doing.

MS: HAMPTON. I want to respond to your question about procedures, whether we needed any additional procedures to deal with a situation versus to face disciplinary action. I'm not really aware that that's a particular problem as a general rule. I think that the last I recall that being a situation where you, you know, I'd hear complaints frequently would be in the context of students who were members of school choirs who objected to the pervasively religious selection of materials that were being used by that school and objected and requested to be excused. And oftentimes, there was not enough accommodation. There was not enough, I think, sensitivity to the seriousness of the issue that the student raised, and that would end up in a disciplinary situation. I don't think that that's really much of a problem these days, and I think more than dealing with procedures, looking at the backend, I think as Rick suggested, education is important for the educators. And although we have

bulletins from the OSPI that will go to the building administrators, go to school board members, I think districts can go a long way towards better educating their teachers by having regular inservice training to discuss these kinds of issues so that the information reaches into the classroom.

CHAIRPERSON BERRY. Commissioner Lee.

COMMISSIONER LEE. I have a followup question. Do the school districts make any distinctions between cultural and religious practices as it applies to curriculum development and selection and also equal access issues?

DR. WILSON. Well, Washington, like so many other States, really, truly and sincerely wants to celebrate diversity, and that would be decided again in the local school districts. I remember when my particular school district went to state finals in basketball and we have all our, you know, sort of marching band. They—the other school that was there, and their team clearly was a South Pacific Islander type of influence with the type of costuming and jumping over of the sticks and doing things, and I think they incorporated that wonderfully in their drill team because of the influence they had in that particular community. And there's one example where they really have a lot of discretion and control about what they can look at in an effort to reach the children, make them feel they're valuable and celebrate their own culture as part of the school.

But, you know, again, we have other people, that's the idea, that you want more than Tacos on Tuesday or something like that to celebrate that type of diversity. But we have actually had the Seattle School District come to us in the Human Rights Commission saying, "You know, your definition of diversity is too narrow because you look at a school and say it's 80 percent minority and don't realize that within the Asian community there's a rich amount of culture between Cambodians and Laotians and Chinese and Japanese, and you're actually in an essence discriminating in your definition because you're lumping all these wonderful peoples together." So I think there's a lot of that going on.

CHAIRPERSON BERRY. I want to thank you very much. This discussion has confused me utterly.

DR. WILSON. That was our purpose. [Laughter.]

CHAIRPERSON BERRY. And before we go through these discussions in the hearings, the

more confused I become because let me just say that I wonder—the public schools are under such stress from a number of quarters to try to be good and to educate people and to have quality education, and issues about that, whether there's diversity, and now the controversies over religion and the like.

And in all of the discussions I've heard here, I was wondering first of all what is the role of expertise in all this? I mean, aren't teachers presumed to know something about what they teach or have some kind of expertise? And also are we presuming that most teachers are somehow opposed to religion or have some agenda? What about teachers who just want to teach people and who are trying to educate them and, you know, in sometimes impossible situations? And I also don't believe that school board members, especially those who are elected—I don't know what they do here in the State of Washington—are so resistant to any parents saying anything to them about something that goes on in school that they wouldn't be responsive to. I mean, even in the community I come from, we do have some school board members who at least listen and hear. And so in the whole discussion what I hear is a sort of unstated presumptions about the antireligious motives of all sorts of people up and down the line in the school system. And I say, I must hasten to say lest I be taken to be opposed to religion because I made that statement, I'm a Baptist, a primitive Baptist. My colleagues have heard me say this many times, and I'm deeply committed to my religion and believe it is the one true faith. And I'm mad at you because you're not a primitive Baptist.

But in any case, I just hear sort of presumptions about the motives of people. And I happen to think that most people try to do the best they can most of the time and are struggling with all these issues and need as much help as they can get and that there are serious issues that need dealing with. And I will listen as I've listened to this panel and the other discussions and maybe there's some way to try to help resolve all these issues and that's why we're here.

And you came to help us and we very much appreciate your coming. I'm not criticizing anything you're saying. I'm just saying I'm utterly bemused and confused here.

DR. WILSON. Well, thank you very much for the opportunity. I'd just like to let you know, at

least according to my parish priest, I'm a primitive Catholic. [Laughter.]

CHAIRPERSON BERRY. Oh, okay. All right. Thank you.

MR. VANDER WEL. Ms. Chairperson, I have some materials here.

Panel 1: Overview

Part II: Equal Access, Individual Students' and Teachers' Rights

CHAIRPERSON BERRY. Yes. Please leave them with the staff, and we will include them. Thank you very much, panel, and we'd like to call the next panel. This is on equal access, individual students' and teachers' rights, Douglas K. Vande Griend, Ellen Johnson, and Forrest Turpen. Mr. Doug Vande Griend will be first. And what we will do is have you make opening statements, and then we will ask questions. We'll be reserving those until the last panel.

Mr. Vande Griend is a graduate of Dordt College, Sioux Center, Iowa, and is a lawyer, also from Willamette College. He is the director of the Western Center for Law and Religious Freedom, a west coast public interest law firm currently affiliated with Christian Legal Society, a 35-year-old nationwide professional membership organization of more than 4,500 Christian attorneys. Is that correct, 4,500, is it?

MR. VANDE GRIEND. Yes, it is.

CHAIRPERSON BERRY. Judges, law students, and law professors. Welcome and please proceed.

Douglas K. Vande Griend, Director, Western Center for Law and Religious Freedom

MR. VANDE GRIEND. Thank you, Chairperson Berry. Thank you members of the Commission. I have presented to your staff already my written testimony. It will take longer than I have to read it, so I'll just kind of get to the essential points.

CHAIRPERSON BERRY. Please, just summarize it.

MR. VANDE GRIEND. What I would like to do is I would like to highlight, and it was very interesting to hear the panel before us and some discussion. I want to put a highlight on something very narrow and that has to do with State constitutional and statutory provisions in the States of Oregon and Washington specifically. As I suspect you already appreciate this whole area of establishment versus free exercise, it gets kind of complicated. You can spend an awful

long time talking about it and end up more confused than you were when you started out.

Well, there is another complication that we see consistently as we do work in the Pacific Northwest, especially in the States of Washington and Oregon that adds to the complication and I think adds to the difficulty that schools have dealing with this.

First, in the State of Washington, you've already heard something about the constitutional provisions. It's my view that in both Washington and in Oregon, what the States and the school superintendents and school districts generally perceive is that prohibitions on the establishment side ought to trump or override prohibitions on the free exercise side. And we get that repeatedly in a very specific way. Now, why do I think that occurs? I think it occurs because there has, in fact, in Federal jurisprudence been a shift from sort of a religion-free zone perspective, in other words, let's keep religion out of schools, to more of an accommodation theory. That has happened in Federal jurisprudence. We know it. I think it's very good. I'm a political pluralist. I think it ought to be that way.

A similar kind of shift [inaudible] has occurred either in the State of Oregon or Washington at various levels. I cited, and I'll talk about them briefly, a couple of examples of my written testimony. In the State of Washington we have a school district, East Valley School District, where a group of teachers wanted to meet before hours to pray for students. Other teachers could meet and do whatever they wanted during these pre-school hours. They could play basketball. They could do union business. They could do whatever they wanted. The East Valley School District told these teachers when they found out that they were praying for students as a group, "You may not do that." They went to the school board. They went to the superintendent. They did all those preliminary things before they came to us. They were told, "No, no, no, there's this Washington constitutional provision that requires that we tell you no." We went through the pain of getting an informal attorney general's opinion from the State of Washington. That attorney general's opinion, a four-pager, is attached to my written testimony. When you read it, it clearly supports the teacher's position. Still, and this is what interested me in the superintendent's testimony, that it is a local body and the local school district has still said no to

these teachers. We don't believe this is a close question, not a close question at all.

Notwithstanding there is this fear, and it comes maybe somewhat from the history of it. Maybe it comes from the strong language in it, but there is this presumption that if you have a battle between a free exercise right and an establishment violation, establishment wins. Teachers, you cannot do this.

And now we're faced with a little bit of a difficult problem. We're seeing a school district who is a local authority body saying, "No, we have a choice, either file a lawsuit or do nothing at all." Either one of those has terribly serious consequences. We're the organization that did *Garnette v. Renton*. That took 7 years. And as you might imagine, a ton of resources.

In Oregon we have a similar problem that may have some historical roots in a phenomena called Bhagwan Shree Rajneesh about 10 years ago. But we have some statutory provisions in Oregon which very exclusively say, "You school districts shall not do anything to support religion, and if you do, we will cut off your funding."

We repeatedly hear from school districts, including the pending case of *Culbertson v. Oakridge*, which you may be familiar with already, where the school district says, "But we have to say no. The reason we have to say no is because we could get our school funding cut off." To add a little bit, we know because they tell us consistently, that the State of Oregon tells these school board members, "Hey, if you lose your funding, you folks may be held personally liable for it." Scares the willies out of them. Of course, when they err here, they're going to err on the side of avoiding an establishment violation because you have those huge penalties. The penalties do not exist on the other side of things.

More recently, just in the last couple of weeks, we had a Christian school in southern Oregon contact us and say the department insists that their local county service district must charge them higher rates for the services that they generally provide to schools. Why? Because they claim a religious perspective, not because they're private. It has nothing to do with that. It's they claim a religious perspective. Therefore, the school district says or the State of Oregon has said to them, "We mandate you must charge them a higher rate." That's what I want to focus on in my testimony because I believe out in the

Pacific Northwest that causes a lot of problems. Thank you.

CHAIRPERSON BERRY. Thank you. Thank you very much. They'll be questions as you know. Ms. Ellen Johnson is a second-generation atheist and has served as the president of American Atheists since 1996. American Atheists is a non-profit, nonpolitical educational organization dedicated to the separation of church and state and the civil liberties of atheists. The organization was founded in 1963 by Madalyn Murray O'Hair, a party to the Supreme Court Case, *Murray v. Curlett*. And *Murray v. Curlett* was a companion case to the *School District of Abington Township v. Schempp*, a leading constitutional case which held that State-mandated Bible readings and recitations of the Lord's Prayer are unconstitutional. Ms. Johnson is a political scientist. Please proceed.

Ellen Johnson, President, American Atheists

MS. JOHNSON. Thank you very much. I do want to say that I also have left with your staff copies of our paper for each one of you. And I'm sorry, but I have to leave at 11:30 because of scheduling. They scheduled my flight at 1:00 o'clock, so if I leave at 11:30, I apologize.

CHAIRPERSON BERRY. Okay.

MS. JOHNSON. Let me begin by thanking the Commission for having me here today: As president of American Atheists—can you hear me?

CHAIRPERSON BERRY. Yes, I can hear.

MS. JOHNSON. I would like to briefly tell you about some of the concerns we have as an organization about certain kinds of religious expression in our public schools. My organization receives a troubling amount of reports from people all across the country who are having their rights to freedom of conscience and privacy violated by religious students and school officials.

Atheists and free thinkers comprise a minimum of 10 percent of our population, and too many atheist students as well as students of minority religions are in a battle to defend their right to be free from religion in the public schools. Let me give you a few examples. And this is a quote I received in an e-mail last Tuesday before I came here:

My daughter had a run-in with one of her teachers last year about praying before a school play practice. On the first night of play practice when my daughter wouldn't pray with the group, she was told by the

teacher that she had better start being a better person and that one of these days she was going to go too far and God wouldn't forgive her. My daughter is an honor student who is ranked in the top 5 percent of her class. She has never had a problem with the law and has never had a problem with drugs.

What right did the teacher have to say these things to her, and what rights does she have to fight back with?

In May of this year, the ACLU of Oregon went to court on behalf of an atheist family, the Powells from Portland, to prevent that school district from actively participating in the recruitment of Cub Scouts at Harvest Scott Elementary School. As you know, the Scouts refuse membership to atheists. What they did is they call the students up to the front of the class and slap little bracelets on the children and send them home and encourage them all to join Cub Scouts. And this poor, boy, Remington Powell, you know, his mother had to tell him, "Sorry, you can't join like the rest of your friends because we're atheists." And as parents, we know what that is like for our children. I have a 5-year-old daughter and a 9-year-old son.

In the Aledo, Texas, elementary school, one of the second-grade teachers was forcing her students to pray by putting their hands together and showing them how to do it. In Pikes County, Alabama, the teacher was taking Jewish children's heads and putting them down in a posture of praying.

Since 1993, Corie Bazydlo, an atheist student from Collins, New York, since 1993, this is 5 years, she had been the target of religious abuse because of her atheism. She joined chorus, as a graded class, but refused to participate in the singing of the majority of the songs. The majority were hymns of praise to the Christian savior, and she wouldn't sing them because they violated her right to freedom of conscience. She was told by fellow students that she was going to burn in hell and that she was really lying about her atheism and that this is a Christian—the school's administrator's reaction was, "This is a Christian nation, so deal with it."

Commissioners, this is all part of the little dirty secret in our schools today, and these examples only skim the surface of the amount and the types of reports that American Atheists receive. There are more in my paper.

Regarding the Equal Access Act, while it is well intentioned, it does not adequately protect either free speech or the rights of nonreligious students because the existing remedy of terminating all student clubs as a reaction if some groups are not wanted by the school, denies free speech rights of all the students and so is a poor solution. In Utah, for example, the Equal Access Act was supported until a gay-straight alliance support group wanted to form a club. And as you probably read, Senator Orrin Hatch declared that the purpose of the Equal Access Act was not to permit the establishment of those sorts of clubs, only religious clubs. The "equal" in equal access does need strengthening.

Another controversy involves the nature of Bible and prayer clubs themselves. We have received firsthand reports that these are not clubs in the traditional sense. Rather they often consist of religious rituals, scriptural readings, songs, prayers, and similar activities usually reserved for the church setting. Mind you, there are more churches in our communities than there are schools. In effect, these so-called clubs have become satellites for the local churches for proselytizing and recruitment in the schools. Other attempts at blind-side proselytizing occur when such activities—such as religious clubs hold their meetings in school lobbies, lunch rooms, and hallways where everyone must hear and see their religious services as in Paducah, Kentucky. In addition, "See you at the pole" events in Fort Worth, Texas, involve public address systems. American Atheists receives reports of exuberant prayer advocates aggressively pushing their religious faith on other students who disagree or are repulsed by such proselytizing.

In summation, our experience has shown to us that the establishment clause of the first amendment does not prevent religious adherents from harassing atheists and those of minority religions or from holding religious rituals in the public schools. The first amendment has been and is simply ignored because it can be. Teachers, principals, and school boards cannot be relied upon to protect all students' rights because they're all too often the cause of the problem. Therefore, we think the following needs to be done.

Just as there are laws with penalties for sexual harassment, so too we need laws to protect atheists from the constant unwanted harass-

ment and threats of violence from religious adherents. The first thing the United States Commission on Civil Rights needs to include: the category of atheism as distinct from religion in the Federal Civil Rights Act. It's hard to believe our government has not yet seen fit to recognize that atheists have civil rights too. Additionally, the Federal Equal Access Act needs to be strengthened with penalties for noncompliance instead of just denying all students the right to form clubs. We suggest that these changes are necessary to bring that part of our population into compliance with the laws that apply to everyone else. Thank you.

CHAIRPERSON BERRY. Thank you very much, Ms. Johnson. And they'll be some questions we can get in before you have to leave.

Mr. Forrest Turpen is the executive director of Christian Educators Association International [CEAI]. That's in California. He was once a public school teacher and a public school administrator. He was educated at Northern Illinois University, in Utah State, and University of Georgia and at Stanford. Christian Educators Association International is a professional association with approximately 7,500 Christian teachers. The majority of members are public school teachers. CEAI publishes a magazine, provides professional benefits, and provides prayer groups at local chapters. The association also organizes workshops, seminars, conventions, and works with local churches to recognize outstanding teachers. Welcome Mr. Turpen.

**Forrest Turpen, Executive Director,
Christian Educators Association International**

MR. TURPEN. Thank you for the opportunity to be able to share.

CHAIRPERSON BERRY. Thank you.

MR. TURPEN. It has been 36 years that I've spent in some form of public school involvement, whether a teacher or administrator as you've mentioned. And I would like to comment on one of the things that came up in the last session. I was able to sit in on it, and I'd like to address the issue of Secretary Riley's letter that went to all public school superintendents in '95, August 10 (15,700 school districts).

In my work within the public schools, I have yet to meet a public school teacher that has seen the document unless our members, which we sent that document, shared a copy of it because we asked them to make it widely known. It re-

mains to be seen whether the May 30, 1998, letter from Secretary Riley receives the same lack of making it known to the community, the school community, students, parents, and teachers. It's extremely important that this document be circulated, which it has not. That's one of our major problems that I believe that we have, just a comment.

I'd like to address several issues and, because I work with educators, it will primarily be focused on teachers and then students. We see a significant number of situations where freedom of assembly and speech of Christian teachers are being denied, such as meetings on campuses for prayer, which was alluded to earlier, Bible study during their free time, before school, after school or at noon. That's a frequent denial of teachers that are out there.

We issue presidential proclamations to our teachers for Thanksgiving, for the National Day of Prayer because they're historical documents that the President proclaims, that Congress has established these events. And we find that many principals will not allow that these documents, given by the President of the United States, to be used in a public school classroom. I don't understand how they can see that it's an issue of separation of church and state.

We run into curricular issues. These abuses and types of discriminations take place in many forms from my perspective. Teachers are not able to deal with what they believe is the truth. Districts will cause educators, if you want to take the issue of evolution of mankind or the origins, they are forced to teach things that would be objectionable for them as they see truth.

Another example that these teachers run into is the issue of homosexuality. They are forced to teach that as an acceptable lifestyle. They're forced to compromise their religious convictions and to decide whether they will stay as a teacher or not. They can't raise the issue, Is homosexuality a personal choice or is it a preference or is it sexual orientation? They can't raise the issue, Can an individual who is in this lifestyle be converted? Otherwise, they run the gamut of being fired, or they run the gamut of certainly being documented as not following the politically correct doctrine of the school's system.

We find that people of strong biblical faith who are educators are intimidated and harassed simply because of their belief systems. They're

not being equally protected under the law from our perspective. Students and parents of faith are also required in school districts to endure curriculum that's imposed which undermines their religious beliefs. You can see this being documented over and over again.

Teachers are denied by administrators from wearing jewelry that might pertain to their Christian belief. Tie clasps, those kinds of religious attire, are forced to be removed from educators. Educators of public schools are not allowed in many districts to have a personal Bible on their desk. This is a part of their faith; they would like to in their free time be able to address issues there that are important to them from the Bible. They can't use the Bible as a reference even. In many school systems we run into this issue that I deal with.

The general concept in public schools seems to be among educators is not to use or refer to any Scripture. There's a tremendous chilling effect that prevails in public schools about using any biblical references. It is so prevailing that when a teacher dares to appropriately use a reference in a classroom, a student will stand up and say, "Hey, Ms. Whatever, you can't use that in this classroom."

I can go on and on, but there is another major issue that I'd like to address related to the discrimination going on that unions require—especially in those States where unions require membership or forced labor unions. The school district does not accommodate or communicate to their employees their legal rights to opt out of the union. And when a teacher tries to opt out, they're met with harassment from unions. They hold them hostage because a school district says if you want any information, you must go to the union to get it. And when they go to the union, the union's best interest is not to advertise the other options available to those teachers.

Especially new teachers to the system are overwhelmed. They're intimidated by what's taking place. It's a brave teacher with intestinal fortitude that will even ask the questions, and when they do, they're still intimidated and harassed. If a teacher can break through all of this and find out that they have constitutional rights to opt out, even if they're political views or if they wanted to exercise their right of conscientious objector or conscientious religious objections, they run into major, major hurdles of intimidation.

You have, I hope you have at least, an example of a young lady, Christie Robertson, who is from this State in the Seattle School District who is presently going through over a yearlong effort to exempt herself, based on religious perspectives, from the union. It is still not completed. I have examples of those who took 3 years to be able to get themselves out of the union based on their religious points of view. I'll stop there because my time has gone, but these are significant issues that are very important to Christians who hold personal beliefs and convictions that are not represented by the union they're forced to join. Thank you.

CHAIRPERSON BERRY. Thank you very much. Does any Commissioner have any questions for any members of the panel? Do you, Vice Chair? Go right ahead.

Discussion

VICE CHAIRPERSON REYNOSO. I do. Ms. Johnson, do you find in the reports that come to you that most of these incidents are idiosyncratic to the teachers or to the school, or do you find a pattern that's schoolwide or countywide or statewide? How do you analyze the types of complaints that your organization gets?

MS. JOHNSON. Yes, Mr. Chairperson. It's a variety. For instance, if you were holding these hearings in the South, in Alabama or Tennessee, you would find that it's systemwide. In the instance with Corie Bazydlo in New York, it's the school system, the principal, the teacher. She can't get help from anybody. They simply ignore her and before you know it, the school year is up. These are people who are living on one salary. They can't afford to go through a legal procedure to help Corie. So in that case, it's the school system.

Often cases in Aledo, Texas, before I came here yesterday, I got that example and it was just the teacher who was telling the second graders to put their hands together. It was just the teacher. And the principal was very helpful. But it certainly is pervasive.

VICE CHAIRPERSON REYNOSO. And I was interested in your observation that sometimes public rituals in public schools then have—or may have an intimidating effect on the folk sharing your beliefs, yet on the other hand, we heard this morning about the new effort in accommodation, which perhaps should accommodate those students that want to have a public

ritual. How do you think from a civil rights point of view we ought to come out on that in terms of making recommendations? That seems to me a little bit of an insoluble issue here.

MS. JOHNSON. The problem that I see is that it's less acceptable to accommodate an atheist in our society today than it is to accommodate a religious person. Religious people, we tend to say, "Oh, yes, of course, whatever you say; we're so sorry; what can we do to help you?" But not to atheists. We are not accepted in our society. It's very hard for atheist children who are children of atheist parents to say something, and it's very hard for atheist parents. You have to identify yourself as an atheist to the school board. Your children's friends will find out, not that we are ashamed to be atheists, but we get treated the way homosexuals get treated today, very badly. And so oftentimes, people don't complain and the problems occur.

VICE CHAIRPERSON REYNOSO. And the definition that you use of an atheist is a person who doesn't believe in a God?

MS. JOHNSON. Generally, yes, yes.

VICE CHAIRPERSON REYNOSO. Okay. Thank you. Good. Mr. Vande Griend, I was interested in your analysis, which I find rather compelling, that the school districts in some ways find easier rules to follow in saying, "Hey, this is an establishment issue," than in a free exercise, which I would interpret as being an accommodation issue. Would it help in that regard—and you pointed to maybe some institutional problems, the statutes and the constitutional provisions we talked about earlier certainly in Washington and apparently also in Oregon.

But, you know, the language, at least the language in the Washington Constitution is sufficiently broad it seems to me, that I'm not sure we have, at least yet, a direct conflict between those constitutional provisions and the interpretations of the U.S. Constitution by the Federal courts. Could again some more education in terms of how to accommodate those differences help in some of the issues that you see come up?

MR. VANDE GRIEND. Well, I think it could, and in this case, I think the issue is complex enough that it would do well to educate some of the school district's legal counsel. What we will find often is the case is that legal counsel for school districts will admit, "Hey, this is a complicated issue, and I know that it's been changing." What is particularly difficult, I think, is we al-

ready have a two-sided coin in the free exercise versus establishment provisions. Now you mix in, say, a State level—it's not the establishment clause but the equivalent thereof. Well, can you go further on their establishment clause? How far can you go? Can you go further than what the Federal establishment clause does? What if you start knocking up against the Federal free exercise clause? And that gets complicated enough that I tend to be persuaded that school districts and school board members, I tend to think that they blank out a little bit when they do get an explanation from school, from their school legal authority. But what they do is they tend to—we still have this, and it comes from the past year's prudence. We still have this thing. Well, when in doubt, everybody shut up and nobody say anything about religion. And it's sort of that tendency. Of course, in Oregon, you have the added thing that I think is particularly onerous. You lose your school funding if you violate an establishment clause like this.

VICE CHAIRPERSON REYNOSO. Has Oregon done what I thought was very helpful in Washington, and that is to mandate that school districts think about these issues and then have local rules? Do you know?

MR. VANDE GRIEND. Not that I know of. And, in fact, my biggest contention with the State of Oregon is when they go to the Department of Education [DOE], they get the worst advice. I hate to say that. But every case we've had, we always get relayed from counsel for school district, "Well, the Department of Education says they're going to cut off our funding." It's sort of this, I have to say no to you because those big boys over there are telling me I have to or they're going to cut off our money supply, and our school board is scared stiff.

VICE CHAIRPERSON REYNOSO. A point could be reached where if there was a refusal of accommodation, of course, it would be a violation of Federal law and maybe even Federal Constitution, but I guess the area is sufficiently gray. The gray area is sufficiently broad from what you're telling me, that those school districts and the lawyers that advise them don't have a real sense of confidence.

MR. VANDE GRIEND. Well—

VICE CHAIRPERSON REYNOSO. They're like our Chair. She's confused about what the—
[Laughter.]

MR. VANDE GRIEND. Maybe in the *Culbertson v. Oakridge* case, and I've got transcripts so I'm not speaking out of school, the judge, Michael Hogan, basically said, "Okay, guys, here's the rule. You treat this organization just like you treat any other community organization." It was Child Evangelism Fellowship. Okay. Same rules. School district didn't want to do it. They were convinced that because they were a religious organization, they needed slightly different rules on when they could use the premises.

Now, you got in front of the judge and there was this discussion between court and counsel. And it was so interesting that the school district's counsel was kind of saying, "Well, yes, maybe that's the law, but we can't agree to that," because the judge was trying to get the parties to agree. Judge Hogan is very much like that. They couldn't agree to it because they said if you do this, DOE is on the other side saying they'll cut off our funding. So we need, judge, to have you order us to do it. In fact, when the amended order of that conference came out, the judge's amended order actually said the motion for the preliminary injunction was requested by the school district, which then they in turn appealed.

But it was so interesting, they maintained this "we're in between a rock and a hard place. You, Federal judge, say we have to. DOE says, 'Watch out, you do, we'll cut off your money supply.'" And that's creating in my mind a lot of unnecessary—we got to go on the wall on this. And I think that should be avoided, but the education there has to happen within the legal community.

VICE CHAIRPERSON REYNOSO. Mr. Turpen, I have two sort of—different sort of questions for you.

MR. TURPEN. Sure.

VICE CHAIRPERSON REYNOSO. You mentioned a concern, and again this is double-edged obviously, that some teachers have been concerned they can't have a Bible on the desk or they can't have religious jewelry, for example, a cross and so on. And I can understand that concern. On the other hand, a teacher is a person of authority in the classroom, and wouldn't some parents of some children be concerned if they were Jewish or did not have the same faith in the Bible that a Christian would, that there would be some manifestation of authority to have that Bible there or to have the teacher wearing a cross around his or her neck? How do you balance those?

MR. TURPEN. Very tough. They're not easy answers as we've already indicated that it's a difficult, difficult situation in which we find ourselves. The issue is one of what do we do to make sure that we protect the innocent children who have to be there. They're required to be there. And I am concerned about that because of other issues as well that impact students because they have to be there. And so where do you—where do these rights of the teachers and rights of the students, the rights of the parents, where do the lines cross? I understand that issue. But it seems to me, from what I have been able to observe, that there is a major blockage out there to allowing educators who are people of faith to be people of faith in the workplace without being overly overt in their religious perspectives, and I think that's what's going on.

VICE CHAIRPERSON REYNOSO. The second question has to do with your discussion on unions, and I don't know whether I didn't pay close enough attention to your explanation, but at what point did the issue of opting out become an issue of religion? Do the unions sometimes take positions that deal with religious matters to which those individual members object? Is that what happens?

MR. TURPEN. Yes, there are positions that some unions take that are clearly objectionable to a person of faith.

VICE CHAIRPERSON REYNOSO. But on religious matters, not just political?

MR. TURPEN. Based on religious matters, not political. And teachers have a right as a conscientious objector to opt out or to give all their money to charity. And that's usually worked out at the school district level. However, time and time again, what's going on is, number one, teachers don't know that they have the right because the school districts—which I believe should be required to communicate their rights as a part of their matter of employment. What most school districts will do who are in States, and that's the bulk of the States, that are required to join a union will tell them that as a matter of employment, you must join the union. That's as much as a school district will do. And so to get that information, you must go to the union to get your information.

And so in that process then it is not articulated fairly what teachers' opportunities are. And from there, in a case that you should have before you with Christie Robertson from Seattle

public schools, is the matter that once she heard on the radio that she had this right years down the road, she investigated and it's now been over a year and she still hasn't gained the opportunity to get the money that she objected to being used by the union. And that's a typical process that continues to happen. Something needs to be done and addressed in this issue, not only for Christian teachers, but there's other faiths that would object too.

VICE CHAIRPERSON REYNOSO. Sure. Thank you, Madam Chairperson.

CHAIRPERSON BERRY. Any other—

MS. JOHNSON. May I just comment on that briefly.

CHAIRPERSON BERRY. Yes, please.

MS. JOHNSON. Because it seems that there might be teachers who are not religious who would also object to their dues being used, say, for church outreach programs or faith-based programs, so I think you're right. It's a double-edged sword. That is a particularly union-type of problem.

CHAIRPERSON BERRY. Any other questions? I'm sure you have some.

COMMISSIONER GEORGE. I do. I just want to give other people a chance.

VICE CHAIRPERSON REYNOSO. Equal access.

CHAIRPERSON BERRY. One question. When you were talking, Ms. Johnson, you were—it seemed from your testimony that you thought that school administrators, teachers, and various people in the system were not sympathetic to the views of atheist children and that there were a number of problems; is that correct?

MS. JOHNSON. Yes, that's correct.

CHAIRPERSON BERRY. How does that accord with the views of those who believe that teachers and administrators and people in the system are unsympathetic to people who have religious views and who are therefore making rules and policies and going about trying to prevent children to express their religion? I mean, if you heard those arguments, you would think, well, gee, they'd all love for people to be atheist.

MS. JOHNSON. Right.

CHAIRPERSON BERRY. So if they heard they were all atheist children, they'd all say, "Amen, bring on the atheists."

MS. JOHNSON. No, it's a very valid point and what was running through my mind sitting here is you're not going to get another—you know, I'm glad, I'm very happy that I'm here to tell you

that there is another side of the story. And I've been involved in that discussion for many years.

With all due respect to the people who have testified, it is incumbent upon you to carefully analyze the anecdotal evidence that is given to you. You must get evidence for these examples, because oftentimes, and I am not speaking about anyone in this room, the evidence that has been given for abuses is often exaggerated. Tom Brokaw's nightly news program examined one of these cases. And I have a transcript from the show and have found out that Ralph Reed from the Christian Coalition was disingenuous about stories that he was telling in the schools. And we find that a case involving a lady named Brittany Kaye Settle, while it was solved many years ago, the Christian Coalition is still talking about Brittany Kaye Settle and her problems. That is an example that was distorted and settled, and yet they're still talking about Brittany Kaye Settle.

But the other side of that is that oftentimes these stories that are given are things that are settled very quickly. The school administrators didn't know what to do. They had a knee-jerk reaction. "You can't do this. You can't do that." Once they're told, "Look, these people have every right to do this or wear this," the problems we find are resolved. But there are examples where I guess, and I'm not familiar with them, where maybe there are egregious violations.

CHAIRPERSON BERRY. Okay. I just thought I'd ask you that. Go ahead, Commissioner George.

COMMISSIONER GEORGE. Is there any reason in principle, Ms. Johnson, why we should believe Tom Brokaw rather than Ralph Reed?

MS. JOHNSON. Well, they investigated. No, you should investigate Tom Brokaw. You should call and get both sides, talk to the parents, talk to the police. Tom Brokaw talked to the police because the story involved this boy taken away in a paddy wagon. I could read it to you. And the police said this didn't happen. The principal said this didn't happen. The father said this didn't happen. Jay Sekulo was quoted too. No, you know, as an atheist I say examine everything that people tell you, of course.

COMMISSIONER GEORGE. Mr. Vande Griend, I'm sorry I wasn't here when you were introduced. Is it Vande Griend?

MR. VANDE GRIEND. Vande Griend. If you get it close, that's good enough.

COMMISSIONER GEORGE. One of the issues that we've been exploring in these hearings and briefings is the question of the extent to which the problems with discrimination and abuse of religious freedom in the schools are problems of education, and the extent to which they are problems of animus. And of course it's very difficult to get the kind of hard data that we need. And we don't have the resources to do all the exploration that would be required, as Ms. Johnson points out, to track down all the anecdotes ourselves.

But it's still very helpful to have the impressions of people like yourself who have had major roles in so much of the litigation that's gone on. And you have noted that the educating of counsel for school districts is a very important missing element in all of this, and that's a point that I haven't heard made before. It was possible that someone made it earlier and I missed it. But could you comment on this question to the extent to which the problem is something of education, whether of school administrators themselves or their counsel, and the extent to which it is hostility or animus to religious practice or faith or belief or, for that matter, unbelief.

MR. VANDE GRIEND. My impression is that not much of it is animus. That usually when we get cases, we don't litigate. I mean, for every one that we litigate, we don't litigate 99. And once you get past the teacher, then the school district superintendent or principal or whatever, generally acts quite evenhandedly. We really don't often encounter problems there.

The animus is a little bit more present when it comes to teachers. And I don't know if it's so much animus or just that they have a strongly held perspective. They haven't looked at it from other perspectives, and I would probably agree with Ms. Johnson. I could easily see where you get to certain parts of this country where, say, Christianity is culturalized. Take the South, you would have Christians doing things where I would oppose them and we're a Christian organization.

There's almost the flip side of that in the Pacific Northwest. There's an unchurched area. There's an area where Christianity is not culturalized. It's out here. And when—I'm originally from the Midwest, and when I moved out here, I assumed when I started doing this, I assumed that I would hit antagonistic responses from schools. And I'll be real honest, I didn't.

What I encountered was they didn't know. I expected the animus, but I didn't get it. And that was real interesting to me because I had expected the other way.

I think a lot of the problem comes up if governments see schools as ways to move their society in a macro way. If you've got societal problems, you got drugs, you got crime, you got all this stuff.

What's the first response? Let's teach our children right. So we're going to teach our children, we decide, everything good in our school system. Of course, we have one school system, so that expands the life jurisdiction of the school system greatly. Well, in a pluralistic society, you know that there's going to be a big result from that. You're going to run up to the children on issues that are very core to your being as a person, whether you're a Baptist, Mormon, a Muslim, an atheist, no matter what perspective you are, as soon as government says we're going to change our society for the better. They have a way that they think better is, and that trickles down. And everybody down in the ladder has a way that they think better is.

Our public schools aren't so much inclined to have a restricted jurisdiction, if you will. We want to take care of all of life's problems. We don't want to just educate. We want to make good children. Children who won't do crime. Children who won't be on drugs. Children who will grow up to be great citizens. Well, you've got to teach a lot more than the three Rs to accomplish all of those things. And when you get to those things and you're a politically pluralistic society, that is a formula for rubbing up against each other in a very difficult way.

And I have a lot of sympathy for school administrators. And sometimes I laugh at them, and I wouldn't want your job for nothing. How in the world can you balance all these free exercise rights? I mean, for every 10 issues that there actually are, there could be 2,000 more issues. It's just that we don't happen to have those particular perspectives. I did a lot of work defending prisoners on postconviction in habeas corpus. I learned that every possible thing you might think there is, there is. And we have a society that's becoming increasingly pluralistic, and when the school takes upon itself such a large jurisdiction, it's a natural consequence. And that's why I think we're seeing so many home-schools.

COMMISSIONER GEORGE. These hearings and briefings really have raised the question of the extent to which the increasing pluralism of our society strains the efforts at a real common moral education to be provided by public schools beyond the breaking point. So I take your comments very much to heart.

MR. VANDE GRIEND. I think it's very true. It's difficult to deal with an increasingly pluralistic society, and I think the solution is to think hard and long about what the jurisdiction of the public schools really is. What do we really want to accomplish in the public schools? Where do we want to let people, the American people, figure out their own morality?

COMMISSIONER GEORGE. Let me ask you to comment and for your views on a proposal about the interpretation of constitutional law. A number of commentators, Richard John Neuhaus, Marianne Glenden, John Noonan, many others, had proposed it's really not two religion clauses that could be in conflict with each other, although it has traditionally been interpreted that way. Contention as you pointed out between the free exercise and establishment clause and complaining regularly that the free exercise clause is trumped by the establishment clause. But rather there's only one religious clause, with a single purpose that is served by both dimensions, both free exercise and establishment dimensions, and that is the protection of religious freedom, that nonestablishment is a means to the end, the end being the protection of religious freedom.

Now, those who make this argument say that its upshot practically in places like the schools is that we should have maximum accommodation of religious exercise to the point at which accommodation facilitates denial of religious freedom for others. So that there should be no independent content to establishment considerations beyond the protection of free exercise. Now, some people claim that they detect the Supreme Court moving in this direction. Some people like my friend Kent Greenwall from Columbia Law School says that that's the Court's adopting that he regrets, that he laments it. But in any event, whether the Court is going in that direction or not, do you think there's merit in that way of looking at the constitutional problem as it's presented in the schools?

MR. VANDE GRIEND. I do. That's how I do think of it. I mean, you always have—you have

to express things in legal terms that are acceptable because that's what the courts—

COMMISSIONER GEORGE. Jurisprudence.

MR. VANDE GRIEND. Right.

COMMISSIONER GEORGE. But in a comprehensive way of looking at it.

MR. VANDE GRIEND. That's exactly how I look at it. Like I always notice that you'll have some folk, and I had this in the Oregon appellate court once where they said, "Well, freedom from religion has to be as equal a right as freedom of religion." And I thought that was nonsense because that's sort of a matter antimatter. One's got to win. I think if you look at it in terms of everyone has a religious perspective, and I tend to look at religion—I mean, I think atheists have a religious perspective. I define religion functionally. It's your set of prerational assumptions through which you look at everything and decide what's true, false, meaningful, right, wrong. It is the core. It's sort of like the conscientious objector cases where William Douglas wrote I thought an excellent opinion where even though these conscientious objectors didn't come from a traditional religion, they have these core beliefs, the essence of it.

COMMISSIONER GEORGE. [Inaudible.] that case.

MR. VANDE GRIEND. I think so.

COMMISSIONER GEORGE. So then he seem to define—I think secular humanism was the term he used, wasn't it?

MR. VANDE GRIEND. Yes.

COMMISSIONER GEORGE. He seemed to define that as a religion for free exercise purposes, but not for establishment purposes. Now how could that be?

MR. VANDE GRIEND. I think that's wrong.

COMMISSIONER GEORGE. You think my interpretation is wrong?

MR. VANDE GRIEND. No, no, I think he's wrong.

COMMISSIONER GEORGE. He's wrong.

MR. VANDE GRIEND. I think there is only—everybody has a religious perspective. You know, we call things Scotch tape, but they're really transparent tape. We Xerox things, but it's really a photocopier. And I think when we say religion equals Baptist or Mormon, we get into the name brand thing. Maybe that's the traditional thing.

COMMISSIONER GEORGE. We'll let Ms. Johnson have a shot at that. As I heard you say and

as is represented in the materials that atheism is in fact not a religion.

MS. JOHNSON. It's not a religion.

COMMISSIONER GEORGE. Now, is it a religion functionally, even if it is not a religion dogmatically? Is it a religion functionally as Mr. Vander Griend would—is it more—

MS. JOHNSON. Well, atheism is not—we don't have a doctrine that our members have to sign and agree to. We don't have a worldview as it applies to everybody. Atheists have their own worldview. That's all, but we do not have belief systems. We do not rely on faith. We do not accept that there are miracles, heaven, hell, devils, et cetera.

COMMISSIONER GEORGE. But it is a world—

MS. JOHNSON. We don't believe there's supernatural existence and invisible beings and things like that. It's not a world where we don't have—we don't have one worldview. The atheists do not have a worldview. We are simply people who live without a reference to a supreme being.

COMMISSIONER GEORGE. I'm sorry. I'm just confused. You say you do or you do not?

MS. JOHNSON. We do not live with a reference to a supreme being.

COMMISSIONER GEORGE. But you do have a worldview.

MS. JOHNSON. No, I do not have a worldview.

COMMISSIONER GEORGE. I thought you said that atheism was a worldview.

CHAIRPERSON BERRY. She said atheists do not have a worldview.

MS. JOHNSON. Do not have a worldview.

COMMISSIONER GEORGE. Do not have a worldview.

MS. JOHNSON. No, that's right. So I really—I object to being defined by religious people as to who I am. And I've forgotten my other point.

CHAIRPERSON BERRY. Would you define atheism then as in part the absence of a worldview?

MS. JOHNSON. No, it's not an absence. We don't ask our members to abide by—we do not speak for our members like religious people. You know, each different religion has its own dogmas and tenets, and you follow those. We do not have those things.

COMMISSIONER GEORGE. Well, but you can't be a believer in God and be an atheist.

MS. JOHNSON. Correct, correct.

COMMISSIONER GEORGE. So there's content to the view. There's some things that are excluded.

If somebody wants to claim to join your organization, but they're a believer, they don't belong there.

MS. JOHNSON. That's right.

COMMISSIONER GEORGE. So in that way, it's like a church. If you want to join the Catholic church and you don't believe in the pope, you don't belong there.

MS. JOHNSON. Well, you know, you could also be a meat eater or a vegetarian, whatever. We don't tell people what to think.

COMMISSIONER GEORGE. But that's a religious—

MS. JOHNSON. It's what we don't. All right, if you want to split hairs, if you want to get down there, I don't accept that makes me a religion—makes me a religious person.

COMMISSIONER GEORGE. Well, let me ask you this: You've advocated a position of freedom from religion. Mr. Vande Griend has criticized that notion. Let me ask you if there's any content to your conception of freedom from religion that is not simply religious freedom? Is there any content to it?

MS. JOHNSON. I don't know what you mean.

COMMISSIONER GEORGE. Freedom from religion, there would be content to it if it included not simply the freedom not to believe, but the freedom not to be subjected to religious speech by others.

MS. JOHNSON. And freedom from religion benefits everyone, religious people as well as nonreligious people because this gentleman here cannot be free to practice his religion if he cannot be free from the imposition of other's religion—other religions upon him.

COMMISSIONER GEORGE. But I'm trying to understand the meaning of your concept of freedom from religion rather than [inaudible] I welcome it. That's fine for you to do that, but just so I understand.

MS. JOHNSON. Okay.

COMMISSIONER GEORGE. Is there anything in freedom from religion beyond religious freedom? It would be the case that there is such content if there was a right, for example, not to be subjected to proselytization. Do you believe that there's a right not to be subjected to proselytizing?

MS. JOHNSON. Actually, I don't think there is in law. I don't think we have that right. I don't think that legally we have that right. We're not—

COMMISSIONER GEORGE. Should the law be changed to do that?

MS. JOHNSON. I think that we should be included as a category of people who have civil rights in this country. I think that would go a long way to saying, yes, we have the right not to be proselytized.

COMMISSIONER GEORGE. But you've got freedom of religion like everybody else, right?

MS. JOHNSON. We're not religious.

COMMISSIONER GEORGE. So you want the law to be changed to have something else that's not there in the law now.

MS. JOHNSON. Right.

COMMISSIONER GEORGE. Now, what's the content of that something else? Is it the freedom not to be proselytized and not to be subjected to people knocking on your door saying you ought to become a Jehovah's Witness?

MS. JOHNSON. Yes, but first you have to be a group of citizens who are recognized as having civil rights by virtue of the fact that you're atheist. That being an atheist means just like being a religious person or being a person of a specific gender.

COMMISSIONER GEORGE. Well, give me the passage. Shall not discriminate on the basis of—now, fill in with what you want the law to be changed to be said.

MS. JOHNSON. Atheism.

COMMISSIONER GEORGE. Then we're going to have Catholicism.

MS. JOHNSON. You have religion, religion and sexual orientation. You tell me—

COMMISSIONER GEORGE. Okay. Then you have to give me the content.

CHAIRPERSON BERRY. Atheism.

MS. JOHNSON. Atheism.

COMMISSIONER GEORGE. The content. In other words—

MS. JOHNSON. The basis of my atheist—you mean, atheist philosophy. Is that what you're saying?

COMMISSIONER GEORGE. No. I want to know what the content of the protection is. You have a right to believe or not believe anything you want. Everybody's got that right. That's included in the concept of freedom of religion. Now, if there's got to be more there in order to protect you.

MS. JOHNSON. Right.

COMMISSIONER GEORGE. I want to know what the more is. I can understand what it is, al-

though I wouldn't agree with it. I can understand what it is, what you're saying is, I want a right not to have my door knocked on by a Jehovah's Witness who says you're going to hell—

MS. JOHNSON. It's not just—no, no, that's not what I'm asking for. I'm asking for the right not to be harassed. I'm asking for the right—it's the same as sexual harassment, Commissioner, where someone is trying to humiliate and demean you and to hurt you. And if you can visualize what sexual harassment is, you can visualize what religious harassment is to atheist children and adults in the workplace.

COMMISSIONER GEORGE. So there's a Catholic or a Lutheran or a Jew who have some right against being harassed that you don't think you have under current law.

MS. JOHNSON. That's right.

COMMISSIONER GEORGE. Can you tell me about that?

MS. JOHNSON. In Wyckoff, New Jersey, because I do have to leave, unfortunately. In Wyckoff, New Jersey, I was—a community put up an crèche and a menorah and they defended it by saying it was a public forum. And I said, "Okay, well, I would like to put up a sign for the winter solstice because that's what I celebrate." They said—oh, I mean, they tried everything to stop me, but finally they had to because it was a public forum.

COMMISSIONER GEORGE. What does this—

MS. JOHNSON. Okay. The point is, Commissioner, the sign was stolen. The sign was stolen.

COMMISSIONER GEORGE. But that's against the law, isn't it?

MS. JOHNSON. But I had—so I filed a complaint with the police department, and I called it a bias crime because the only people who would have stolen that sign were people who objected to it. Religious people would have stolen the sign, although they couldn't prove it. I could not—I had to—the form had to say the bias crime was against me because of a religious point of view, because of religion, because there was no category of bias crimes you could be protected as an atheist. I could only be protected as a religious person, which was no protection at all for me. I have to lie about who I am in order to get protection.

COMMISSIONER GEORGE. You had to say you weren't an atheist?

MS. JOHNSON. That's right. I had to say that I was taking protection as it was a violent—

against my rights, against my religious rights or something like that.

COMMISSIONER GEORGE.—to believe or not believe.

MS. JOHNSON. But you have to be religious to take that. You have to identify yourself as a religious person to take that.

Another thing I just want to say about religious exercises in the school is that it should be remembered that there are 350,000 mosques, temples, and houses of worship in this country. Why there is this great cry to have religious services in the public schools when there's only so much time for academic subjects. It's troubling. I don't know what's so special about the hours between 9:00 and 3:30.

COMMISSIONER GEORGE. Well, you don't want to provoke me into another dialogue.

MS. JOHNSON. You know I'd love to, but—
[Laughter.]

CHAIRPERSON BERRY. Let's let Commissioner Horner ask a quick question because you have to go.

COMMISSIONER HORNER. I know you have to go.

MS. JOHNSON. That's right.

COMMISSIONER HORNER. As I listened to you talk about the student who was—the atheist student who was distressed at the preponderance of music in a school concert having a Christian or religious language to it.

MS. JOHNSON. Right.

COMMISSIONER HORNER. This is the subject we could talk a long time on, so I'll just make a very quick question. Would it be your ideal outcome that there would be no religious content in music performed in schools, or are you seeking some kind of balance between religious and non-religious?

MS. JOHNSON. The majority of the songs in this case were religious hymns of praise to Jesus. That was troublesome for the student. There was also a Jewish boy, Jeremy Kraut in Long Island, and of course also Rachel Bachman in Utah. There are more. There are lots of these, it seems, cases. The student wanted an alternative. There was none. This was a graded class. The school would just not accommodate her.

COMMISSIONER HORNER. I guess the only comment I would make very quickly is we've had 2000 years of musical and artistic and architectural and literary traditions based on Christianity, Christian ideas, and so on. And I guess the

thing that concerns me about your point of view is that if you relinquish or diminish the amount of religious content in the cultural artifacts, you're destroying the cultural artifacts of our civilization. Some people would like to do that and start over with something else. It's been tried several times in this century to great blood bath. I don't want to see that happen. I'm concerned that what you're for, which sounds fair minded on the surface, might also destroy a civilization that protects our religious liberties.

MS. JOHNSON. You can answer the question oftentimes by saying, Would you allow another religious persuasion's songs to be sung? And oftentimes, the answer is oh, no, we'll get rid of all religious songs before we'll allow another religious group's songs to be sung. Oftentimes when you ask for equal access, you'll see how there really isn't equality.

COMMISSIONER HORNER. Well, if you're looking for the highest quality of musical experience in our civilization, there aren't too many non-religious pieces of music. If you're looking for the highest quality, you're going to see a preponderance of religiously infused music.

MS. JOHNSON. There are plenty of non-religious holiday songs and I think that—I don't think that that is the basis for the choosing of the songs. I think those songs are chosen because it's Christmas. I don't think you hear Jewish songs. Again, if you ask for equal time for an atheist to sing a solstice song, you're not going to get it. But I think the fact that with Corie's case, the majority's songs were to the Christian Jesus, that was a problem for her. She had to sing the majority. Or when she opted out, the problem is she's now identified by her classmates and identified and isolated because she's an atheist. Now she had to, against the Supreme Court's decision, saying that you cannot be required to profess or not profess a belief in a God, she just did. She just did. She was just made to do it. That's a problem for atheist children, too. Once you don't pray or get involved in something, you have just identified yourself and taken the position.

COMMISSIONER HORNER. Is a young atheist not taught as a young Christian is taught to be staunch in pursuit of the faith, in public declaration of the faith, and educative of others with respect to—

MS. JOHNSON. Yes, but they are often harassed because the atheist position is not the

same as the religious position is. It's still not acceptable. It's like, you know, they're going to get hurt. There's going to be problems just like the gay children if they're being outed. I'm asking the Commission, please help our children. They have—Corie's brother has stomach aches. He has stress. He has anxiety. He's in the same school as Corie. Please help our children, Commissioners. Let's accommodate everybody, but don't forget that there are people who are atheists, and atheists are treated like homosexuals in our community. Let's not have them be beaten up and harassed and abused. How can we protect them, too?

COMMISSIONER HORNER. I know you have to go.

CHAIRPERSON BERRY. I want to thank you, and I want to thank the panel because our time is up. And I said I was going to stay on schedule, I think, unless my watch is totally wrong, and we're 5 minutes or so off. So we'll replace the panel and we will take a brief break and reconvene at 11:45. [Off the record.]

Panel 2: Curriculum

Part I: Curriculum Overview

CHAIRPERSON BERRY. Mr. Sewall and Mr. Eidsmoe. And I was just left a note that said that Mr. Grelle, who was in Chico, I'm not sure I know where that is—

VICE CHAIRPERSON REYNOSO. California.

CHAIRPERSON BERRY.—has plane difficulty. There's a weather—his plane is weathered in Chico and has called to say he isn't here. He's in Chico, wherever that is. And so Mr. Grelle is not here at the moment. So we have Mr. Sewall and Mr. Eidsmoe for this panel, and we very much appreciate—maybe he'll get here later so we can accommodate him, and we'll go through this now.

Mr. Sewall is president of the Center for Educational Studies in New York, New York City, where he directs the American Textbook Council, an independent research organization that conducts reviews in curriculum studies in history and humanities. He's the author of the report, *History Textbooks A Standard Guide*, 1994, and *Religion in the Classroom: What the Textbooks Tell Us*, 1995. This fall, he will publish "Learning About Religion, Learning From Religion," completing a 6-year study of religion in

public schools. He is a former history instructor. He's actually taught history. Is that right?

DR. SEWALL. That's correct.

CHAIRPERSON BERRY. In Phillips Academy, Andover, and an education editor at *Newsweek* magazine. He's on the editorial boards of Phi Delta Kappan and Publishing Research Quarterly. Could you please proceed with an opening statement.

Gilbert T. Sewall, Director, American Textbook Council

DR. SEWALL. It's good to be here today and to talk about a subject that I've been working on for 6 years.

CHAIRPERSON BERRY. Just one moment, Mr. Sewall, I forgot to ask the interpreter to ask if anyone needs sign interpretation services. It seems that no one is presently in need of such services. So thank you very much and excuse me for interrupting and please proceed.

DR. SEWALL. All right. Thanks. I've been the director of the American Textbook Council for the last 10 years. And as such, I have tracked many different controversies, in the curriculum and the extracurriculum, particularly, multiculturalism and what we've come to call the culture wars. We've conducted over the last 6 years extensive reviews of treatment and coverage of religion and history and social studies textbooks as well as health and personal development textbooks. We conduct no studies whatsoever in sciences.

My interests as a historian are in the curriculum and the integrity of the curriculum. But over the last 3 years, as I've been working on religion and the extracurriculum, I've come to the firm conclusion that there can be no surgical cut between what takes place in classrooms and what takes place in the larger campus. And on schoolgrounds for a long time now, the religious domain has been shrinking. It has shrunk in textbooks, though efforts in the last 10 years all point in promising directions. As William Damon of Stanford University has said, in the humanities today, in class, the transcendental function of education is missing. And that of course we might extend to the whole moral atmosphere of the schools.

Religion's expression in defining and promoting good in human life is well-known. By custom and by law, it holds a smaller place today than it has traditionally in the United States.

Furthermore, I'd like to say in concluding and thinking about this forthcoming report, I don't think we can pretend when we talk about quality of education that there is no moral force in the curriculum, that ethical and moral standards are inseparable from total education. Culturally, historically, civilly, the Judeo-Christian heritage is foundational, and indeed, as was pointed out a few minutes ago, integral to the literary and artistic traditions. In fact, I would agree with Commissioner Horner that by trying to excise these aspects of the past from religious content, we are in fact engaged in the destruction of cultural artifacts.

Let me say just a few words. Just let me read a few words from a fairly well-along draft of this forthcoming report of mine to give a just general picture of how I see and many others see the problem today, the problem in front of you.

CHAIRPERSON BERRY. You can take a little more time since we're two panel members.

DR. SEWALL. Oh, okay. All right. This will take—

CHAIRPERSON BERRY. Not too much.

DR. SEWALL. No, no, no. I'm going to wrap it up in just a few paragraphs that come again from my report. Much is made of the strength of the Nation's religious, or more specifically Christian, impulse. In fact, the percentage of Americans who describe themselves as Christians is falling and among Christians, there is no agreement on theology. Many Americans of Christian heritage are not at all observant. Christmas has become an entirely secular event of family celebration and gift giving. The gulf between liberal and conserve Protestantism is vast and growing in matters of love, virtue, and morality.

Whereas a confident and hegemonic Protestant ethic was once ingrained in the curriculum and more a life of public schools, a secular establishment finds it very difficult to conduct any school-based discussion of religion's place in human life. Among secularists and religious people alike religion remains a very large question mark. It's not that religion is persona non grata in schools; it's simply that by custom and by law on matters particularly of religion and religion-based morality, public schools are characterized by caution. While it is legal to teach about religion in limited ways, acknowledge religious practice, operative legal distinctions have grown complicated, and legal hairsplitting is the rule.

In the past decade, educators and policymakers have agreed that public schools can and should strengthen classroom teaching about religion and its function in human affairs. Several have constructed action plans and programmatic guides. The 1998 publication of the First Amendment Center and the Association for Supervision in Curriculum Development, *Taking Religion Seriously Across the Curriculum*, written by Warren A. Nord and Charles C. Haynes is the latest evidence of arising consensus and sense of progress, as educators rethink religion in classrooms and school life. Yet wanting to make adjustments and actually doing so are two separate things. Thank you.

CHAIRPERSON BERRY. Thank you very much. All right, there will be questions, as you know. Mr. Eidsmoe serves as legal counsel to the National Council on Bible Curriculum in Public Schools, a nationwide, nonprofit organization based in North Carolina whose curriculum has been adopted by 70 different school districts and 25 States all over the country, including Alaska and California. I understand that Mr. Eidsmoe teaches—you teach constitutional law. Is that the case?

MR. EIDSMOE. Yes, ma'am.

CHAIRPERSON BERRY.—at the Thomas Goode Jones School of Law in Montgomery. Welcome and please proceed.

John Eidsmoe, Legal Counsel, National Council on Bible Curriculum in the Public Schools

MR. EIDSMOE. Thank you, ma'am. In light of the time factor, I'm going to have to change my prepared remarks. Instead of saying good morning, I have to say good afternoon. [Laughter.] I serve as professor of constitutional law and related subjects at the Thomas Goode Jones School of Law, Faulkner University, in Montgomery, Alabama, and since I hold degrees in theology as well as in law and—

VICE CHAIRPERSON REYNOSO. Ph.D.?

MR. EIDSMOE. No, I have a doctor of ministries from Oral Roberts University, a master of arts and biblical studies from Dallas Theological Seminary and my basic degree and a master of divinity from the Lutheran Brethren Seminary, all of which represent somewhat divergent perspectives. [Laughter.] And the University of Iowa, where I received my law degree is still a divergent perspective. But I also teach Old Testament, systematic theology, apologetics, ethics,

and related subjects at the Birmingham Theological Seminary. But I come to you today in my role as associate legal counsel for the National Council on Bible Curriculum in the Public Schools, a nonprofit corporation established in 1993 to encourage and facilitate the teaching of Bible as history and literature in the public schools. The National Council, chaired by Elizabeth Ridenour of Greensboro, North Carolina, has developed a nondenominational, objective curriculum that has been adopted, and these figures change every few weeks it seems, but right now as of day before yesterday, at least 74 school districts in 26 States. And it's based in part on models that have been used in various school districts for at least 40 years.

Ever since the adoption of the first amendment in 1791 and, in fact, for thousands of years before that, people have debated the proper relationship between religion and government. In the United States, two prominent models for church-state relations have been the separationist model and the nonpreferentialist model. The separationist model holds that religion and government should have as little to do with each other as possible, although even the strictest separationists recognize that absolute separation is impossible. The nonpreferentialist model holds that government should not bestow special favors or status upon one denomination over others, but that religion in general is a great benefit to a nation and its people and that government should benevolently accommodate and encourage religion in general.

I favor the nonpreferentialist model. First, I believe it is most consistent with the intent of the framers of the Constitution and Bill of Rights, as I hope I've demonstrated in my own book, *Christianity and the Constitution*, and I will leave a copy of that with the Commission.

CHAIRPERSON BERRY. Thank you.

MR. EIDSMOE. Three other very fine works that support this position are Professor Robert L. Cord, *The Separation of Church and State: Historical Fact and Current Fiction*, Professor Daniel Dreisbach, *Real, Threatened or Mere Shadow: Religious Liberty and the First Amendment* and *A Nation Dedicated to Religious Liberty: The Constitutional Heritages of Religion Clauses*, by Judge Arlin Adams and Professor Charles Emmerich. I give full citations in my notes for you.

My second reason for favoring the nonpreferentialist approach is that the separationist approach, while never really workable, is far less workable in 1998 than it was in 1791. At that time, government was very limited in scope, and State and Federal involvement in education was almost nonexistent. Americans were at that time, and continue to be, a religious people. Today, government at all levels is much more involved with the lives of its people, and since Americans continue to be a religious people, that increased government involvement inevitably means that government and religion are going to come in contact with each other and cannot be kept entirely separate.

Nowhere is this more apparent than in public education. Education is much more than just the transmission of raw facts. It includes the communication of values, concepts, ideals, and culture from one generation to the next. These values, concepts, and culture are to a great extent shaped or influenced by religion. An attempt to divorce education from the religious roots of our culture will inevitably be incomplete and distorted to say the least.

The Supreme Court has repeatedly recognized this. As the Court said in *Engel v. Vitale* in 1962, the history of man is inseparable from the history of religion. And in *Abington School District v. Schempp*, 1963, the Court said it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization.

It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of Bible or religion when presented objectively as part of the secular program of education may not be affected consistently with the first amendment. I might just add on the side that in that case the Court struck down a religious exercise, the reading of a portion of Scripture followed by, if I recall correctly, the Lord's Prayer, as a act of worship in the schools, but went on to say that they weren't saying that it couldn't be used in this secular manner.

While there is much disagreement over the role of the Bible in public schools, I would like to believe that most people on all sides of the issue sincerely want to be fair. Those who have tried to keep the Bible out of the public schools and who objected to its being taught even objectively

as history or literature have done so in the sincere belief that the best way to be neutral about religion is to say nothing about religion. But in fact, this says a great deal about religion. It tells the student that his or her religious beliefs might be important at home or at church, but they are unimportant and irrelevant, and I could add maybe even unfashionable or forbidden, in the academic world. In the marketplace of ideas, many ideas compete for acceptance, some secular and some religious.

By making education largely a function of government, government has come to occupy a major role in the marketplace of ideas. To a large extent, the marketplace is the public arena. If the government's policy is that secular ideas may be expressed in the public arena but religious ideas may not, the government has come down squarely on the side of the secular and against the religious. That is not neutrality towards religion. That is hostility toward religion.

The National Council believes the best way to approach this problem is to offer an elective course on the Bible. The best way to present the Bible we believe is in an objective manner that uses the Bible itself as the primary text, but which incorporates many other resources and supplements. We believe the curriculum the National Council has developed is an excellent way of achieving this objective.

I would like to make two closing observations. First, there are many ways of understanding the Bible. Some regard it as the inspired and inerrant Word of God. Others believe the Bible is divinely inspired, but not necessarily free from error. Still others believe the Bible is neither inspired nor inerrant, but is simply the work of ancient man.

In Bible scholarship, we speak of lower criticism and higher criticism. Simply stated, maybe oversimplified perhaps, lower criticism examines the texts of Scripture to try to determine what the original manuscripts actually said. Higher criticism goes beyond lower criticism and seeks to determine whether the original manuscripts were accurate or not. Advocates of higher criticism, for example, generally argue that the first five books of the Bible, Genesis through Deuteronomy, were not the work of Moses as they claim to be, but rather were a composite of four different authors known to us today as J, E, D, and P who wrote over a period of many centu-

ries. This is often called the documentary hypothesis or the Graf-Wellhausen theory or sometimes just the JEDP theory.

My concern is that some of the textbooks which are used to teach the Bible in public schools present the views of higher criticism as though they are accepted by all intelligent, thoughtful people. I assure you, they are not. Many outstanding Bible scholars reject the conclusions of higher criticism. In fact, the higher critics views, such as the Graf-Wellhausen theory, probably less accepted today than those views were 50 or 75 years ago.

The National Council believes that it's appropriate to acquaint students with these various views, including the views of higher criticism; that it is wrong to teach the theories of higher criticism as though they were established fact. This is favoring one religious belief over others. The best approach we believe is to explain the various views but allow the Bible to speak for itself. These students can read the Bible and decide for themselves whether to believe or disbelieve any part of it or how to interpret it.

Second, the question often arises whether offering the course on Bible requires the school district to offer similar courses on the Koran, the Upanishads, or other books held sacred by other religions. My response is that I would have no objection to such courses being offered, provided they are electives and there is student demand for it. And I might even urge my own children to take such courses. But I do not believe such courses are constitutionally required, because the Bible has played a formative role in American culture that far exceeds that of any other book.

CHAIRPERSON BERRY. If you have another sentence you'd like to say, you can.

MR. EIDSMOE. That will be my last.

Discussion

CHAIRPERSON BERRY. You were posed as if you weren't finished. You are. Okay. All right. Thank you very much. Let me just ask one question myself first now this time. And usually—let me ask you two questions. First for you, Mr. Sewall. The National Science Academy released a report earlier this year entitled *Teaching About Evolution*, which argues that evolution is not being taught in many schools around the country. Do you think the evolution versus creation-

ism debate is still ongoing in the area of textbooks?

DR. SEWALL. I said earlier I am a historian by background. We have done no studies whatsoever. I've looked not at all at controversies in science curriculum, and it's just outside my domain. I'm sorry.

CHAIRPERSON BERRY. Okay. So you don't know whether this is still a hot issue in terms of textbooks?

DR. SEWALL. Well, I can answer that. It is a hot issue. It doesn't take being an expert to know that it's a very, very hot issue.

CHAIRPERSON BERRY. Okay. And the only other question I'd ask is, Do you think the Federal Government should play any role in controversies over textbooks?

DR. SEWALL. My short answer would be no. Looking at the textbook industry, which I know well, and looking at operations in States, particularly California—I'm a native—and Texas, no, I think adjustments in textbooks will come from other venues, should come from other venues.

CHAIRPERSON BERRY. And the last question I have is, Mr. Eidsmoe, you were answering a question that I was about to ask you about whether the Bible is taught, the Koran should be taught too as literature. And did I understand your answer correctly? Did it have to do with persistence and numbers of people who are involved, or what were the criteria about what you decided which books ought to be taught?

MR. EIDSMOE. The first criteria that we need to look at there is to what extent they are relevant to our culture. And I would say that the Bible has played a formative role in the development of Western literature, art, music, and law, and culture in general, in a way that at least in our society here in America to this point, the Koran and other books have not. So I would say that I would have no objection to offering both. And my son just graduated from the Air Force Academy with a minor in Arabic, is now doing advanced study in Arabic, and I might well encourage him to take a course in the Koran. But I'm just saying that teaching the Bible, I don't think imposes an equal time requirement that the other course be offered.

Now, the second question as to demand, that raises a question that I'm not sure how to answer exactly. And if let's say you had 50 students in the school that wanted a course in the Bible

and only, let's say, 2 students that wanted a course in the Koran, can you consider the demand for the course as a relevant factor in deciding whether to offer it? That's a question that is difficult to answer, and I'm not sure I have a clear answer on that. I can only say that in schools, at least at the university level all around the country, we decide whether or not a course makes it based on how many students enroll in a course. So I think that's entitled to some consideration.

CHAIRPERSON BERRY. What about if the students wanted to have you teach about Buddhism in a certain community?

MR. EIDSMOE. I would feel exactly the same way about that as I would about the Islam, the Koran, or any other.

CHAIRPERSON BERRY. Suppose large numbers of students and their parents wanted such courses taught?

MR. EIDSMOE. Again, I would have no objection to that at all. I might even have—I wrote a book dealing with new age that goes into a lot of this and I'm teaching a seminary course this fall called Contemporary Theology where I get into some of this and I might encourage my children to take that course. But I would see no reason to treat a course like that any differently from the Bible course or the course on the Koran.

CHAIRPERSON BERRY. So if the school system decided not to offer the course on Buddhism, though demanded by the students and their parents in the community, you would feel they had no legal basis for such a challenge?

MR. EIDSMOE. That's a good question. My initial answer would be to say no, they do not, and again, because I think over and beyond the question of student demand, a school board is entitled to consider how relevant this course is as far as the major purposes of education, which are the communication of values from one generation to the next. For example, if the—let's say there is a large student demand for a course on shall we say rock music or other subjects like this, I don't think the school district—or on Saturday morning cartoons or something like this, I don't think the school district needs to offer a course just because there is student demand for it. I guess they're entitled to consider that though.

CHAIRPERSON BERRY. I want to be sure that I'm being fair to you in my articulating the question so that we can be fair in the answer. Per-

haps the question was inartfully phrased. What I meant was if you were in a community where large numbers of students were Buddhists and so were their parents the majority in the population, and they wanted a course in Buddhism and its religious influence and its cultural influence and the like, and the school system refused to offer such a course but offered a course in the Bible as literature, do you feel that these particular students and their parents would be wrong to bring a legal challenge, and do you believe that they wouldn't have a leg to stand on in trying to win such a challenge?

MR. EIDSMOE. The question I think is very artfully put, and if I'm struggling for an answer, it's because I'm not sure exactly what I believe of that. But I think the answer I'd probably give you is this: That if the school board's reason for refusing to offer a course on Buddhism while offering a course on the Bible, if their reason was motivated by the desire to advance the Christian religion or Judaism or a hostility toward the Buddhist religion, then I think that they would have a valid legal challenge to a school board's decision. If their basis for the decision was simply that the course on the Bible was relevant to Western culture and a course on Buddhism was not as relevant, then I think that the school board would be on solid ground on their decision then. That's the initial answer, but I've still got some things to think about there.

CHAIRPERSON BERRY. Okay. Thank you. Other questions? Commissioner Horner.

COMMISSIONER HORNER. Yes. I'd like to get both of your observations on a dilemma. It may be hard for me to express, but I'll try. I taught on and off for about 12 years, English literature, and my impulse as a teacher, my overriding, overwhelming vital impulse was to express and elicit truth. What is the truth about this text which we are reading? And what I'm hearing from both of you, although I think from Mr. Sewall skeptically with respect to potential for execution, is that you are recommending the teaching of the Bible as a cultural, historical, or literary artifact, understanding that for many, it has deep religious meaning, if not origin, and, therefore, what you're proposing is a teacher to teach constrained within certain rules that apply in the case of this text but not in the case of the rest of the curriculum.

And my problem is that when teaching history, I think to bright 10th graders, it's very

hard not to teach historiography by implication at least. Here's American history. Here's how we believe we know the contents of American history, history and historiography. Therefore, if we teach the Bible without teaching here's how we believe we know this document came to be, what it is, then we are asking teachers to suppress their own intellectually arrived at or spiritually arrived at conclusions in the classroom. And I know teachers do this as a practical matter all the time and have to or they'll be fired unless they have an ear acutely attuned to the mainstream of their community. But still I think it poses an ethical dilemma for educators.

And the second observation I'd like your reaction to is this ethical dilemma: If we teach the Bible in public schools in order to accurately represent its place in our culture and our civilization, are we by implication reducing its import as a religious document to those for whom it's a religious document? And I would ask the question are we—are those who believe it's a religious document better advised to teach it outside the public schools as such in order to teach it in a very direct way, not constrained by rules? Mr. Sewall.

DR. SEWALL. Yes, some profound questions arise here because when we talk about teaching the Bible, that means very different things to different people. First, let me say that I would imagine the Bible is taught more likely than not formally in world history courses. And those world history courses are like a flat river, you know, a mile wide, an inch deep. The coverage of all world history is superficial, and the content of what we used to call Western civilization, thinner and thinner as the diversity movement moves out and tries to bring in the histories of other cultures, other religions, which in some ways have an easier time of it than Judeo-Christianity in the classroom, the teaching of Islam or the teaching of Buddhism.

I'd like to say, make no mistake, no reputable historian would use the Bible as a history textbook in high school. That's not what it is. It's Scripture, and the council has concluded that the study of Scripture, not only the Bible but of all world religions, living world religions, is something that is desirable, would invigorate and improve our world history.

Now, turning to a different aspect of your musings, your reflections, many religious conservatives don't want the Bible taught in

schools. They feel that a bias against traditional Christianity and literalism and the simple ignorance of the people doing the teaching, makes the Bible better taught in another place, in another institution. That's not a view I hold, but I think that is an honorable view of people who are literalists who find what's going on in the public schools morally corrosive or even diabolical. I am not one of those people.

MR. EIDSMOE. I'll disagree in part to Dr. Sewall's suggestion that the Bible should not be treated as history or as a history book. That I will agree that, say, Genesis 1 through 11 could not be corroborated by other historical sources, nor do I believe could they be contradicted. But beyond that, I would say that most of the rest of the Bible I think certainly has a place in history to compete with other versions of history and in most cases corroborated by modern archaeology. So I would say that the Bible can be used as at least a source of history.

Now, I think part of the questioning that's being addressed here concerns maybe a different perspective as to how the Bible is to be used in school. I believe Dr. Sewall, if I understand him correctly, is suggesting that it should be integrated with some of the rest of curriculum. I'm suggesting for the National Council here that we have a special course on the Bible. And I don't think these two approaches are at all mutually exclusive, and I don't think Dr. Sewall would understand them that way either.

The question that I think arises in my mind, based upon what Commissioner Horner just asked here concerning the role of the teacher in this regard, possibly having to suppress certain beliefs the teacher may have in teaching and so on. Well, one of the things that we have done in the National Council, I should say this was all done before I ever became associated with them in any—but I'm going to leave with you several works here on our curriculum where we suggest, among other things, that those who are selected by the public school to teach these courses should be selected without regard to those teachers' own beliefs about the Bible. In other words, their main purpose is to teach the contents, not necessarily to express their beliefs. But as I believe one Commissioner raised a little earlier, there's a very valid question concerning the role of a teacher. In part, the teacher is a State agent imparting information that the State has mandated the teacher to impart. But also,

the teacher is a citizen with certain first amendment rights. The *Tinker v. Des Moines Independent Community School District* case involving the wearing of arm bands certainly addressed that, and where the court said neither students nor teachers shed their constitutional rights at the schoolhouse gate. Likewise, *Epperson v. Arkansas*, I believe about 1968 or thereabouts, and so the courts have recognize too that the teachers do have certain first amendment rights.

I think possibly the case that addresses this best is *James v. Board of Education*. That's a second circuit case. The citation on it is 450 or 451 F.2d 566, and that's a 1973 case, in which the court simply said that a teacher has a right to express an opinion in a classroom, but the teacher does not have the right to indoctrinate in a narrow and dogmatic manner. Now, granted there's a lot of gray area between those two. When I say what I think, I am expressing an opinion. When my opponents say what they think, they are indoctrinating in their own dogmatic manner. [Laughter.]

But a lot of this is the relevance of it, how it's raised, and other questions like this. But within those parameters, I think the teacher, either in a Bible course or maybe in a literature course where some of the biblical evolutions and some works of literature or maybe in music where maybe we're doing one of Bach's cantatas or Handel's *Messiah* or other works like this, I think a teacher is entitled to express an opinion, whether it's an opinion I agree with or not. I'd only suggest that regardless of what those opinions are, maybe in light of the sensitivity to this area, a teacher needs to be maybe especially sensitive here.

COMMISSIONER HORNER. I'd like to ask Mr. Sewall one more question if I may. Because of the change in immigration law beginning in 1965 and other historical circumstances, there's been a big shift in the cultures of origin of the American population now, and one of the problems that this poses for the people who think about education is this: Is the teaching of history, art, literature, and the Bible perhaps supposed to—or is curriculum design supposed to inculcate in a young American citizen or a future citizen knowledge of the historic experience and the political, cultural understandings of the U.S. as it has occurred to date or to recent times, or is it supposed to respond to the influx of people of

other cultures now such as occurred at the turn of the century, but I think perhaps even almost more so now because of communications? Is it supposed to respond to the cultures of origin? In other words, should we teach the Judeo-Christian tradition predominantly because it infuses our political documents of origin, for instance, or should we teach Buddhist or Islamic culture because large segments of our population come from cultures which are Buddhist or Islamic?

DR. SEWALL. There's no doubt that the school population is more heterogeneous culturally than in the past. But I think we can overdo the concern about districts where there is a wide spectrum of children whose cultures of origin are not American. This is the case in isolated districts, don't get me wrong. But there are many, many schools that have not experienced the kind of influx that you would imply, where there's more homogeneity, cultural homogeneity, than you might think, where people of various backgrounds, of multiethnic backgrounds, think of themselves as Americans and parents. Some of non-Western, non-European—well, I'm searching for the right word of the day.

COMMISSIONER HORNER. This is difficult to talk about.

DR. SEWALL. In any case, I think parents of all backgrounds are interested in history and social studies, civics that stresses the political and cultural background of who we are, what we are, emphasis on the "we," emphasis on the commonalities rather than the differences.

COMMISSIONER HORNER. The concept being that all who come will become Americans—

DR. SEWALL. Yes, that is correct.

COMMISSIONER HORNER. And participate on that history.

DR. SEWALL. All right. I'm afraid an assimilationist view, I've been accused sometimes wildly of being culture bound. And I would say there's much to be said for the serious study of world religions. Given the fact that in schools today the big problem is ignorance of everything, amnesia of the humanities dumbing down, not content or interpretation. I strongly urge curriculum leaders to move towards those commonalities and toward the "we" rather than this splintered idea of an American mosaic.

COMMISSIONER HORNER. Well, I entirely agree with what you just said. Thank you.

CHAIRPERSON BERRY. Vice Chairman.

VICE CHAIRPERSON REYNOSO. I have a broad question for both of you. Religion is so important to most human beings and most Americans, or a nonreligion to atheists as we heard earlier, and yet the public schools, for the many reasons we've discussed this morning or we've heard about this afternoon too, find it very difficult to deal with issues of religion. We've heard the suggestion that maybe there's simply an incongruity in our system of public education as it's evolved in our country and the importance of religion. The implication being that maybe we should start diminishing the importance of public education. Maybe look more toward private education so those who have strong feelings can inculcate that in their children. That's a very broad sort of concern. I just wonder what your reaction is to that theme that, I—theme is too strong a term—that question that I think has been raised in these hearings that we've had, and this is the third of those hearings. I wonder if both of you would take a shot at that because that's a matter that I want to say greatly concerns me.

MR. EIDSMOE. Well, first of all, I come from a background, both of my parents were public school teachers, my wife was a public school teacher. We ourselves have home-schooled our children and had them in private schools as well. And so I guess my view is that the current trend toward more diversity in education, public, private secular, private parochial, and home-schools is a positive trend. And I see that as a trend that tends to promote more diversity.

If I could maybe tie in an answer to this question with an answer to the question that was asked earlier by Dr. Horner concerning the question about multiculturalism and the purpose of education. As I see it, education partly is conveying the values of the culture of the past to the present. Also partly, it's enabling the next generation to cope with the world in which they live. And to whatever extent in our society today, the non-Judeo-Christian religions are impacting our system. They always have to some extent of course. In fact, there are books written about the influence of the Algonquin Federation and the Iroquois Federation on the framers of the Constitution, particularly on Franklin. But at any rate, I think it's very clear that the Judeo-Christian tradition and the Bible, the book that that tradition is based upon, has been the pri-

mary formative influence in developing our legal system and in our culture of the past.

Just as I was flying here yesterday, I was starting to read the fascinating book by a Professor Douglas Kelly at Reformed Theological Seminary, *The Emergence of Liberty in the Modern World: The Influence of Calvin on Five Governments from the 16th through 18th Centuries*. Now most people, if they've even heard of John Calvin, it would never occur to them that he might have had some influence on government. And yet George Bancroft, who was probably the leading American historian in the 1800s, makes the statement that John Calvin was the virtual founder of America. And so I mean these are influences here that I think we need to deal with.

Let me add one thing else. In regard to the multiculturalism in America today and studies that I've seen say that—and I'm sorry. I can't cite these. I didn't come prepared with the—although I could try to cite them. But about 85 percent of the population in America today claims to be Christian. And granted they may be defining that more broadly denominationally and culturally and theologically than they would several hundred years ago. And the interesting thing is that immigrants to this country, particularly immigrants from Third World countries, they tend to either be Christian before they came, or become Christian after they came, in about the same percentage as the rest of the population.

But as far as multiculturalism in general, I have no problem with multiculturalism, provided, number one, it's based on sound scholarship and provided, number two, it is not simply the pretext for bashing Western civilization as I think sometimes it becomes.

VICE CHAIRPERSON REYNOSO. I wonder what your response is, Dr. Sewall.

DR. SEWALL. In light of that answer, could you rephrase the question.

VICE CHAIRPERSON REYNOSO. Yes. The question was a very fundamental one and it goes like this: Religion is important to individuals and their families and yet as we have seen, public schools because of all the pressures of different religions are incapable of incorporating within the public schools in emphasis, et cetera, the religion found in those families. To the extent that they can't, it's an atmosphere devoid of that religion and to a certain extent therefore even antagonistic to the religion from the point of view

that it doesn't incorporate as part of the curriculum and so on. That being true, would we be better off to diminish the importance of public schools in terms of as institutions and look toward other educational means, perhaps parochial schools, private schools, where those concepts can be better incorporated? And I see that coming up in some questions that we've asked, some comments that some of the witnesses have had. And so I have that broad question.

DR. SEWALL. The tensions that religion produces on school campuses among teachers, in faculty rooms, not to mention in principals' and superintendents' offices, cannot be underestimated. Robert George said earlier that increased pluralism may strain moral education beyond the breaking point in schools today. That holds to some large degree for religion in the curriculum in the course of study, in syllabus. We can teach about religion, guardedly, cautiously, gingerly. But if you will, teaching from religion, posing the kinds of questions that religion raises about human nature, existence, ontology, and cosmology, these, I would argue, are integral questions and discussions in the humanities that are being avoided, avoided because of legal and customary worries. You ask, if I understand you correctly, should we then, since we can't reach any consensus because there is such fracture, cultural fracture here, let's find other agencies for religious education.

VICE CHAIRPERSON REYNOSO. That's not the only option, but I pose it that way. Of course, another option is simply to have folk emphasize their religion in areas that don't incorporate the public schools, to have it be in their churches, to have it be after 3:30 p.m.

DR. SEWALL. That's what I mean by other agencies of learning.

VICE CHAIRPERSON REYNOSO. So you're including a broad—okay. I gotcha.

DR. SEWALL. In the tradition of Lawrence Cremin Teachers College at Columbia University, our schools are formal agencies of learning. They would do well to stick to the basic subjects and the arts and sciences.

MR. EIDSMOE. May I address that question, Vice Chair?

VICE CHAIRPERSON REYNOSO. By all means. This is a theme that keeps coming up. That's why I wanted to—

DR. SEWALL. And we haven't even gone into sex education.

VICE CHAIRPERSON REYNOSO. That's right.

DR. SEWALL. And maybe we don't want to.

CHAIRPERSON BERRY. Mr. Sewall, I didn't understand the last part of your answer. Was your answer that by quoting Cremin and going on with it, that you believe that the schools ought to stick—

DR. SEWALL. No. I was just making his famous point that we have in American society many, many, many agencies of learning and the schools are one of them and you have to understand what the schools do and then understand what education is at large.

CHAIRPERSON BERRY. What is your answer to the Vice Chair's question though?

DR. SEWALL. Oh, I'm being evasive.

CHAIRPERSON BERRY. Should we then encourage or simply say that we must have religion in other places?

DR. SEWALL. I think in order to teach history, civics, arts, and literature, we have to acknowledge religion and it's place in human life.

CHAIRPERSON BERRY. Okay, I got your answer. Mr. Eidsmoe, you wanted to comment further.

MR. EIDSMOE. Yes. I'll say first of all, if the schools have been reluctant to address this issue adequately, as I think they have, in fact, I was going to address Dr. Paul Vitz's study on this subject, but I understand he has testified before at another hearing of this Commission. But I would say part of the reason the schools have been somewhat reluctant has been the idea that being the best way to be neutral is simply to say nothing about it. And I've already spoken about why I think that's an invalid idea. But another is sometimes a fear based upon misinformation that they have less legal rights to be involved in this area than they really do.

When Ellen Johnson addressed this question a little earlier, she said that she thought many of these cases were exaggerated and that many of them were easily resolved, and in many cases, she is correct on that, particularly where you have a parent or student that is either informed and has gotten legal advice and has fought the issue. But I don't think she even talked about, and I'm not sure we even know about, all the other instances where the student or parent just accepts the restrictions because [he or she] doesn't know any better or doesn't have the guts or money or whatever it takes to stand up and fight for his or her rights.

But as far as my own view, my own view of education, I guess, is influenced quite a bit by Martin Luther when he just simply makes the statement that above all other things the principal subject of study in the school should be the Holy Scriptures. And I guess I wanted for my children a type of education that I, myself, did not get, and that is an education that is thoroughly based on what I believe to be a biblical worldview.

Now, I don't believe the public schools can present that worldview or that they even should. And for that reason, I've opted for private and home education for my own children. But I do think the public schools are entitled to and can and should treat Christianity and Judaism and the Bible fairly. For example, one way that I might distinguish here is—maybe the best way to do this would be to go back to one case, a case that took place earlier this year in Florida which involved a Bible course that was going to be taught in the public schools. This is down in Lee County, Ft. Myers. I don't have the citation for you here. The school board is the Lee County School Board. The persons bringing the action were the American Civil Liberties Union, but I don't recall if they brought it in their own name or on behalf of another party plaintiff. But it involved a curriculum, a Bible as History Old Testament, which was number 1 and Bible History II, which was the New Testament. And Judge Kovachovich, the Federal district court judge in this case—by the way, I should add that our own involvement in this, originally, they had been looking at our curriculum and we sought to intervene on the side of the school board against the ACLU on this. The ACLU objected to our intervention. They noted that in the 2 years the school board was considering this, they had changed the curricula so much from the one that we had offered that it wasn't really our curricula that was at issue here, and as a result of that, we withdrew our petition to intervene.

Anyway, Judge Kovachovich issued a ruling in this case and she said that they're essentially using the *Lemon* test. There is a secular purpose for teaching the Old Testament, and so she was not going to enjoin the teaching of Bible History I, Old Testament. But then she went on to say that she did not see how the Resurrection and the miracles of the New Testament could be taught as secular history, and so she did issue a temporary restraining order against the teach-

ing of the Old Testament—or the Bible History II course, New Testament.

Now, I would argue that there's a fundamental inconsistency here because, number one, the Old Testament is filled with miracles, much as the New Testament is, and not only that, but the culture and history of practically every society and civilization on the face of the earth is based upon a belief in miracles.

So as to where the school should come out on this and where the court should have, I think, for the school to teach in a Bible history course that the Resurrection did in fact occur, I think that that would be beyond what the school ought to be teaching. But I think that it is appropriate for the school to teach that the Bible says the Resurrection occurred, that millions of people through history have believed this, and that this belief has affected history in some profound ways. So teaching about religion and its influences in that sense I think is appropriate.

Another way I might distinguish it would be, you might say a first story and a second story. The first story is a structure that I might call biblical Judeo-Christianity would be the doctrines, the doctrine of God, the doctrine of the atonement, other doctrines like this. And I would suggest that on these the school may be able to teach about them but shouldn't be teaching them either that they are true or false. But then we go on to the second story and that is some of the values. Values of honesty, integrity, and other values that are taught by Judeo-Christian religions and many others as well. And I think it is entirely appropriate that the school system should teach certain values. For example, if a teacher is telling the students that she would prefer that they not cheat on the exam, I don't think she has to go on to say that cheating is simply an alternate lifestyle and there are advantages that way. I think certain values can be taught as being true.

CHAIRPERSON BERRY. Commissioner George.

COMMISSIONER GEORGE. There's so much that I'd like to go over with these panelists.

CHAIRPERSON BERRY. Commissioner Anderson. Would you like Commissioner Anderson, to go first?

COMMISSIONER ANDERSON. I have one or two questions here. First, I'd like to say it seems to me and maybe it's just obvious that people act on their faith and they act within a culture. And so to try to understand that culture without an un-

derstanding of the faith motivating so much within the culture, it's a very difficult activity. It seems to me we would have known a great deal more about what was going on in Vietnam when Buddhist monks started setting themselves on fire if we had a better understanding of Buddhism in the 1960s. So if we want to understand Western culture, American culture, it seems to me we have to understand biblical roots of that culture because you cannot simply understand writers such as Milton or Shakespeare or Melville without that kind of understanding. Now, having said that, you know, it's obvious that you're a professor, Dr. Eidsmoe, at a seminary teaching theology, teaching law. I don't know if you teach literature.

MR. EIDSMOE. No, I do not, sir.

COMMISSIONER ANDERSON. So the question arises, the motivation of the National Council on Bible Curriculum in the Public Schools, what is the real motivation there? Is it a motivation which is proselytizing or evangelizing? Is this a backdoor way of getting the Bible into schools to subvert the Supreme Court's decision in the 60s, or is there really an academic reason totally separate? I mean, academically, you can say it's separate, but now I'm talking about the people involved in your organization.

MR. EIDSMOE. I can only say that—well, I might prefer that some of these decisions like *Engel v. Vitale* and *Abington v. Schempp* be overruled; that, no, I don't want to advocate subverting them or trying to get around them or disobey them. As to the motive of the council itself, I think maybe the best way to summarize their purposes—I'm going to leave these documents with you, sir—but as they have set them forth in their own policies, maybe this would answer it for you, at least as far as what they say. That they advocate that the school's approach should be academic, nondevotional. The school may strive for student awareness of religions but should not press for student acceptance of any one religion. The school may sponsor a study about religion but may not sponsor the practice of religion. The school may expose students to the diversity of religious views but may not impose any particular view. The school may educate about all religions but may not promote or denigrate any religion. The school may inform students about various beliefs but should not seek to conform the student to any particular belief. And I would say that summarizes, as well

as I understand it, the basic motivations of the founder and chairman and the board members that I know at the National Council.

COMMISSIONER ANDERSON. Do you see Bible as literature, Bible as history course, as an accommodation of Christians? Would you defend it on those terms, or would you defend it on the academic terms that this is really foundational to so much in American culture and Western culture in terms of history?

MR. EIDSMOE. Well, sir, first of all, I would defend it on the foundational ground of it being cultural, that any education that does not include an awareness of Scripture is going to be an incomplete education in a Western society. But I think I could further defend it as an accommodation and of course in several court decisions, the Supreme Court, the *McGowan v. Maryland*, *Zorach v. Clausen*, the Court has said that an accommodation of religion is permissible whereas an establishment is not. And I think I could defend this on the second line of defense, on the accommodation basis.

COMMISSIONER ANDERSON. See, I'm trying to get a sense here. We're talking about the civil rights and freedom of religion and accommodation of religious liberty within the context of schools. Is that what we're talking about here, or are we talking about good educational policy is what's necessary for the student to have an appropriate understanding of our institutions and our culture and our literature?

MR. EIDSMOE. Well, particularly, what we're talking about here with the course that the National Council is advocating, I think we're talking mostly about sound educational policy. But I think we're talking secondly about an accommodation and recognizing what Dr. Vitz I understand has told this Commission before, that in many instances in the public school, the Bible and Judeo-Christian religions are understated as far as their influence is concerned.

One way of counteracting that is by the Bible courses that we're talking about here. And to the extent that you could make an argument that by sliding the Bible in teaching, that the schools are doing what I believe that Justice Goldberg once described as establishing a religion of secularism, preferring those who do not believe over those who do believe. And if you could make an argument that that has the effect of violating free speech rights or free exercise rights of those students or teachers who feel otherwise, or that

it might be an establishment of the religion of secularism, to that extent, I think you could defend this then as an accommodation of the rights of those who want this included and feel that their education—that their values and beliefs have been slighted in their education.

I think an argument can be made that when you have an entirely secular system, it has the effect of moving the children in the secular direction and away from the religious direction, and that this would be a way of just kind of correcting the balance, and that could be an accommodation.

COMMISSIONER GEORGE. Thank you. First, let me say how much I appreciated Vice Chairman Reynoso's framing of a question that really has been weighing on me throughout these hearings and also how much I appreciated your very thoughtful answers. It's an extremely difficult question, one that I think we as society have to wrestle with and the questions of religious liberty and nondiscrimination would bear on it, I think, in a critical way. And I hope that therefore this Commission can give some attention to that issue, although I'm certain that we won't be able to come up with any definitive resolution of it here, but it's a critical one, and I thank you all, including Vice Chairman Reynoso, for these reflections on it. Let me move to another area though.

Mr. Eidsmoe—Dr. Eidsmoe, as I understand it, Christianity is a type of religion that is unlike some—it's like others and unlike still others in respect that it's being based on historical claims. I know of no reason to be a Christian that doesn't involve the accepting of certain historical claims about God's action in history and so forth, claims which are to be accepted or rejected on the testimony of the apostles and as presented principally in the Bible and then in other respects in early Christian history and so forth, the witness of the martyrs and all that. So we have historical claims, and we have a book, the Bible, that represents in the New Testament, at least some testimony offered in support of these historical claims. So in that respect, a Christian has to treat it, or someone who's contemplating whether to be a Christian, as a work of history, it makes historical claims. It's unlike some other religions in that way. Like others, but unlike still others.

All right. Now, what position does that then put the public school that wants to teach the Bi-

ble as history? Now, the Bible as literature really might be a different subject here, but the Bible as history presents certain claims, and it presents certain evidence for the claims, and it challenges the reader, it would seem to me, to either—to assess the credibility, the veracity of those claims and the witnesses making the claims. So in that respect, I can see at least the possibility of there really being an objection to the possibility of treating the Bible as history in a way that is objective or secular, unless it's possible to believe what I take it Charles Haynes and Warren Nord, Oliver Thomas has suggested when they gave their testimony in an earlier one of these hearings, and that is to teach the conflicts, to teach about the claims the Bible makes, but not to take a position as to whether the claims are true or false. To note, because it's unavoidable and inescapable, that there are historical claims being made here, claims by witnesses that miracles happened. The grave was empty. Christ appeared to Mary Magdalene and so forth. But then here is the evidence we have for the claims.

Now, it's up to the individual student to assess the evidence. Now, if we teach the conflicts, however, then wouldn't it be legitimate for a non-Christian parent to say, "I don't want my child to be subjected to having to make that choice. I don't want him to consider that evidence one way or another"? And couldn't a Christian parent say, "I don't want my child to be presented with this as if it is a choice, that he is free to assess on the basis of his best judgment about the evidence and the testimony of the apostles and so forth and so on"? Which I think backs us back into Vice Chairman Reynoso's question about whether this is really doable in a context of pluralism and diversity.

MR. EIDSMOE. Mr. George, I think that's a very profound question. I'm going to try to address it. First of all, I agree with the distinction you're making of the way in which Christianity is based upon certain truth claims and truth claims based upon history. I've heard the argument made, and I think it's valid that if you could convince a Buddhist that Buddha had never really lived, that would not affect his beliefs in the basic values, of the ethics and truths that Buddhism teaches. And that would be true of most other religions. But if you could convince the Christian that Jesus Christ never lived or never died on a cross and never rose from the

dead, that the Christian claim to truth would be entirely invalid because the claim that salvation is based upon what Christ did for us on the cross. Yes, I think that's a valid distinction.

And I'm going to say secondly that of the various models for handling religious matters in public life in general and in the schools, the separationist model, the nonpreferentialist model, and so on, none of them are going to be without problems. I think there are less problems with the nonpreferentialist or diversity approach than with the complete separationist approach.

COMMISSIONER GEORGE. Would you translate that here into the teach-the-conflicts type philosophy?

MR. EIDSMOE. No.

COMMISSIONER GEORGE. To take your example, higher criticism, yes, you teach there's one theory, that it's JEDP, and then there's another theory that it's not and it's all written by a single author who's—

MR. EIDSMOE. Yes, that's the way we would suggest that it be taught. Teach that there are these various views and—

COMMISSIONER GEORGE. That's how nonpreferential translates concretely into dealing with the problem of nondiscrimination on the basis of religion in the curriculum.

MR. EIDSMOE. Mostly we would say let a student read the Bible as the basic text of the course, make up their own mind, but as far as the teacher's role in teaching the various methods of interpreting it, that we would see that as being more supplemental and the reading of the Bible itself is being the primary, but yes.

And let me add one thing else to the one thing that I think as far as, you know, you have a parent here who would say, "I don't want my child presented with that choice in that way." That's one of the reasons why we feel this should be strictly an elective course. And as far as I know, it has never been anything but an elective course anywhere that at least the National Council's curricula has been involved. And I think that may not totally eliminate the church/state problem. But I think that it diminishes it a great deal.

May I relate an incident that occurred to me with the Air Force Academy. I retired from the active reserves a couple years ago as a judge advocate, and part of my reserve duty is to be involved teaching at the academy in the law de-

partment. But the Center for Character Development at the law school, or at the Air Force Academy, gave me a call and they had—they asked me if I would write a legal opinion in regard to an issue that had arisen in regard to a command formation where the speaker was Chuck Coleson. And several cadets objected that since this was a mandatory formation that it violated their religious freedom to have to attend a religious lecture by Coleson. Well, as I read the text of Coleson's remarks and also listened to the tape of it, he was talking primarily about character development. And in a question that was asked by a cadet afterward as to how he came to develop the—he defined character in his way as two things: First, knowledge of right and wrong, and he said, "I knew right and wrong from studying Hagle in secular philosophy, but I still ended up in prison." And he said, "Character involves more than the knowledge of right and wrong; it involves the intestinal fortitude to adhere to the right." And he said, "I didn't have that." And he said, "For me, the way that I found that was through the power of Jesus Christ." It was presented in about as low-key of a way as it could have. But it was arguably a religious message.

Anyway, as I considered to write an opinion on this, I looked beyond that to the fact that the Center for Character Development had had quite a few mandatory formations, had had quite a number of speakers. Some of them were secular speakers, and a few of them, a minority, came from a religious perspective. And since this was presented as only one of several options and one of a number of speakers that the cadets listened to, I said I did not consider this to be an establishment violation. I went on to say that nothing of the first amendment that I read means that I should never have to hear anything that I disagree with.

COMMISSIONER GEORGE. Thank you, Mr. Eidsmoe. We need to wrap up.

CHAIRPERSON BERRY. I think we should too. We want to thank the panel very much for coming. We very much appreciate it. Thank you very, very much. We will take a break now for lunch. It's 8 after 1:00 so we will reconvene at 8 after 2:00. Thank you very much.

[Lunch recess.]

Panel 2: Curriculum

Part II: Curriculum Controversies in Biology

CHAIRPERSON BERRY. The meeting will come to order. The next panel is Curriculum continued, Curriculum Controversies in Biology. Could Mr. Stephen Meyer, Ms. Eugenie Scott, and Mr. Richard Sybrandy please come forward and take your seats. Thank you very much. We very much appreciate your being here today, and we apologize for starting a little bit late. And we would like to begin with you, Dr. Meyer. If you would please make an opening statement.

Dr. Meyer, Stephen Meyer, received his Ph.D. in history and philosophy of science from Cambridge in 1991. And he did a dissertation on "Origin of Life, Biology and Methodology of Historical Sciences." He was a geologist before that, and he is now director of the Center for Renewal of Science and Culture at the Discovery Institute and teaches philosophy at college. And he's contributed to several scholarly books and anthologies, including *The History of Science Religion in the Western Tradition*. He is currently working on a book, "Formulating a Scientific Theory of Biological Design," which looks specifically at the evidence for design in the encoded information in DNA. Please proceed, Dr. Meyer.

Stephen C. Meyer, Director, Center for Renewal of Science and Culture, Discovery Institute

DR. MEYER. Thank you. I would like to thank the Commissioners for the opportunity to share my perspective on this important issue. Let me start with the scientific question as old as humankind. How did the astonishing diversity and complexity of life come to be? In particular, did a directing intelligence or mind have anything to do with the origin of biological organisms?

Darwinian evolutionary biologists say no. They contend that life arose and later diversified by entirely naturalistic processes such as natural selection acting on random variation. They say the scientific evidence weighs against the theory that a designing intelligence played a role in the history of life. But if there can be evidence against a theory, it must be possible at least for there to be evidence for a theory as well. As Charles Darwin himself argued, both logic and intellectual honesty requires consideration of both possibilities. He wrote in the *Origin of Species* a fair result can be obtained only by stating

fully and balancing the facts and arguments on both sides of each question.

But is there any scientific evidence supporting the idea that intelligence played a role in the origin and development of life? In fact, there is. During the last 40 years, evidence, much of which was unknown to Darwin, has come to light to support the design hypothesis: the breathtaking intricacy and complexity of even the simplest bacterial cell with its highly specified molecular machines and motors, the fossils of the Cambrian explosion which show all the basic forms of animal life appearing suddenly without clear precursors, and the encoded information in DNA, which Bill Gates has recently likened to a software code. All these lines of evidence and many others suggest the prior action of a designing intelligence.

Is any of this evidence discussed in publicly funded science classrooms? Almost never. As I have documented elsewhere, both high school and college biology textbooks make very selective presentations on the scientific evidence relevant to this question. For example, only one of the standard high school biology texts even mentions the Cambrian explosion, arguably the most dramatic event in the history of life. And not a single text discusses the challenge that Cambrian fossils pose to Darwinian evolutionary theory despite extensive discussions of this very point in technical paleontology journals and popular publications such as *Scientific American*, *Time* magazine, and even, ironically, *Peoples Daily* in Communist China.

Why does this selective presentation of evidence persist in a nation known for its liberal intellectual traditions? Very simply, the opponents of full disclosure in science education insist, often backed by threat of lawsuit and other forms of social intimidation, that any deviation from a strictly neo-Darwinian presentation of origins constitutes an establishment of religion. They insist that the concept of design, intelligent design, that is, is inherently religious whereas Darwinism with its denial of intelligent design is a strictly scientific matter. But how can this be? Darwinism and design do not address two different subjects. They are two competing answers to the very same question: How did life arise and develop on earth? Biology texts routinely recapitulate Darwinian arguments against intelligent design, yet if these arguments are philosophically neutral and strictly scientific, why are

evidential arguments for intelligent design inherently unscientific and religiously charged? The acceptance of this false asymmetry has justified an egregious form of viewpoint discrimination in American public science instruction.

I enclose a diagram showing the relationship between evidence, scientific interpretation, and the larger worldview considerations that inevitably come into play when discussing biological origins. This diagram and to a much greater extent published work in the philosophy of science suggest an equivalence in status between Darwinism and design theory. Both these theories are interpretations of biological data. Both we must all admit have larger philosophical or worldview implications. If design theory is religious, then so is Darwinism. If Darwinism is science, then so is design theory.

Despite this equivalence, the public school science curriculum generally allows students access to only one theoretical viewpoint and only to those evidences that support them. Students receive little exposure to scientific problems with neo-Darwinism and still less evidence that might support a contrary interpretation. Yet, and this is key, because origin's theories have incorrigibly philosophical implications, and I represent that on the diagram, this imbalance in effect favors and promotes a naturalistic worldview or philosophy over a theistic one.

Indeed many texts openly explain the naturalistic and antitheistic implications of Darwinian theory. For example, in Douglas Futuyma's text, *Evolutionary Biology*, he writes, by coupling the undirected, purposeless variations to the blind, uncaring process of natural selection, Darwin made theological or spiritual explanations of life superfluous. Purvis, Orians, and Heller tell students that "the living world is constantly evolving without any goals." Evolutionary change is not directed. I have one short paragraph. Students skeptical about such overtly materialistic perspectives who wish to develop a view of the scientific evidence more consonant with an atheistic worldview are often silenced. Indeed the influential California Science Framework advises teachers to tell students to "discuss the question further with their family or clergy."

For students and teachers wanting to consider or express a theistic viewpoint on this scientific subject as opposed to advocating religion, and this is a critical legal distinction, the present

imbalance in public science instruction represents a clear form of viewpoint discrimination. In many cases, such discrimination has also entailed the abridgment of academic freedom for teachers and professors and the free speech rights of individual students. I ask the Commissioners to consider such practical measures as they have at their disposal to rectify this situation.

CHAIRPERSON BERRY. Thank you very much, Dr. Meyer. Let me ask if anyone needs interpretation services, needs the skills of the interpreter. Could you please ask that. All right. I think the answer is no. Thank you very much.

Dr. Scott has a degree in biological anthropology. She has taught as a scientist for many years at various universities, and she has been the executive director of the National Center for Science Education [NCSE] since 1987. The National Center for Science Education is a membership organization composed primarily of scientists with other interested citizens concerned with the teaching of evolution and the teaching of science in public schools. It is a nationally recognized clearinghouse for information and advice to keep evolution in the science classroom and scientific creationism out. NCSE is the only national organization that specializes on this issue. Welcome and please proceed.

**Eugenie C. Scott, Executive Director,
National Center for Science Education**

DR. SCOTT. Thank you very much. I have left red packets with you. They include background material for this really very complicated problem, and I hope you will have the leisure to take a look at it in the future. My statement, I'm obviously not going to read because it's too long. But I was asked by staffers to prepare some examples of what is going on in the creation/evolution controversy at the grassroots level around the country. And this is what I've done. I've tried to highlight some things so that we can go through them fairly quickly and we'll have more time for questions. In the early part of this afternoon's session, I was pleased that the distinction was made between teaching about religion and advocating religion. So in my introductory paragraph what you will see, I agree with that point of view very strongly.

I will provide some case studies that demonstrate what's going on nationally, but I need to underscore three false claims that crop up all the

time in the creation/evolution controversy. The bottom of page 1, they're listed 1, 2, and 3; that evolution is a theory in crisis; that evolution is incompatible with religious belief; and that it is only fair in some fashion to present creationism or alternatives to evolution when evolution is taught. The book, *Voices for Evolution*, consists of statements from scientific organizations, religious organizations, and education organizations that deal with all three of these issues. Evolution is not a theory in crisis. It is state-of-the-art science. Let us move on to page 2 on the case studies. There are two manifestations of the creation/evolution controversy in American schools. One takes the form of "equal time for creationism." I don't know if it's necessary to define creation science for you, but it's the idea that there is scientific evidence for a largely biblical literalist interpretation of Scripture, six 24-hour days, special creation of all living things of the entire universe. And the claim they make for scientific creationism is that there is scientific data for this.

There were laws passed to require that creation science be taught when evolution is taught. These were overthrown by *Edwards v. Aguillard* in 1987. The Court said that creationism is inherently a religious position and to advocate it as opposed to talk about it in a social studies class is unconstitutional. Creation science is a religious advocacy.

The other manifestation is "alternatives to evolution," and my friend, Steve Meyer, and I disagree on intelligent design theory. I see it as a synonym for creation science. "Abrupt appearance theory" is another synonym for creation science. In fact, a recent U.S. District Court case, *Freiler v. Tangipahoa Parish*, has recognized that curriculum proposals for intelligent design are equivalent to proposals for teaching creation science. Some are examples of equal time in creationism in some form:

We do get at the National Center for Science Education requests from districts, from teachers because they are being asked to teach old-fashioned creation science even though it has been outlawed. If you turn to page 3, there was current controversy in Post Falls, Idaho; a recent controversy in Merrimack, New Hampshire; Lake County Florida; Salisbury, North Carolina. I won't iterate these. They're boldfaced. You can recognize them.

In a number of communities, ministers have been invited to present creation science to students and school assemblies. This is clearly advocacy of religion. In some cases, students heard presentations on creationism from representatives of creationist ministries, and this has occurred here in Washington as well as in Peoria and in Eads, Colorado. In the Eads situation, students were actually marched down the street to a church to hear a lecture on creation science. There are many things that go on that are clearly religious advocacy in this context. There are teachers who decide to teach, to introduce creation science or an alternative on their own, even though courts have also addressed this issue.

Creation science may also be presented as intelligent design theory or more vaguely as "alternatives to evolution" or "alternate theories to evolution" or a "balanced treatment." These euphemisms have come up as a result of the Supreme Court case that has stated creation science is clearly religious advocacy. So new forms have evolved to take its place.

The other form that the creation/evolution controversy takes is on the bottom of page 3, antievolutionism itself. In addition to promoting creationism in its various forms, there is frank antievolutionary activity. Evolution is eliminated from the science curriculum in some places. Some districts and some teachers are encouraged, as it says on page 4, to teach "evidence against evolution." And I assure you, the materials in this packet will or should be reasonably persuasive. I hope that there is no such thing as "evidence against evolution." This is a euphemism again for creation science.

The idea that evolution must be somehow disclaimed. It must be treated as theory, not fact. It must be treated as differently from all our scientific theories is another antievolution movement that has come up and is becoming more and more prevalent. Examples of the elimination of evolution, "evidence against evolution" disclaimers are presented in the following section on pages 4 and 5.

Textbook controversies also have sprung up around evolution and creationism. In Marshall County, Kentucky, a superintendent actually glued together the pages of a fourth-grade book discussing the Big Bang because it didn't give equal time to creation, to the Bible, to the biblical view of special creation. State standards have also been weakened in terms of presenting evo-

lution. A recent book by Lawrence Lerner, published by the Fordam Foundation, discusses evolution and State standards and criticizes a number of them for being deficient in this regard.

In conclusion, I would like to present a rather different view from my friend, Steve. I feel that the attack upon evolution and the promotion of creationism in its various forms at the K-12 school districts is an establishment clause problem under the first amendment of the Constitution. As a science educator, I'm also concerned about this being a problem for science literacy because whereas 79 percent of adults in the United Kingdom agree evolution took place, in the United States, only 47 percent. We have a major problem with science literacy, as well as a first amendment problem.

In the materials that I am leaving with you, I present some suggestions for how evolution may be taught without disrupting religious concerns of individuals. This will not be possible for all individuals. There are some individuals whose religious views are simply such that they will not be satisfied by any teaching of anything that goes against their religious views. We cannot tailor the curriculum to suit all people, otherwise, we couldn't teach the germ theory to Christian Scientists. We have to make some decisions about what we teach, and I hope that I will be able to elaborate on this more. Thank you.

CHAIRPERSON BERRY. There will be questions. Thank you very much. Mr. Richard Sybrandy—Sybrandy?

MR. SYBRANDY. That's correct.

CHAIRPERSON BERRY.—is an attorney with a general practice firm in Bellingham, Washington. He's worked at the National Legal Foundation on public school issues. And while at the National Legal Foundation, he compiled a parent and teacher's handbook on the rights of parents, teachers, and students in the public schools from a religious freedom perspective. From a referral from the Rutherford Institute, Mr. Sybrandy represents Roger Dehart, a biology teacher from Burlington, Washington. Mr. Dehart has for the past 10 years included materials on intelligent design along with materials on evolution when teaching about the origin of life. The ACLU has threatened to sue in this case. Please proceed, Mr. Sybrandy.

**Richard Sybrandy, Attorney, Law Offices of
Richard C. Kimberly**

MR. SYBRANDY. Thank you. Again, I'd like to say it's an honor to speak here today, and it's an honor to be with the esteemed members of this panel. Because I'm not a scientist, I'll be revising my remarks accordingly and leaving the science to the scientists. However, just as a means of introduction, judging from the remarks that we've heard so far, I think it would be a shame to deprive high school students in biology class from exposure to this type of debate. I would just say that as a means of introduction.

There's generally three points that I would like to make today and that is that, number one, the study of the origin of life has religious implications no matter what theory you're going to teach. The second point I'd like to make is that simply because a scientific theory that's supported by fact has religious implications, that doesn't exclude it from being taught in the public schools. And the third point that I'd like to make is that excluding an alternative theory that is supported by science, simply on the basis that it may have a religious implication is discrimination against religion. It could violate the teacher's rights to free speech. It could violate a student's right to know, and I'll explain later what I mean by a student's right to know.

Regardless of which theory is taught, there is going to be a religious implication. Darwin's theory of evolution says there is no creator. Life was the result of purely natural processes. As Carl Sagan once stated, there was nothing for the creator to do, and every thinking person is forced to admit the absence of God. That's a religious implication to evolution.

You look at the flip side as well, the intelligent design theory, specifically which Roger Dehart is exposing his students to. The intelligent design theory looks at the complex life that we see on earth and examines scientifically natural processes, what we know about natural processes, and it hypothesizes and says natural processes could not have resulted in life as we know it. Well, then there must be a creator. Now, that's the implication. That's not what's taught, but that is certainly the clear implication behind intelligent design. Same implication as evolution. They're both religious, but that doesn't mean they should be excluded from the public schools. We all know that. I've been here today

and I've heard the testimony. I'm sure this panel accepts that.

The real question is how legally to expose students to these issues. The even-handed and objective instruction of intelligent design theory is not illegal. The Supreme Court in *Edwards v. Aguillard* addressed the issue of creation science, and I'd like to focus your attention on the specific facts of *Edwards v. Aguillard*. We had a situation where the stated legislative purpose of the act was to increase academic freedom. We have the religious right and fundamentalist Christians heavily advocating for the passage of this bill. On the other hand, the Court looked at what the bill actually did and mandated and said this bill mandates that every time you teach evolution, you must give equal time to creationism. The Court simply had a hard time figuring out how that increased academic freedom in the public schools.

I'd like to draw your attention to the quote in *Edwards v. Aguillard*, and the citation is 96 F.2d at 525 and 526. We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. In a similar way, teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science and structure. And again, whether this enhances the effectiveness of science and structure, I'll leave to the scientists. Again, in *Abington v. Schempp*, it has been made clear, and it's been quoted to the panel already, that basically you can present religious material as part of a secular program of education. It does not violate the Constitution.

Contrary to some assertions, intelligent design is not the study of the 6-day theory of creation. Intelligent design simply looks at the evidence of life we have here. It looks at natural processes and says we believe evolution does not account for a lot of what we see here today. From a scientific viewpoint, I don't think a court can find that there is any fact as to the origin of human life. There is no undisputed fact. And simply the discoveries, the recent discoveries about neutrino particles, the effect that has on the Big Bang theory, which is all part of the evolutionary process, it shows that evolution is a theory in crisis and theories are in a state of flux. Again, I would draw your attention to the July 20, 1998,

cover story in *Newsweek* entitled "Science Finds God."

As a way of concluding, I would just say that students have a right to an unbiased instruction, and when we deprive students of certain scientific facts and certain scientific theories merely on the basis of that happens to support a certain religious viewpoint, implicitly supports a religious viewpoint, that should not be excluded from children. Mr. Dehart, when he teaches to his students, he uses the video, *Inherit the Wind*, and it's the video about the Scopes trial. It's the movie about the Scopes trial. And one of the telling parts in that trial is where they say it is the right to think that is on trial. And I think that's what we have in this issue as well, the right to think. Will we accept an orthodoxy, or will we allow prevailing theories to be challenged by hard science? And I think that's the issue here today.

Discussion

CHAIRPERSON BERRY. Thank you very much. Commissioners, questions for the panel?

VICE CHAIRPERSON REYNOSO. I always have questions.

CHAIRPERSON BERRY. How about Mr. Anderson?

COMMISSIONER ANDERSON. Thank you. Dr. Meyer, would you tell us what your dissertation was on, the title, at Cambridge?

DR. MEYER. It was called "Clues and Causes, a Methodological Interpretation of Origin of Life Studies."

COMMISSIONER ANDERSON. And what was of the scope of that?

DR. MEYER. It addressed the methodological groundrules of the origin of life debate and the nature of historical inference and historical discussion of the development of origin of life theories.

COMMISSIONER ANDERSON. And did it take into account intelligent design theory?

DR. MEYER. No, it did not.

COMMISSIONER ANDERSON. So it was involved primarily with what, evolution?

DR. MEYER. It analyzed the modes of explanation that are used in historical sciences such as evolutionary biology. It focused specifically on evolutionary, chemical evolutionary theory, and Darwin's theory of evolutionary biology.

COMMISSIONER ANDERSON. Was it a critical dissertation?

DR. MEYER. It was an analytical one. What I was attempting to establish there was that there are certain methodological cannons in the historical sciences that actually legitimate alternative points of view. My subsequent research subsequent to my Ph.D. has—I've published a number of articles making the point that there is an equivalency of methodology in these two different strands of thought.

If you take the—you analyze evolutionary biology and analyze the rules of evidence and inference that are employed to decide what's a legitimate claim, you find that those same rules of evidence and inference can be used equally to legitimate alternative conclusions, and there has been a significant legal issue over the definition of science, and this known arcane philosophy literature is the demarcation issue.

And in the early 80s in the first of the creation trials in the South, in Arkansas, a definition of science was promulgated by Michael Ruse, a philosopher of science, a five-fold definition that Judge Overton accepted. And this definition was immediately repudiated by other philosophers of science. And much of my work has been designed to show that the definition he used in order to exclude alternative points of views is philosophically tendentious and untenable. And interestingly, in 1992 or 3, 1993, after actually Ruse and I spoke at a conference in Dallas, he repudiated his previous testimony publicly in a Triple AS meeting in Boston and no longer asserts that there is a clear philosophical definition of science that can be used to make categorical exclusions of certain points of view. And this is a very significant development, both philosophically and legally.

COMMISSIONER ANDERSON. It seemed to be significant to the faculty in Cambridge.

DR. MEYER. Well, my initial research was at least, yeah.

COMMISSIONER ANDERSON. How would you describe the difference between creationism and intelligent design?

DR. MEYER. I have a slide I wish I had with me. There are—design has two crucial planks. One is that there is—that some sort of intelligent agent acted to create and that that action is detectable scientifically. And, for example, you have your big billboard here, but when you go into Victoria Harbor up north there, there is a mural or red and yellow flowers against the background of the harbor, and it's a very specific

arrangement. And as you get closer, you make a design inference. You can detect intelligence was involved in the arrangement of those flowers because they in effect spell a message, "Welcome to Victoria." The theory of design stipulates that the presence of high information content is an indicator of intelligence so that design—an intelligent cause is detectable by some clear probabilistic or information theoretic criteria. So the idea is that a designer acted and that it is detectable in some way.

The theory of special creation stipulates a number of things. It is not strong on the idea of detectability. Oftentimes, creation is simply asserted as the result of a prior religious commitment. It's a deduction from religious authority rather than an inference from data. And it also stipulates a very specific tenet, such as a 6-day creation in six 24-hour literal days, the reality of Noah's flood, a number of things that are drawn directly from the Genesis text. Design theory has no truck with any of those matters.

COMMISSIONER ANDERSON. I think, Sir Isaac Newton believed that there was an intelligent design behind physics. Would you say that teaching Newtonian physics is akin to teaching creationism?

DR. MEYER. Well, it's very interesting. I've just written an essay, and Newton's design arguments are actually quite extraordinary and very sophisticated. And he makes his arguments on the basis of the precise configuration of parts that you find, for example, in the eye or in the configuration of planets. And these kinds of arguments are coming back into currency.

I'm going to enter into evidence this book by Michael Behe called *Darwin's Black Box*, which is now in its 12th or 13th printing. It's done very well. This is a photocopy enhancement of bacterial flagellum, a motor that is really an outboard motor on the back of a cell that powers—gives the cell its locomotion. It has 50 separate protein components. Each of these must work in precise coordination in order to attain any function. Behe argues, much as Newton did many centuries ago, that this system is irreducibly complex, that if you remove any of the components, you cease to get function. Now, he says this type of system cannot be explained by Darwinian gradualistic evolution, because to get any functional advantage, which is the stipulation of Darwinian theory, you have to have all the parts before you get any function. So you can't build

this up gradually. If you have 50 percent of the parts, you don't have a broken motor—you don't have a motor that works half as well, you have a broken motor. And so this kind of evidence in biology is resuscitating these kinds of design arguments. And this is part of the evidential basis for this theoretical approach.

COMMISSIONER ANDERSON. Thank you.

COMMISSIONER HORNER. I think that Dr. Scott might like to say something.

DR. SCOTT. I was going to ask you about protocol. Is it possible for us to comment?

CHAIRPERSON BERRY. Yes. If you'd like to say something, you may.

DR. MEYER. I knew she'd want to say something.

DR. SCOTT. We've done this before. I was interested in your bringing up Newton because Newton made a very clear distinction—as a very religious scientist, he made a very clear distinction about how science should work, which is directly relevant to what my two companions here have said about science in disagreement with it. Newton's view was that we should understand the natural world solely by using natural processes. And he said this for religious reasons because he didn't want God's existence or God's transcendence, shall we say, to be tested by the base methods of science.

There is—without getting into philosophers dancing on the heads of pins here, which we're dangerously close to doing, we have to distinguish between science as something that is naturalistic in a methodological sense. Yes, we explain the natural world restricting ourselves only to natural cause. This is what Darwin meant when he said, "We will explain without recourse to the supernatural." This is what modern-day scientists say when they're studying any aspect of science. We're only talking about natural processes. Evolution is not inherently atheistic. It is methodologically naturalistic.

There is also, I will agree fully and I've criticized it myself, here something Steve and I can agree on, it is also the case that there are those who have taken evolution and made a philosophy of it. Now, I do not think that that should be—that philosophical view of evolutionary naturalism, if you will, should be promoted from the schoolroom or from the college podium any more than should religious views. But I think it should be made very clear that evolution is not

inherently a philosophical system, as both of my companions have claimed.

DR. MEYER. May I come back on each of those three points?

COMMISSIONER HORNER. Sure, sure. I'll just hold my questions.

DR. MEYER. The historical point on Newton I'm afraid is just simply incorrect. If one opens to the general scholium, the introduction to the *Principia*, arguably the greatest book of science ever written, one finds an exquisite design argument by Newton in which he makes clear that the arrangements of the planets can only be explained, not he says by natural law but only by the contrivance of a most wise artificer. He's very explicit about this. This is in the introduction to his magnum opus.

And you find these kinds of design arguments all throughout the scientific revolution from Hoyle, from Kepler, from others. The convention of methodological naturalism to which Eugenie appeals is an entirely tendentious standard, and as Neil Gillespie establishes, a historian of biology, this was a result of the Darwinian polemic. Darwin established, in conjunction with other scientists who were like minded in the late 19th century, this convention. It nowhere existed prior to the late 19th century. And the presence of these design arguments in the writing of the early scientific founders makes this clear. We are, in addition to challenging the evidence, the Darwinian evidential claims, challenging the normative function of that convention, of methodological naturalism. That is up for grabs. We do not concede it. And it should—and this is one of the reasons that students are being limited from hearing this evidence because science has been defined, by definition, as an entirely naturalistic enterprise.

DR. SCOTT. That's right.

DR. MEYER. But that definition wins the debate by stipulation, and we don't want to allow that. We want a free and open discussion of the evidence and let the evidence lead us to the truth, no holds barred.

CHAIRPERSON BERRY. Let me say that Commissioner Horner is going to ask her questions. We are not going to have you go back and forth and back and forth. Then we'll never get to all the questions. Then you'll have an opportunity for other exchanges as we go along.

COMMISSIONER HORNER. My question is for Dr. Meyer. Your chart has an arrow going from

intelligent design and microevolution to theistic worldview.

DR. MEYER. Yes.

COMMISSIONER HORNER. My question is, Is it possible to have intelligent design without a theistic worldview?

DR. MEYER. Absolutely. The arrow there I intended—this is a fine point of logic, but an arrow of implication not entailment. For example, there are naturalistically minded scientists. Scientists who hold a naturalistic worldview such as Fred Hoyle, for example, and perhaps—we don't know quite how to take Francis Crick on this point, but Crick and Hoyle have both suggested that perhaps the origin life is such a difficult problem, and Crick says so many are the different conditions that have to come together, that perhaps the best explanation is that it was seeded here by intelligent beings from outer space.

COMMISSIONER HORNER. Is that the only alternative?

DR. MEYER. Well, no.

COMMISSIONER HORNER. Can you define intelligent designer—or intelligent design without reference to a conscious deity or without reference to an alien being?

DR. MEYER. Well, I think you can define it by reference to a conscious mind without stipulating identity of the same.

COMMISSIONER HORNER. Okay.

DR. MEYER. My point is that if a student is trying to integrate what he or she is learning into a worldview framework, they are often prevented in that process by this convention of methodological naturalism. And design theory, for obvious reasons, fits nicely in a theistic worldview, but it doesn't entail—it's not a proof of God's existence.

COMMISSIONER HORNER. And one last question for the philosophically illiterate of us on this panel, at least to me, are you repairing in your thinking to an older metaphysics that has been superseded in modern times, or are you repairing to something entirely metaphysically new?

DR. MEYER. Personally, I'm more of a traditionalist. I think my—but this differs from scientist to scientist—my own metaphysical interests are more traditionally theistic. But there are others who have different points of view. We have some fellows in our Discovery Institute, David Berlinski, for example, basically a secular Jewish scholar who is very critical of Darwinism.

And I frankly don't know what his metaphysical inclinations are, but he has scientific reasons for opposing neo-Darwinism, and he's done so with great elegance.

COMMISSIONER HORNER. But it is the case that almost all people who share your point of view are at least theistic?

DR. MEYER. Well, I get a lot of letters from pantheistic new age sort of folk who think that this is kind of interesting. And myself, I could make philosophical arguments against their position. I think this debate is, you know, what you make of this is in a sense your own—subject to your own philosophical consideration.

COMMISSIONER HORNER. I guess what I'm trying to get at is whether there is a very intimate, politically and philosophically intimate connection between intelligent design and believing in God in some traditional broad sense, or whether there is a secular counterpart in support of intelligent design. I'm thinking of something, for instance, if you'll just bear with me just a moment.

DR. MEYER. Sure.

COMMISSIONER HORNER. This is very hard to talk about. About 20 years ago, I read some book by Teilhard de Chardin which seemed to suppose that over a period of millennia or millions of years, some period of time, all people would blend into one universal mind or something like that.

DR. MEYER. Right, right, right.

COMMISSIONER HORNER. Is it possible that there are people who believe in intelligent design from that point of view?

DR. MEYER. Yes, it is. Just as there are people who believe in evolution who find a way to merge that with a theistic worldview.

COMMISSIONER HORNER. It's a minority.

DR. MEYER. Right.

COMMISSIONER HORNER. It's a minority view, but there are—

DR. MEYER. Right. There are easier and harder kinds of inferences to make.

COMMISSIONER HORNER. Okay. That's enough. Thank you.

CHAIRPERSON BERRY. Okay. Other questions from other Commissioners. Vice Chair.

VICE CHAIRPERSON REYNOSO. I have a question for Dr. Scott. You mentioned, Dr. Scott, and the material that you gave us indicates that you take a different view in terms of the melting of—or potential melting of science, even Darwinian

theory, with religion. The implication is that there may not be any incongruity. Am I reading the material correctly?

DR. SCOTT. Could you restate the question, please. I'm not really sure what you're asking.

VICE CHAIRPERSON REYNOSO. Can one accept a Darwinian theory of evolution and at the same time believe in God?

DR. SCOTT. Now I understand. Of course. And one of the articles that I've included in your packet is a review that I wrote for *Annual Review of Anthropology* in which I represent the creation/evolution continuum. This is not a dichotomy where evolutionists line up on one side and creationists on another.

One reason why I would argue strongly against the presentation of creationism with evolution in the K-12 schools is because, What creationism are you going to use? Are you going to use Catholic creationism? Are you going to use one of the many kinds of Protestant creationism, young earth creationism, old earth like Steve?

VICE CHAIRPERSON REYNOSO. Native American creationism.

DR. SCOTT. And which Native American creationism are you going to use? You will remember that there are many, many different tribal groups with different traditions. I think before we get bogged down in either philosophy or history, you forgot LaPlace by the way if you're going to talk about Newton, I think—I'm sorry. I couldn't help that.

COMMISSIONER HORNER. It's all right. We didn't understand it. [Laughter.]

DR. SCOTT. That's okay. He understood. I think it's important for us to remember how it is we determine what we teach at the K-12 level. And we don't determine what we teach at the K-12 level based upon a popularity contest. What we do is we look to see what is being taught at universities and what scholarship in that particular field, whether it's literature or geography or science or whatever, what the people who do that for a living consider to be state-of-the-art scholarship. So even though we find there is great enthusiasm for perpetual motion machines, and I can show you plenty of Web sites that are promoting—and that would be great because then we'd solve the energy problem. We don't teach perpetual motion machines because physicists have decided that's not going to work.

What Stephen is doing and his colleagues at the Discovery Institute and elsewhere in the

country, a small group of people, they are going about trying to establish design theory in the right way. They are discussing this. They are holding conferences. They are writing papers and they have by and large, unfortunately for them, been met with a large thud. Design theory has been heard, and it has at this point not yet been accepted. There's an article in the packet by a man named Gilchrist who did a computer survey looking at scientific articles to see the place of intelligent design theory. This is an idea that is a contender in the world of science, and I think if you look at the article, you will see that he does not have any evidence for that at all. Maybe intelligent design theory will someday prove to be a valid scientific alternative. I doubt it, and thus far, it isn't. And I don't think we should be presenting it to K-12 students until it has achieved its status within the world of science and scholarship as a whole. If you go to Brigham Young or Baylor or Notre Dame, you will not be taught intelligent design theory. You will be taught evolution, and you will be taught that evolution happened.

DR. MEYER. May I respond to that point?

CHAIRPERSON BERRY. Do we have questions from any of the other Commissioner? Yes, you may respond, and she may respond, and then you may respond. [Laughter.]

DR. MEYER. The side of cultural hegemony in one domain as a justification for the continuance of cultural hegemony in another is tendentious. We in fact have some very cutting edge scholarship coming out. This is a brochure about a new book, *The Design Inference*, by Bill Dembski, double Ph.D., math, philosophy, University of Chicago. This is Cambridge University Press, 1998. A colleague in biology, Paul Nelson, has a book coming out in the distinguished Evolutionary Monograph Series at the University of Chicago Press in a month. The book as a creationist, if you will, is in the broad sense a design-based critique of Darwin's Common Ancestor thesis. We have a book on anthology coming out this fall with some 15 design theorists.

It is indeed very difficult because of the convention of methodological naturalism, which Eugenie Scott cited before, for many of our people to make explicit the importance of their scientific research. Many of our people publish their research, the nuts and bolts of science, without making their theoretical point of view clear. But we have found that there is an open-

ness with top-level academic publishers to our work, and we're developing a very robust publishing program, and this is not something that's just taking place here in Seattle at Discovery. But there are places. There are Germans, Munich Institute of Technology. There are Israelis. There are people all around the world that hold this perspective who are finding ways to get their scientific case out.

So I think this is—again, I'd ask the Commissioners to weigh the importance of this doctrine, which Eugenie mentioned before, this idea of methodological naturalism. This suppresses the free expression of scientific ideas that are contrary to the Darwinian perspective, and that has to be taken into account in weighing the numbers game and counting heads. Even so, we have a very robust publishing program under works.

CHAIRPERSON BERRY. May I just make a minor intervention in the emphasis in fairness to Commissioner George. We heard what you said about the robust publishing program and all the rest of it and that's fine. But do you deny that there are distinguished organizations of academics who are scientists who still believe, and I don't just mean people who are against creationism philosophically, but most of the major scientific organizations still believe that evolution is a valid scientific theory and that the weight of the evidence is in support of it? Are you denying that this is the case, or are you saying that there is this developing field—

DR. MEYER. I would agree with you—yeah, I would agree with you about the majoritarian point.

CHAIRPERSON BERRY. You do agree with that. I'm just only doing it to balance it out.

DR. MEYER. No, sure, I understand. But I do not agree with the point about the weight of the evidence. I want to emphasize how important to this Commission methodological naturalism is. This is a review I have quoted, a review of Michael Behe's book by Robert Shapiro, and he commends the book for a top notch job of explaining and eliminating one of the most vexing problems in biology, the origin of—the complexity of the—

CHAIRPERSON BERRY. Mr. Meyer, if I may—

DR. MEYER. Yes.

CHAIRPERSON BERRY. I'm not trying to engage you about the validity of the argument. I'm not even interested in that.

DR. MEYER. Oh, sorry. You just want a straight yes or no answer. Sorry.

CHAIRPERSON BERRY. No, I am simply putting in the record that there are many other scholars who have, you know—

DR. MEYERS. Different claims.

CHAIRPERSON BERRY. Claims to distinction—

DR. MEYERS. Yeah.

CHAIRPERSON BERRY.—who are in distinguished organizations of academics whose list of books I do not have here, and I don't know if Ms. Scott does so she can read all their latest works, that on balance there are scholars, many of them, who believe that the theory of evolution is a valid theory and that it is scientifically supported and that they have major works done by major publishers over the years and that the weight of scholarship is not all to the side of intelligent design.

DR. MEYER. Oh, no, I mean, I—

CHAIRPERSON BERRY. I'm only just stating that for the record.

DR. MEYER. I'm not making that point. The point is, is there a debate here that's worth having in front of our students.

CHAIRPERSON BERRY. Right. And I don't know the answer. I'm just saying that that's covered my intervention, not to get into an argument over it.

DR. SCOTT. And that is exactly the point. Is this a debate worth having before our students?

CHAIRPERSON BERRY. Sure, any debate is worth it.

DR. SCOTT. Well, is it? I mean, no, that is an important issue because we could spend a lot of time at the K-12 level talking about many things that are debated in science. My suggestion and one that I make in my article for our teachers on teaching evolution and avoiding the minefields is to encourage the teachers to have debates between students of actual scientific controversies.

Now, we've had a number of things jumbled together. We've had origin of life, which is not the same thing as descent modification. Origin of life and actual common ancestry are different phenomena. We've had certain confusion about what is science and what is religion and does science have to be methodologically naturalistic and so forth. There are many valid controversies in science that students could debate, whether evolution took place is not one of them. We can debate how it took place.

CHAIRPERSON BERRY. Okay. Do you have something, Commissioner George?

COMMISSIONER GEORGE. I do have some questions, but I think Mr. Anderson—

CHAIRPERSON BERRY. Okay. Go right ahead.

COMMISSIONER ANDERSON. As I see the issue here for this panel, and maybe I'm just speaking for myself, is, number one, Is any alternative to evolution so tainted by religion, that it constitutes the establishment of religion in the public schools and therefore cannot be taught? That's one issue. And the other issue is whether there is a significant scientific literature and debate about the theory of evolution that alternative theories ought to be presented as good education policy. Now, we can—I don't know how you measure the weight of the evidence, whether you weigh all the books on the one side, but I think at one point, a lot of books on one side and Galileo had— [Laughter.] So you can measure weight in different ways. But it seems to me that that ought to be the two issues, at least that I would see addressed here, number one, Is there independent scientific grounds to see whether there's an alternative to the theory of evolution that ought to be discussed and, secondly, are those alternatives so tainted by religion as to be inappropriate in the public schools?

CHAIRPERSON BERRY. He's just simply stating, unless you want him to explicate again.

COMMISSIONER ANDERSON. Well—

DR. SCOTT. One place to look for the answer to the first question that you raised is at the National Academy of Sciences, which consists of the most highly regarded scientists in the country. They advise Congress and groups like yourselves. They have recently published a book which I included in your red packets, except unfortunately, you, Commissioner Lee and you, Commissioner Reynoso, I discriminated against my fellow Californians. I will get you your copies when I get back to my office. I didn't have enough to bring. But in that book, which is *Teaching About Evolution and The Nature of Science*, they reiterate the fact that evolution is considered state-of-the-art science. Teachers need to teach it. And it's absolutely appropriate for the K-12 level.

COMMISSIONER ANDERSON. I don't see anybody on this panel saying evolution ought not to be taught. I mean, that's not the issue we're discussing.

DR. SCOTT. This may not be what Steve and I are discussing. But this certainly is happening out there in the big world, the grassroots examples that I gave you. There are many, many places where evolution is misunderstood to be antireligious, inherently antireligious, inherently a philosophical system such as ideas presented here, and therefore you can't teach it because you would be offending somebody's religion. And I think this is more the issue for—that the Commission would be concerned about rather than, you know, we are dancing on heads on pins over here.

CHAIRPERSON BERRY. We like dancing on heads and pins, but first let me see if Mr. Sybrandy or Dr. Meyer, do you want to respond to what she said before I let Commissioner George ask questions?

DR. MEYER. I just wanted to make a point in response to Mr. Anderson's point which is that the detection of an intelligent cause is something which does not depend on a religious premise. We do it all the time. There are whole industries that are based on the ability to detect intelligence, cryptography, fraud detection in insurance work. I'm looking at a sign which I assume had an intelligent cause behind it because it has a high information content. I don't have to have a religious point of view in order to detect the effects of intelligence. And so I think the theory of design can be separated in a meaningful way from a prior religious commitment that's not incorrigibly tainted. And I forget what else is being discussed. [Laughter.]

CHAIRPERSON BERRY. You'll have another chance. Do you want to say anything, Mr. Sybrandy?

DR. MEYER. Let the lawyer get in.

MR. SYBRANDY. If I could address also Mr. Anderson's point as far as the first point you were making, Is intelligent design so tainted by religious purpose or by religion that it constitutes an establishment? I think the weight of the cases that we've seen so far indicate that it is not. The *Freiler* case, which was discussed here earlier today, wasn't a case regarding whether intelligent design should be taught. It was a disclaimer case where every time someone mentioned evolution, the school, the biology teacher had to say, "And by the way, I'm not in any way trying to denigrate your belief in the 6-day version, Genesis biblical version of creation." The

court found that that disclaimer was unconstitutional because it had a sectarian purpose.

And in fact, in *Freiler*, the court noted prior to this mandate of giving disclaimer, the court stated that teachers had academic freedom to discuss all sorts of alternative theories in evolution. And the court mentioned that with approval, that you could mention alternatives to evolution. But they said in this case, we just don't see any secular purpose in doing this. That's really where the court on every single creation and evolution cases come down. And I think it's important instead of looking at the dicta of a case to determine what is legal and what's not, they started to look at the holdings of the cases. Again, going back to *Edwards*, look at the holding of the case, look at exactly what the facts were and was the *Lemon* prong of sectarian versus secular purpose.

CHAIRPERSON BERRY. Commissioner George.

COMMISSIONER GEORGE. Thank you, Madam Chair. As I understand the debate, there's a certain asymmetry here. Dr. Scott is taking the position, not only that evolution must be taught in science curriculum in K-12 but also that alternatives or criticisms of evolution must not be taught. Dr. Meyer by contrast, and here's the asymmetry, is not arguing that evolution may not be taught, but only arguing that criticisms of evolution must be taught along with evolution. Now, let me just pause here to ask whether I've represented both of your points of view accurately.

DR. SCOTT. I'm afraid not in my case.

COMMISSIONER GEORGE. Okay. Could you correct me.

DR. SCOTT. Alternatives to evolution can certainly be taught if they are, in the words of *Edwards v. Aguillard*, have a secular intent and are not religiously based. I mean, you have to teach secular alternatives to evolution, not religious alternatives. The problem is that Justice Brennan was a wonderful jurist, but he didn't know zip about science and there are no scientific alternatives to evolution that are recognized by scientists.

Now, the whole history of the creation/evolution controversy from creation science to the recent "alternatives to evolution," intelligent design theory, or varieties has always been, "Well, we're going to teach the evidence against evolution, and because evolution is not true, that means our position is true." I congratulate Steve

and his colleagues because they are at least attempting to come up with some sort of positive arguments for intelligent design. My personal opinion and that of most others is that they haven't succeeded. They may yet. If they do succeed, then they have a right to be taught. But they have to earn their spurs so to speak within the body of scholarship that decides what is state-of-the-art science. I mean, we've all had papers rejected, right? I mean, we've all had our ideas, some are accepted, some aren't. I don't think that we should make a decision as to what to teach at the K-12 level until these issues have been decided at the level of scholarship which is most appropriate, which is the college and professional level.

COMMISSIONER GEORGE. Then I'm not sure that I did misrepresent your position.

DR. SCOTT. Well, maybe I was just unclear on what you said.

COMMISSIONER GEORGE. Let me try again. You take the view that at least for now students may not be presented with any punitive reasons not to believe evolutionary theory.

DR. SCOTT. I think that students who are presented with these alternatives to evolution such as the ones discussed in my statement are receiving bad science. They may not be getting anything illegal, but it is definitely bad science. And if you look at the statements from the National Science Teachers Association and the National Association of Biology Teachers, they would agree with this. As somebody who values scholarship and as a former academic, it pains me to rely upon authority for decisionmaking. This is not a comfortable feeling for me, but I think to some degree, we do. I mean, I don't know how many of you could tell me why perpetual motion machines don't work, but we all agree that we will not teach perpetual motion manufacture in the schools.

COMMISSIONER GEORGE. Surely, Dr. Scott, you believe that competing accounts of evolution such as those given by Gould, say, on the one hand, or my old colleague at New College Oxford, Scott Dawkins—

DR. SCOTT. Dawkins?

COMMISSIONER GEORGE. Dawkins, ought to be taught although one side is plainly right and the other side plainly wrong.

DR. SCOTT. What you are talking about are debates about how evolution takes place. And I was saying before, if we were going to have de-

bates among students as a critical thinking exercise, we should have them debating things that are validly considered—

COMMISSIONER GEORGE. But those are debates where there are minority and majority decisions.

DR. SCOTT. Those are debates about how evolution takes place, not whether.

COMMISSIONER GEORGE. Oh, I understand that. But it's a ferocious debate, is it not?

DR. SCOTT. Uh-huh.

COMMISSIONER GEORGE. By which there have been claims of irrationality made by both sides against the other, and besides the fact that they're in minority and majority positions, you think it's a good thing to teach the conflict?

DR. SCOTT. Actually, I would be a little reluctant to have students engage in a who will be the Dawkins side and who'll be the Gould side debates, because they don't know enough about evolutionary theory to debate this issue.

COMMISSIONER GEORGE. Well, which do we teach them then? Do we teach them Dawkins' view or Gould's view?

DR. SCOTT. You know the irony of this is that students get so little evolution at all in school.

COMMISSIONER GEORGE. You're evading the question, Dr. Scott. Which would it be? Really, seriously, which should they be taught?

DR. SCOTT. How would you characterize Dawkins' view and Gould's view, because we may have a different understanding? The way I would look at it is they are both talking about natural selection, but they are both talking about difference of importance. The effect of natural selection in different kinds of contexts has different importance and explains different aspects of the fossil record.

COMMISSIONER GEORGE. Are we agreed that in speaking of evolution, we're speaking not only of descent from a common ancestor but of a mechanism of random mutation and natural selection? Can we agree about that?

DR. SCOTT. And others, other mechanisms as well. The random mutation and natural selection is Darwinism. There are other mechanisms of evolution in addition.

COMMISSIONER GEORGE. In addition or as competing accounts in the mechanism?

DR. SCOTT. In addition.

COMMISSIONER GEORGE. All right.

DR. SCOTT. Because nobody says natural selection doesn't work. That's a double negative, but you know what I mean.

COMMISSIONER GEORGE. Let me follow that that nobody says natural selection—

DR. SCOTT. Everyone agrees evolution works. Everyone agrees natural selection is a major component.

COMMISSIONER GEORGE. Everybody who—everybody who both believes evolutionary theory and—well, that is just a tautology. People who believe in natural selection, believe in natural selection.

DR. SCOTT. No.

COMMISSIONER GEORGE. Or is it not true that there are some people who believe in descent from a common ancestor, but not in the mechanism of natural selection?

DR. SCOTT. I think there would be very few because natural selection—what natural selection does is shape groups within—shaped populations within species. That, coupled with the phenomenon of reproductive isolation and speciation mechanisms, is what causes speciation.

Now, that basic picture is something I think you would find in all the textbooks, and you'd get all the evolutionary biologists to agree with. Where these people square off and start arm wrestling is over the presence or absence of other factors such as reorganizations of the genome to various genetic processes, developmental biological processes and these other—

CHAIRPERSON BERRY. Before you guys go too far afield from civil rights issues, let me just ask again, am I clear that you said that you didn't mind discussions of evolution and criticisms and different theories being presented so long as that they were not based on religion and so long as they were secular in nature? Did I understand you to say that, quoting *Aguillard* when you first began there? You said you didn't mind the definition in *Aguillard*. That was before you complained about Brennan not knowing anything about science. And you were asked whether you thought people shouldn't discuss criticisms of evolution or different theories, and you said something about so long as they had a secular purpose and they were not based on religion. Did I hear you right or not? If I didn't, then tell me.

DR. SCOTT. Criticisms of evolution based on religion are unacceptable.

CHAIRPERSON BERRY. That's what I mean. Is that what you said?

DR. SCOTT. If there are solid scientific criticisms of evolution, of course, they can be heard.

CHAIRPERSON BERRY. I'll give it back to Commissioner George.

COMMISSIONER GEORGE. Let me take it back in a civil rights angle. Did I hear Dr. Scott right to say that she would object to criticisms such as those offered by Berlinski and Behe and all these other—Dembski and all these people, she would not object to those criticisms being presented on grounds that they were religious and therefore a violation or separation of church and state or something, but rather, that she would object to them on the grounds that they're bad science?

DR. SCOTT. You lumped a lot of people into the same hopper, Berlinski and Behe differ enormously in their attitude.

COMMISSIONER GEORGE. But they're critics of—

DR. SCOTT. The point is they're dealing with different matters completely.

COMMISSIONER GEORGE. But they're all critics of evolution.

DR. SCOTT. Yes, they're all critics of evolution.

COMMISSIONER GEORGE. And you wouldn't object to their views being presented on the grounds of separation of church and state or any constitution? You would object to their criticisms to—they give reasons against believing at least certain theories of evolution?

DR. SCOTT. And some of these are religious reasons, and some of these are secular reasons.

COMMISSIONER GEORGE. And say Berlinski's, you wouldn't object to Berlinski. Berlinski's not a believer, how are you going—

DR. SCOTT. Berlinski, if you read Berlinski's criticisms of evolution, he's just rehashing creation science except he leaves out the age of the earth. He talks about the second law of thermodynamics.

COMMISSIONER GEORGE. Does he get excluded then on religious grounds? Are you going to say now you can't have students exposed to that, that's not only bad science, that's religion?

DR. SCOTT. He would be excluded on the grounds of bad science.

COMMISSIONER GEORGE. But not religion. So we don't have a civil rights—

DR. SCOTT. He's pretty careful about not mentioning religion.

COMMISSIONER GEORGE. Is that a hint about his motive or—

DR. SCOTT. Uh-huh.

COMMISSIONER GEORGE. So you're suggesting that his motive really is religious, and therefore you're going to exclude him.

DR. SCOTT. No, no. I don't think either of us think David is religious. I have other reasons for thinking—I think David is doing something different with this exercise.

COMMISSIONER GEORGE. But I want to get to the civil rights. In other words—

DR. SCOTT. It is a difficult issue because we are talking about civil rights and civil liberties. We're also talking—and I at least part of the time am talking about pedagogical issues, what's good science and science literacy.

COMMISSIONER GEORGE. Okay. If we could just keep it—

DR. SCOTT. And we may have slipped back and forth.

COMMISSIONER GEORGE. And I appreciate that you're in an unusual position because you are both a scientist and an advocate, political advocate. But could we just stay on the civil rights dimension so that we could say that there are some people, as much as you might object to them on scientific grounds and object on straight out school curricular grounds, you wouldn't object on civil rights/civil liberties grounds to their positions being presented in biology classes.

DR. SCOTT. I would not make a blanket statement.

COMMISSIONER GEORGE. Well, I'm not asking for a blanket statement. I'm not saying everybody. I'm saying there are some people like Berlinski's views.

DR. SCOTT. I don't know Berlinski's agenda. I think you're asking for a hypothetical that I'm reluctant to give you.

COMMISSIONER GEORGE. No, I'm asking for a specific. It's not a hypothetical. You know Berlinski's view very well. Okay. If Berlinski's view is to be excluded, but not on the grounds that it's religious but on some other civil rights/civil liberties grounds, what's the civil rights/civil liberties grounds for excluding—

DR. SCOTT. Berlinski's view is not unique to him.

COMMISSIONER GEORGE. So?

DR. SCOTT. I mean, the position Berlinski advocates has been advocated by those who on the purpose prong of *Lemon* are definitely intending for religious establishment.

COMMISSIONER GEORGE. People argue for civil rights on the basis of religion and on the basis of

secular things. We're going to say because some people work for civil rights on religious grounds and invoke God and the brotherhood of man, that any advocacy of civil rights was itself a violation of civil rights?

DR. SCOTT. If you are familiar with the arguments that are raised in the creation-science debate, the vast majority of them never mention God. A whole lot of them have to do with supporting ideas like the whole world being inundated by a flood, by evidence that the world is actually young, an awful lot of the literature, not the stuff—

COMMISSIONER GEORGE. But that's not Berlinski. If Berlinski's view were being presented to students, would there be anything objectionable on civil rights/civil liberties grounds?

DR. SCOTT. I would want to ask a lawyer.

COMMISSIONER GEORGE. Okay. Then, let me ask, Is it your position, Dr. Scott, that the evolution that you would like to see presented in schools without criticism, because none—at least there's at the moment no criticism that would be sufficiently serious to put forward, okay, that you were presenting is a view that has no preconditions or premises that are not themselves empirically verifiable, in other words, it rests on no questionable metaphysical assumptions? That's your view?

DR. SCOTT. My view is that science should be—evolution should be taught as science without metaphysical implications.

COMMISSIONER GEORGE. And that to believe in evolution with the mechanisms that we've discussed and perhaps additional mechanisms, say, natural selection, one can believe that without any nonempirical assumptions being made. In other words, to believe in that does not presuppose, as people like Phillip Johnson claim it does, certain assumptions that are not themselves empirically variable, certain assumptions that are metaphysical rather than—

DR. SCOTT. I think Phillip Johnson is dead wrong in his depiction of evolution as a fundamentally naturalistic philosophical system. It is no more naturalistic than heliocentrism. Excuse me. It is no more philosophically naturalistic than heliocentrism.

COMMISSIONER GEORGE. Dr. Meyer, would you like to comment?

DR. MEYER. One of the—let me first clarify my position and then come back. What we are advocating is teaching the controversy within

the limits of the law. And there are legitimate scientific reasons for criticizing Darwinism. I started to point out Behe's molecular motor here. Some 50 book reviews have been written about Behe's book, many by scientists, most often conceded his point that there are no neo-Darwinian explanations for the origin of these motors. And so the grounds for exclusion, which is of his view has been again this convention of methodological naturalism, it's against the groundrules which we have decided—

COMMISSIONER GEORGE. Can I just interrupt?

DR. MEYER. Yes, sure.

COMMISSIONER GEORGE. When you say, his view, I take it his view being the denial of the neo-Darwinian mechanism—

DR. MEYER. Right.

COMMISSIONER GEORGE. Not descent from a common ancestor, because as I understand Behe's position, he does not deny a common ancestor.

DR. MEYER. He's either in favor of that or agnostic about that.

COMMISSIONER GEORGE. Go ahead.

DR. MEYER. So my concern for science education has been rhetorically the same as Eugenie's. It's the bad science. We have a selective presentation of evidence going on. It's not fair to say that because you don't have a lot of people using the jargon, intelligent design, that there is not a significant scientific dispute here. Paleontology journals are full of discussions of the problem that the Cambrian explosion poses for the neo-Darwinian gradualistic model. Behe did a literature search in his book on systems like this and looked for neo-Darwinian explanations for their origin and found virtually none. There is weighty evidence for this, and we want the evidence—students to be exposed to the evidence that supports these other viewpoints.

COMMISSIONER GEORGE. Now, do you take the view, contrary to Dr. Scott's view, do you take the view that in fact some nonempirical assumption must be made either way?

DR. MEYER. Yes.

COMMISSIONER GEORGE. So that there are metaphysical hypotheses not themselves empirically verifiable which must be made prior to one's adoption of either the design theory or evolutionary theory?

DR. MEYER. Right. In the diagram, I show a two-way arrow between worldview assumptions and theoretical viewpoints. The two can inform each other. And secondly, I think this is clearly

the case by something that Eugenie has said already that she accepts the principle of methodological naturalism. That's not an empirical or empirically verifiable principle. That is a philosophical principle. It's something that is a groundrule if you will—

DR. SCOTT. On both sides.

DR. MEYER.—which is not established by viewing nature. It's something which has I would say rather dubious philosophical arguments.

COMMISSIONER GEORGE. Doctors of all science may take that to mean—

DR. SCOTT. Not just of evolution, of all science.

COMMISSIONER GEORGE. That although it's a nonempirically verifiable assumption, it is nevertheless a noncontroversial one. I take it that your view over Dr. Meyer is that it cannot be made in a way that does not shade over into a more comprehensive naturalism.

DR. MEYER. Correct.

COMMISSIONER GEORGE. So it looks to me—and then I'm going to let Dr. Scott come back and take a shot at me on it. It looks to me like your side has radicalized the discussion in such a way, radicalized meaning going to the root, in such a way as to drive the issue out of the realm of science precisely to the realm of philosophy where you make the orthodox scientists defend on philosophical grounds—

DR. MEYER. A latent philosophical principle of their whole enterprise, exactly.

COMMISSIONER GEORGE. Dr. Scott.

DR. SCOTT. I think the link between methodological naturalism and philosophical naturalism is faulty. One can be a methodological naturalist without being a philosophical naturalist.

COMMISSIONER GEORGE. Now, there you disagree—

DR. SCOTT. Absolutely.

COMMISSIONER GEORGE. Not only with people like Dr. Meyer, but also with people like Dawkins and Lewontin.

DR. SCOTT. Dawkins, Lewontin, and Will Provine and others of that particular persuasion, will admit that there are people who are methodological naturalists who are theists.

COMMISSIONER GEORGE. Oh that's a—we know that. But don't they take the view, and I can tell you they do because I had this discussion with Dawkins, that if you understand, if you have a correct understanding of evolution, you realize that there's no possibility of theist?

DR. SCOTT. I don't agree with Dawkins either. Philosophically, I'm more similar to him than—

COMMISSIONER GEORGE. So if we talk Dawkins' view, this I guess is the point, if we talk Dawkins' view in school, we'd be committing a civil liberties violation.

DR. SCOTT. Oh, absolutely, yeah. I have discouraged that. In fact, Will Provine and I have gone back and forth on this on a number of occasions.

COMMISSIONER GEORGE. So *The Blind Watchmaker* or Provine's works really shouldn't be taught—

DR. SCOTT. No, no, no. The philosophical views that they have. Provine has done very good work in history of science and, you know, there's reason to—

COMMISSIONER GEORGE. Not all his works, but, I mean, look at *The Blind Watchmaker*. Look at Dawkins' book. In Dawkins' book it quite exclusively—

DR. SCOTT. It had—

COMMISSIONER GEORGE.—adopts naturalist views so—

DR. SCOTT. It also presents a lot of straight science.

COMMISSIONER GEORGE. Well, yes, but I mean, are we going to permit it to be—wouldn't that be—

DR. SCOTT. We should not be advocating the view that evolution or science equates with disbelief, because it's false and it also is an establishment problem or free exercise problem.

COMMISSIONER GEORGE. Just to conclude my line of questioning. So you both agree that there shouldn't be viewpoint discrimination, and Dr. Scott would say therefore Dawkins' comprehensive naturalism and Meyer's, Berlinski's, and other's design theory ought to both be excluded. It would be viewpoint discrimination to allow Dawkins' comprehensive naturalism a place but not Meyer's design theory, but I take the real difference is that just Dr. Scott says there are no legitimate scientific reasons that can be presented at least for now against evolution, and therefore viewpoint discrimination isn't a problem between evolution and nonevolutionary views, at least at the moment, because there's no plausible nonevolutionary view.

DR. SCOTT. And you have to distinguish between keeping out Dawkinzoid metaphysics and intelligent design or creationist metaphysics,

and whether or not you teach science as methodologically naturalist.

COMMISSIONER GEORGE. And your position you're trying to make out here is that I've got a view and we, the orthodox scientists and biologists have a view that itself does not have any questionable metaphysical presuppositions.

DR. SCOTT. Not per se, although it certainly has implications. But it's clear that—I mean, look at something—look at an idea like natural selection. Natural selection was taken by Marx and modified to suit his agenda. It was taken by the Nazis and modified to suit their agenda. It was taken by the robber barons and modified to suit their agenda. Now, you've got very, very different social and political ideas here, all claiming to be derived from natural selection. So clearly, I mean, I've often joked you could probably take photosynthesis and make a religion out of it if you wanted to. You should not confuse the philosophical implications or ideas people derived from a science with a science itself.

COMMISSIONER GEORGE. If something is random, it can't be directed, yes?

DR. SCOTT. Now, this is again a little bit of fancy footwork that goes on in this debate. When people who oppose evolution talk about randomness, they are generally using random in the sense that the man on the street is going to understand it, that there's nothing out there except just stuff falling into the place, and obviously you're not going to get a brick wall by all the bricks falling into their actual position, or the tornado that goes through the hangar and constructs the 727.

COMMISSIONER GEORGE. But on the other side, there's also Dawkins, who says, yeah, random—

DR. SCOTT. But random as a concept important to evolution refers to the production of genetic variation, which is random in respect to the needs of the organism. Now, evolution is not a random process, particularly, if natural selection is the mechanism that directs it, which most of us accept. Natural selection is the opposite of randomness. This is why this matter becomes so very complicated. We can get bogged down real fast at school board levels in the operations like this talking about very technical scientific elements.

What really matters I think is how do we decide what to teach in the curriculum. We can't make everybody happy. I suggest in an essay

that I wrote to teachers ways that they could teach evolution without ruffling too many feathers. And I would encourage you to consider them when you make your report.

COMMISSIONER GEORGE. Thank you.

CHAIRPERSON BERRY. Thank you. I have considered this a wonderful discussion. I wish we could have had it in my seminar and took all day and had lunch and then dinner. And I must say, though, Dr. Meyer, I was so attracted to the intelligent design theory when I misunderstood it. And I thought you were going to say that the way the DNA particles encoded and so on that there had to be an intelligent, you know, workman up there and that it was God. And then I was going to say, hooray, I like that theory and it reinforces my beliefs. But then when you didn't want to concede that there was a being up there, God, or somebody—

DR. MEYER. I think the being was God, and I think other arguments can be made for that. But it's a technical point as to whether you have an implication or a strict entailment, a proof of God's existence. I think the best explanation is that God is the designer, but it could be different.

COMMISSIONER GEORGE. A self-organizational pantheism, could it not?

CHAIRPERSON BERRY. I want God to be.

DR. SCOTT. Don't forget the extraterrestrials. That's it. We'll teach kids evolution, we'll teach them God, and we'll teach them extraterrestrials, and we'll teach them pantheism. Boy, wouldn't that go over well in the school districts.

Panel 3: Partnerships between Schools and Communities on Religious Freedom Issues

CHAIRPERSON BERRY. I want to thank the panel very, very much. This is very illuminating. We have taken up our break with the discussion, so we have to bring the next panel. So we thank you. And we would ask that the next panelists come forward. Jerry Don Warren, Wayne Jacobsen, Keith Naylor, Christopher Meidl. Please come forward and there are name plates for you somewhere and we'll put them in front of you. Then we will proceed.

Mr. Warren is a health education specialist with the Comprehensive Health Education Foundation [CHEF] since 1990. He has developed comprehensive health education programs for the public schools in Washington State. The CHEF is dedicated to promoting good health by

providing leadership, support, and resources for health education in schools and communities. One of their current programs is a partnership project in which they encourage cooperation and understanding between faith communities and public educators. Mr. Warren is educated at Lewis & Clark College. And we're going to begin with you, Mr. Warren, and then go on to the other presenters, and then there will be questions so could you please proceed.

Jerry Don Warren, Health Education Specialist, Comprehensive Health Education Foundation

MR. WARREN. Thank you. What I'd like to share today and have you consider is about our partnership project that we've been involved in for the last 5 years. And the purpose of our partnership project is to bring together faith leaders and educators in hopes that they will discover ways that they can work together to provide quality public education to all students in their communities. And our goal here is that we want to encourage support of relationships between school educators and faith leaders to present within our seminars differing opinions on the partnership between church and public schools, to rekindle what we consider is an interest that has always been there. From one side, which is the faith communities and the other side, schools, that there would be a rekindled interest of communities of faith in public schools and to discuss strategies that have been going on within schools that they can get involved in that don't cross the boundaries, the church and state boundaries.

Within our seminars, we have opportunities for that dialogue to take place because administrators feel that that's a real important key and faith leaders also believe that that is a real important aspect that needs to be a part of what we do.

We spend a considerable amount of time talking about those issues and at least letting them have an opportunity to discuss those issues. We also spend quite a bit of time having someone address the history of schools and the history of religion as it's played a role in our public schools in terms of background.

We highlight often quite a few of the partnerships that have been developed, not only in those communities but also in communities across the State here in Washington, and that's where we've been spending quite a bit of our time. And

we involve them in a process where they can talk about what they can do, what schools and faith communities can do in partnership to begin to rekindle this interest and also to begin to work together for the benefit of our students and our schools.

Some of the things that we have found as a result of being involved in this process that administrators and/or faith leaders are doing right now is that faith leaders are going back to their congregations and at least talking about the issue, at least bringing the issue up in their churches, in their worship services. They have begun to at least report that they begin to attend school board meetings just to find out what's been going on within the schools, to address the theme of public schools through discussions, through their sermons, through worship services having begun to invite administrators to come to their congregations and talk about the schools.

Because what we found is that there has been a separation and there has been a reluctance on the part of administrators, at least some administrators here in our State, to call on faith leaders to be involved, and that's not all. But we found that there are some that are not doing a very good job of that. We found that, at least being reported, that there are opportunities within church services where they are honoring the educators within their congregations and that they are beginning to meet with administrators on either a monthly basis or biannual basis at least to talk about what's going on within the schools. And that has been at least the beginning point of what we call bridging and at least making new partnerships.

From the administrator's side, what they've been reporting that they've been doing is speaking to local faith leaders about their schools, reviewing their policies that they have that deal with religious diversity access or equal access for students and parents within the schools, and also talking about various challenges that have come about as a result of administrators or the schools not taking seriously the issues that faith—I say faith people bring to the school. They've included in their plan ways to include more faith leaders and advisory councils and advisory committees, and they begin to look at curriculum to at least opportunities to begin at least teaching about religion. I will leave that at this point, and if there are questions or other things that you'd want to hear

about what we've been doing, I'd be happy to share that.

CHAIRPERSON BERRY. Well, thank you very much and there will be questions as you noticed from sitting there listening to all of the other discussion. Mr. Jacobsen is the president of BridgeBuilders, which helps school districts build bridges between parents of religious conviction through training seminars, community forums, mediation and consulting services. He has served for two decades in Christian ministry as a pastor and he was educated at Oral Roberts University. Mr. Jacobsen, could you please proceed.

Wayne L. Jacobsen, President, BridgeBuilders

MR. JACOBSEN. Thank you, Madam Chairperson, members of the Commission. Five years ago I was a pastor in a growing evangelical congregation in central California. Today I travel throughout the United States helping school districts and religious parents build bridges of cooperation through some of the most divisive issues of our day. Why did I make that change? The reasons are best exposed in comments made to me by a teacher from Northern Ireland who was in Massachusetts on a teacher exchange program. After sitting through the first part of a workshop I conducted, she said to me, "I appreciate what you're trying to do here, but it won't work. You'll end up killing each other over these issues just like we're doing." Given her circumstances, I understand her despair. Hopefully, current events in Ireland will yet lead them to peace.

But the reason I am involved doing the work I do now is to prove people like her wrong. I don't agree that religious tensions must end in anger or bloodshed. We do have the necessary court decisions and broad-based consensus to tackle the most difficult issues in our society with compassion and mutual respect. Thus I founded BridgeBuilders 4 years ago to help school districts and parent groups understand the current tensions of the so-called culture wars and to build relationships of mutual respect across philosophical differences.

We have helped fractured communities heal and others to avoid conflict and misinformation by taking a proactive approach. We also help faith communities understand the religious liberty issues inherent in the public school environment. They need to know that applying the

Bill of Rights to all people in our culture is not a national repudiation of God but simply a valuable limitation on the role of government. The State isn't going to broker the religious faith of its citizenry.

Two years ago, I arrived in a school district in southern Arizona that was deeply divided over the implementation of an HIV/AIDS curriculum. Accusations had been traded in the local paper for the 8 months before I arrived. When I first met the parents, they took great pains to indicate that their concerns were not derived from their religious faith. They thought I had been invited to their district to identify their concerns as religious based, and under the of doctrine of the separation of church and state, exclude them from the dialogue. Nothing could have been further from the truth. I was there to help identify their concerns and see if the district could build an HIV/AIDS curriculum that would be endorsed by the wider community. In 3 days together, they were able to write a framework that had the support of the entire faith community, as well as medical doctors, educators, and other community agencies.

Here, as in most places I go, the conflict resulted from people's mistaken perceptions about the agenda of the opposing side and the lack of knowledge about religious neutrality in public schools. While our society has undergone a critical transition these last 35 years, it is sorely misunderstood by most people in our society. Religious pluralism did not emerge from public debate and legislative action but by lawsuit and court decision. Though I'm convinced it provides a fair platform for our diverse society together, no one has helped the community understand or appreciate religious neutrality in public education. In other words, while the case has been made in the courts, it has not been made in the living rooms or schoolhouses of America. To a significant degree, this misunderstanding is fostered by a suspicion and mistrust inculcated by advocacy groups on both sides of the religion and society debate.

To illustrate, during a period of 2 days last November, I had the opportunity to address the Healthy Schools/Healthy People Conference in Sacramento, California, and a regional convention of the Christian Coalition. At the first, I heard one keynote speaker say anyone who opposes condom distribution to high school students is unthinking, uncaring, and demagogic. A

day later, at the Christian Coalition conference, I heard the following: "We know that sex education in our schools is not designed to reduce sexual activity but to encourage it." I don't find either of those statements to be true of the vast majority of people I work with on both sides of this issue. But both were acknowledged with vigorous applause from their respective audiences. Highly visible, well-funded advocacy groups on the right and the left attempt to raise funds by raising fears and have more to gain by intensifying the conflict rather than bridging the peace. Except for the First Amendment Center at Vanderbilt University, I am aware of no other group seeking to inform the public without a personal agenda that often distorts the facts and vilifies the opposition.

Thus in our patchwork of locally controlled school districts, abuses and misunderstandings abound. This misapplication of the doctrine of separation of church and state has lead in many cases to an environment that is hostile to the values of religious parents and to conflicts that destroy the fabrics of entire communities. While we gain from separating the institutions of church and state, we cannot and should not attempt to divide someone's faith or their lack of it from their participation in culture. Though public education cannot promote religious faiths, it certainly cannot denigrate it either. If public education is going to survive into the next millennium, it's going to have to take seriously the role of parents in rearing their children and recognize that if schools cannot be used to indoctrinate students into religious faith, then it also cannot be used as a tool of social engineering in defiance of the values parents seek to instill in their children.

Let me close with a question posed to me by a science teacher in Long Beach. "Personally," he said, "I'm an atheist, but is there a way for me to teach science faithfully and not undermine the religious faith of students in my classroom?" The answer to his question is a resounding yes. The fact that he asks it is one of the best demonstrations of the kind of respect that must be rebuilt into the national dialogue if we're going to learn to live together beyond our deepest differences. And after all, isn't that the highest ideal of living in a democracy? Thank you.

CHAIRPERSON BERRY. That was very impressive. You finished in exactly 5 minutes. What

you said was impressive, very impressive. [Laughter.]

VICE CHAIRPERSON REYNOSO. With that timing, he must be a prize fighter.

CHAIRPERSON BERRY. That's right.

COMMISSIONER GEORGE. What you could rely on was when he was the pastor of a church for a sermon. [Laughter.]

CHAIRPERSON BERRY. You know what time you get to go to lunch. Since 1994, Dr. Naylor, Dr. Keith Naylor, has been a professor and chair of the department of religious studies at Occidental College—which I think John Slaughter [phonetic] is over there, isn't he?

DR. NAYLOR. Yes.

CHAIRPERSON BERRY. John is still over there as president, in Los Angeles, California. He is a former adjunct assistant professor. He's gone up through the ranks there at Occidental in the department. He has authorized a number of articles, presented papers on, and conducted research on various religious issues. He was educated at Santa Barbara, at UC Santa Barbara and at Stanford. Beginning in 1996, he worked as a consultant to the California 3Rs Project, a nonprofit, nonpartisan educational program whose mission includes encouraging cooperation between schools and communities on religious freedom issues. He is now an advisory board member for that project. Please proceed, Dr. Naylor.

D. Keith Naylor, Chair, Department of Religious Studies, Occidental College

DR. NAYLOR. Thank you. Some people feel threatened by the term "secular." To some, the term means worldly or nonreligious. I prefer the technical definition in which secular means beyond church control or nonecclesiastical, in other words, civil. That is of the basis upon which our public schools must operate in a pluralistic society, as civil institutions, not ecclesiastical ones.

Of course, religion played an initiatory role in education in America and by tradition for many years had cultural custody of the schools. But the Supreme Court decisions of the early 1960s regarding State-sponsored school prayer and Bible reading and other similar decisions since honor another worthy tradition, that of non-establishment, of secularization, of public institutions as civil institutions. Secularization in structural terms does not threaten religion in cultural terms. Secularization certainly does not

prohibit religion. And it need not be hostile to religion. Our voluntary system regarding religion is responsible in large part for the vitality of religion here as compared with countries that have established religion.

In recent years, I've been involved in teaching public school teachers how to teach about religion via the California 3Rs Project. Secondary public school teachers have been enthusiastic in learning about how to imagine religion as part of human civilization rather than ruling it out. In geography, history, literature, social studies, art, music, et cetera, we can find religious influences and actions which can be studied in the usual academic sense. We can ask about religion, the who, what, where, why, when, and toward what effect questions that we ask about other subjects. We can create separate religious studies courses on the model of those taught in college when appropriate and useful. And we can include study units on religion within already established courses.

Sometimes the mere mention of religion as a varied and persistent human phenomenon is a good beginning. Key to the teaching about religion is attention to the variety of definitions of religion, both substantive and functional. Discussions about what religion is, while rarely conclusive in an academic setting, are highly useful in learning about religion. And discussion about what Professor Ninian Smart has called the dimensions of religion, the doctrinal, mythical, ethical, ritual, experiential, and social aspects of religion have proven extremely helpful in moving beyond arguments about religious ideas or theology.

Studying religion as a plural phenomenon, that is, studying about different religions and different religious perspectives is essential in our longtime pluralistic society. Along with their enthusiasm, I have sensed an anxiety among teachers about their training to teach about religion. Because religion has been such a taboo topic up and down the public educational system, teachers are missing not just official certification but any sense of confidence to teach about religion. The California 3Rs project therefore seeks to give them academic content and to build their confidence in teaching about religion in a constitutionally permissible and educationally sound way. We help to identify useful textual and audiovisual instruction materials on religion. We work with teachers on developing

teaching methods that are appropriate to the subject and to the grade level. The enrichment of the curriculum to include religion, and the training of teachers to teach about religion are areas where joint activity by schools and communities is sorely needed.

Many college and university faculty in religious study, such as myself, are eager to participate in these efforts. In short, teaching about religion in the public schools increases knowledge about human civilization and fills the vacuum maintained by religion as a taboo subject. The academic study of religion provides useful methods in addressing the pluralistic nature of our culture and society. It is a way of decharging and depolarizing the kinds of discussions that emerge solely from faith commitments, and at the same time, the academic study of religion builds respect for religion itself.

CHAIRPERSON BERRY. Thank you very much, Dr. Naylor. Christopher Meidl—am I pronouncing your last name right?

MR. MEIDL. Yes, you are.

CHAIRPERSON BERRY.—since 1997, has held two positions with the International Fellowship of Christians and Jews, a Chicago-based non-profit organization founded in 1983. As executive director, he provides overall management for the organization with the mission of fostering better relations and understanding between Christians and Jews, supporting Israel, and working to build a more moral society. He is also vice president of the Public Policy Office of the International Fellowship, the Center for Jewish and Christian Values, which has its headquarters in Washington, D.C. He is an evangelical minister and has over 15 years experience in local church-related teaching, music, administration, and government. He was educated at the University of California, Berkeley, and the Law School of Santa Clara University. Please proceed, Mr. Meidl.

Christopher Meidl, Executive Director, International Fellowship of Christians and Jews; and Vice President, Center for Jewish and Christian Values

MR. MEIDL. Thank you, Madam Chairperson and Commissioners. First, may I ask is it permissible for me to sign onto the statements of the earlier presenters?

CHAIRPERSON BERRY. Oh, sure.

MR. MEIDL. Excellent. And I'll dispense with my prepared remarks in deference to questions

later and also because many of the things that were referenced there or mentioned were included in my prepared remarks.

As I was listening to the previous panel, it became apparent to me why this panel to create partnerships is so necessary. As I've experienced traveling around the country and even over the course of this summer, I find many teachers driving in shuttles to and from O'Hare and Midway airports in Chicago and I ask them questions. I find that they are frozen in the headlights of this debate and are unsure what to do. Where do they go? Where is the common ground? And is there common ground, and if there is who's out there to tell me about it? And I see that there are many very capable and wonderful organizations that are doing just that.

I found myself striving for some great advocacy during the debate about curriculum that I could come up here and let my lawyerly juices flow or my philosopher's juices or theologian's juices, and I was somewhat bemoaning the fact that I didn't have a great piece of advocacy to present. But then I really do, and that's as Dr. Charles Haynes has described it and as others have mentioned already, there is a "common ground in the law" that's there to be protected.

The program that the International Fellowship of Christians and Jews in its Center for Jewish and Christian values started last year, a relative new-comer to this arena, is entitled Protecting Religious Expression in the Public Schools.

And as I come to this panel, I probably carry most critically my role as a parent and father of two young boys who are in public school. I see them in that public school system and I hear what they're told and what they learn and I see that, in many respects, they're day is a religion-free zone. It's very much taboo; religion has gone underground. Not only do they not learn about religion, but they don't learn about other religions from their fellow students because teachers and administrators are fearful of discussing that, so the boundary is drawn. And, I think, that is sad for all of us. It's sad for my boys, and it's sad for us as a culture and as a nation.

Our project essentially aims to take the *Joint Statement of Current Law*—which is agreed to by many, many organizations, the ACLU, the American Jewish Congress, National Association of Evangelicals—and put it into the hands of teachers and administrators all across the coun-

try. We're in California, in two different cities, we're in Michigan—Grand Rapids has been a tremendous success since the inception of the program—Colorado and New Mexico. And what we've done is find local leaders, rabbis, Jews, Christians, parents of no particular sectarian affiliation who are interested in protecting that common ground. We've taken these guidelines and then asked, "May we present this at a school district meeting; may we present this to the administrators; have you seen this; do you understand this?" We'd like to explain this to you, with the goal of initiating a three-phase program. One, the adoption and recognition of the guidelines, formally, by the policy committee of the school district; two crafting (again organically within the school district) a program that will allow for inservice training for the teachers so that they can see this as not just an academic exercise, no pun intended, but here's how they can really apply those guidelines, what we can really do, and what we should not do within the classroom so that the "deer frozen in the headlights" syndrome is erased. And then the third phase, which we've yet to implement, is to create a regional master teacher seminar whereby we would be on the campus of a local college, community college, or university and bring in a number of teachers and administrators regionally for a training program. So that you know our program has received a great deal of guidance from the American Jewish Congress, from Dr. Charles Haynes, Elliot Abrams at the Ethics and Public Policy Center, Prof. Robert Destro at the Catholic University, Columbus School of Law, who is the chair of our National Legal Advisory Committee, and William Bennett of Empower America. Dr. Bennett has agreed to help us craft a training video that Dr. Charles Haynes will participate in, as well. I'm happy to answer any questions.

Discussion

CHAIRPERSON BERRY. Robert Destro used to be a member of this Commission. I don't remember if you know that. Any Commissioners have any questions for the panel? Yes, Commissioner Horner.

COMMISSIONER HORNER. Yes, for Mr. Jacobsen. You talked about going into a community, which I gather you do regularly, and bridging differences. I'm having trouble imagining how that actually works. It sounds wonderful. It

sounds American. It sounds like it's based in reasoning together a compromise and all the things that we have been taught to believe are part of—vital part of our political culture. That's how we operate as Americans, and I'm all for that.

You also said living together despite our differences, isn't that the highest ideal of a democracy. And I'll bet you there are people who do not agree with you that that's the highest ideal, living together despite our differences, and perhaps they have a substantive rather than a procedural definition of the highest ideal. So I guess I would ask you if you could describe—was it you who brought up the HIV issue? Could you tell us just anecdotally and briefly what people thought before you encountered them, and how you worked with them, and what they agreed to in the end, what they each gave up.

MR. JACOBSEN. The community was incredibly polarized from 8 months of dialogue of an HIV/AIDS curriculum that had been imposed on the school district, which was a K-8 elementary district. The parents, when they saw HIV/AIDS administered that low in the curriculum age-wise, they were very concerned about what they were going to teach kids about HIV/AIDS and then sex education and then homosexuality and on and on. And the fight ended up in the media very, very quickly. Parents were very angry. The school district thought they were fulfilling a State mandate. It turns out later that there was the good intentions of someone in the State Office of Education, and it wasn't necessarily a mandate from the State Department of Education itself. When the parents found that out, the school district said that the curriculum had been formulated by a group of parents and staff. It turns out that all the parents on the committee were also staff members, so the parents had a lot of animosity, a lot of suspicion.

I arrive there on a Monday afternoon. My first meeting with the community was an open forum on Monday evening to let people air their concerns. As I said in my statement, I was regarded as an enemy hired by the district to come in to marginalize their interests. I think that evening we gained their trust that I wasn't there for that purpose, that I was there to help them deal with this HIV/AIDS curriculum. The school district by the way 8 months ago had shelved the curriculum, tried to convince the community that they had. The community was not con-

vinced. They thought it was just hidden away until the parents concerns died out and then it would come back again. We were able to convince them that in fact it had been shelved, that if there was going to be an HIV/AIDS curriculum, it was going to be agreed upon by the community as a whole.

The next day I spent a full day doing a workshop, common ground kind of stuff, a lot of it from the First Amendment Center, Vanderbilt University, Charles Haynes' and Dr. Thomas' material. A lot of it helping them to have an appreciation for why it is that the culture war conflicts are so intense right now.

COMMISSIONER HORNER. Which group?

MR. JACOBSEN. All groups. They're all there. They're all represented. Yeah, we had—it was an open meeting Monday night. The inservice on Tuesday was made up of—I think it was 52 people there. They were made up of educators, people from the community, pastors, people from the gay/lesbian consortiums since we were dealing with HIV/AIDS. So we had a broad base there, and we talked about religious neutrality, why it's there, why it's changing, what has happened the last 35 years.

And I think when people understand the convergence of historical forces that are promoting this conflict right now to realize we're probably the first nation in the history of the world that is trying to engender a national identity without a shared religious experience, and that is relatively new because prior to 1963, we at least tacitly had a shared religious experience, being Protestant or Christian Protestantism primarily even though there was freedom of religion for other groups to exist. Since that time, we tried to restructure the dialogue so we recognize the plural nature of our community. And I helped them take a look at what the value of that is and let them give vent to their concerns and frustrations. We finished Tuesday with a fairly positive response. I think everybody that left there felt like, wow, there is a bigger issue here than I knew about and, yes, I'm willing to work towards some kind of solution.

The next day, we gathered with 25 people that had been part of all the first two previous events, and they were made up again of a broad cross section of people who had a interest in the HIV/AIDS curriculum. And we spent about 6 hours together, first, of all, dealing with what they wanted and then what they were willing to

say was in the best interest of the district as a whole.

And I think probably the process that's most significant is to get people to think from what's best for my group to being part of the community as whole. What's best for the community as a whole. For instance, one conservative pastor who started that meeting by saying, "I will not agree to any HIV, any kind of sex education K-8. That's the responsibility of parents and the parents only." By halfway through the day he was saying, "You know what, I really want parents in my congregation to deal with this and I wish they would and I hope they do, but I realize that a lot of parents in this community are not, and we're going to have to do something more." And he came on line as a real advocate for what kind of HIV/AIDS instruction at which ages.

When we finished that day, they had an agreement as to framework. They had a suggestion to the school board about a committee that would be an ongoing way to oversee any kind of family life, sex education related curriculum. It was made up of a broad cross section of conservatives and liberals. Planned Parenthood was part of it as well as conservative religious churches. And as far as I know, that was over 2½ years ago now. The committee is still working fine. The letter I got from the superintendent after that whole experience was "not one board member believed that you would have any impact coming into this community. And they were all pleasantly surprised when you left that you turned some of our greatest detractors into some of our most ardent supporters."

COMMISSIONER HORNER. Now, at the end of this process, is there a curriculum? Is there one now?

MR. JACOBSEN. There is a framework and they've adopted other—they didn't write their totally own curriculum. They had some framework guidelines, and they're finding pieces of curriculum consistent with those guidelines, yes.

COMMISSIONER HORNER. And the—you just in talking about this talked about the concession of one of the conservative ministers, that he conceded territory that he'd gone in with. He conceded that it wasn't going to be just parents; it was also going to be schools doing this educating in the K-8. Is there any concession you've identified by the other side to the discussion?

MR. JACOBSEN. The other side wanted a whole lot of information very early, very young,

and what we came up with was some initial statements about finding syringes on the playground, those kinds of things, not touching them, not touching another student who is bleeding, some of those kinds of things at the very young ages, but saving some of the sexuality information until fourth, fifth, sixth grade, and then more explicit seventh and eighth. So I think what they gave up was early, how young in the curriculum some of this stuff would appear.

COMMISSIONER HORNER. Wow. Okay. I mean, that sounds fine. I'm just a little bit taken aback by the going in position from which the concession to fourth grade was made, but that was just my—

MR. JACOBSEN. I was too. I understand that.

COMMISSIONER HORNER. Is it your view that compromise and resolution of these debates is the primary goal and that the substantive preferences of one side or another must always be less important in order to achieve harmony in a pluralistic society?

MR. JACOBSEN. No, in fact, I wouldn't. I don't even use the word, compromise, in my presentations because there are many in the religious conservative community that don't understand how they can compromise their religious faith and religious values. So I don't talk in terms of compromise. I talk in terms of how do we have a mutual respect, how do I give to another person, even if they disagree with every philosophical position I hold dear, how do I assign them respect as a human being, and how do we work together as a society to exist in light of the fact that we don't agree about everything?

And so I basically work toward mutual respect and then common ground solutions which people will agree to because, "Okay, I realize this is not exactly all that I want, but I think this is the best given this community, and what we need to do to answer the needs of this community." So I get them to think differently than my positions and how I concede and compromise and how we craft some kind of compromised position. Instead, how do we think in terms of common ground. How do we bring diverse people together. And one of the wonderful things about—and as I said in my statement, all of the misinformation that's out there. I mean, any of us who side with one point of advocacy or another in this debate realize there's an awful lot of misinformation out there about me, and we all realize

that. And I think one of the best things about bringing people together, which is why I call what I do bridge building, is when they get together and see face to face that this person is not the person I thought they were, even the person who's representing the gay/lesbian community in that town is not the person I thought they were, and is not as whatever their stereotypical expectation was of that person. We do find that, again, 90 percent of what I do in districts is to help them see that their misperceptions about the other side are exactly that, misperceptions.

COMMISSIONER HORNER. Are both sides usually equally right and wrong, or in your view does one side usually in your private personal view have a much stronger case to make, but you'll overcome that fact and help compromise occur?

MR. JACOBSEN. Again, I think if we can get all the facts out and get them correct. In this specific instance in Arizona, at one point, one of the parents who stood up Monday night at the open forum, called me a liar, called the district superintendent a liar. I mean, she was absolutely vicious, and, yeah, I would probably have more in common with her positions theologically given my background and hers. About halfway through that morning session, she interrupted me and she said, "Could I speak for a moment?" and I said, "Yes," and she said, "I want to speak to the superintendent." I realize this was one of those make or break moments. We're going to make something here or the whole thing's going to fall apart. She said, "I want to apologize to you. I've said things about you in this community and I've said things to you that I deeply regret. You are not the man I thought you were." It didn't turn out he was any more of a passionate believer that she might have wanted him to be or anything like that. She realized he wasn't there working against her and her desires for her children. So I think that made a difference for her. It makes a difference for many people.

So I'm a little bit off the platform of positions and try to get to a place of mutual respect and a common ground. This environment of public education is a unique environment. There's captive minors here. So we're not using this to proselytize. You want to proselytize, you've got street ministries, prison ministries, all other ways that we can do that for our respected positions out there, but not here, not with captive minors.

COMMISSIONER HORNER. Not even secular proselytization for a certain point of view on health education?

MR. JACOBSEN. And that's a big problem I face, yes, because there's a certain amount of social engineering that some people want to use our public schools to drive the culture and when it defies the values of religious parents, they need to come to see that we can't denigrate those values here either, and they do. I have yet to be to a district that we have not walked away with some kind of positive result.

COMMISSIONER HORNER. Do people—and this is my last question. Do people who wish to secularly proselytize for a certain point of view, say prokindergarten AIDS education of a sort that offended some of the religious parents, do people of that persuasion view themselves as equally prone to righteousness, ignorance, stubbornness, as they view the other side as being?

MR. JACOBSEN. No, I wouldn't think any of us do.

COMMISSIONER HORNER. Thank you. That's all. I just wanted to get that on the record. [Laughter.] I admire the effort, your undertaking tremendously, but sometimes I've seen these efforts undertaken as a way of patronizingly tamping down honest difference.

VICE CHAIRPERSON REYNOSO. Yeah, I'd like to explore with Mr. Warren the nature of the school-church cooperation and, incidentally, I must say that I think this panel which has clearly from the initial statements emphasized how we in a diverse society can live together, I find inspirational. But, Mr. Warren, you were rather general. Mr. Jacobsen, on the other hand, stressed the need as he just did now for neutrality in the schools. And I didn't hear anything in your statement that went to the contrary, so I want to explore a little bit further with you from whence came the idea to have a school-church cooperation organization and what has been its principal function, how it operates.

MR. WARREN. Well, let me take you back on what Wayne was just describing there, because what has happened across our State is that after a school district has gone through the kinds of issues that Wayne has described without getting anyone—having anyone come in to mediate as Wayne has just described there, results in both sides basically shutting down. And I can name a number of school districts here in this State where if it happens to be HIV/AIDS, and there's

some of those issues that have gone on, sexual education, it could be any kind of methodology teaching about decisionmaking or managing your own stress using different kinds of muscle relaxation techniques, and if the community feels as though—religious community feels as though these are activities that they disagree with or it's really opposed to their Christian beliefs and values, they will oppose those. And when the district then on the other side now doesn't quite see it that way and they don't quite have a process to allow dialogue to occur where there can be some discussion on both sides to resolve the issue, then there is this polarization and there is this fighting and then nothing happens, or what does happen is that there's a stalemate and the curriculum is left, put aside, and not being used. And then the result of that is that students who may need HIV education, students who may need sexual education are not getting it. And that the school is no longer addressing these issues.

What we have done then is to look at, well, if these things are happening within our schools and these things have happened in our schools, what needs to occur before that happens. Or within our State now, what needs to happen as a result of those things that already have occurred. What can we do.

Well, what we've done, because I'm a health educator and our organization is one that's trying to get our education materials within the schools to be used, whether it be drug education, whether it be sexual education, the HIV/AIDS education, what we found is that after a school district goes through what Wayne is describing here, they don't touch any other hot topics that could bring the community up in arms and then complain about what's been going on. We just don't want to do it any more and they just basically shut down. So what we have decided to do with this project that we are looking at then is just to ask the schools and those surrounding communities of faith to come together and begin to talk again. And they're willing to do that. What they're willing to do more so is that because we seem to be neutral, we're not faith communities coming in, and we're not representing the schools at all, and they really can't believe that an outside entity would provide funds for them to come together and begin to at least have some discussions.

It's, you know, what we go back to just as a basic process, for my dad is a Baptist minister and one of the things that he always told us was that one of the first things you need to do is provide some food for people, invite them to your house and begin to find out what your community is like. Let people know who you are first and what you really stand for and begin to make friends. Let's do that first. And so what our process really does is to start with that premise. Let's bring people together, and let's let them talk. And once they then begin to realize that, you know, we're all in it for the same thing.

What are some of those things that we then need to be able to do then to work within our—whatever the restraints might be, whether it be separation of church and state, let's at least look at that and understand what that's all about. So we're trying to make sure that what Wayne is describing doesn't happen by bringing together church and schools in partnerships to begin planning together again when many of them have separated and just stopped.

VICE CHAIRPERSON REYNOSO. Okay. And understanding what's mutually acceptable—

MR. WARREN. That's right.

VICE CHAIRPERSON REYNOSO. In terms of health education so that these issues of HIV and all of that don't come up.

MR. WARREN. That's right.

VICE CHAIRPERSON REYNOSO. Okay. Okay.

CHAIRPERSON BERRY. All right. Commissioner George.

COMMISSIONER GEORGE. Professor Naylor, I wanted to invite you into a conversation that Vice Chairman Reynoso and I have been having with some of the panelists over these hearings. You made a very eloquent plea on behalf of teaching about religion in the schools, and I want you to know that I'm on your side, and I desperately do want to believe, and at least for the time being, do believe, that that can and should be—that it should be done and it can be done in a fair and evenhanded way. But I have, and I think the Vice Chairman has, although I should let him speak for himself, a kind of a nagging worry about it in the context of religious and cultural pluralism which is only increasing.

When I teach my courses in philosophy of constitutional interpretation, I adopt a method which many of us in this business do that's Socratic dialectical, getting the students to question their own presuppositions and beliefs, and

there's a kind of tearing down and building up. Well, that's fine in philosophy of law, aesthetics, or even at some level in metaphysics. But when my colleagues in the religion department at Princeton tell me that they do the same thing in religious studies, get their students to question their religious beliefs, then I start a little bit to where I say, yeah, that—yeah, that's what we're about, this university. That is what we're about, and students shouldn't hold beliefs uncritically. But it does just a little bit worry me that the teacher takes it as his job to get the student to question his own assumptions when those go to religious faith and particularly when that faith is partially constitutive of making him a member of a faith community from which he has come to the university and so forth.

And then I worry if the model of religious studies, which I think you were suggesting be to some extent imported into secondary education, if that model brings with it that kind of Socratic dialectical approach to teaching where we're inviting the students for the sake of critical knowledge to examine critically their own beliefs, whether that works, whether that's right, whether that's fair, and whether it's really in the end sustainable in the context of religious pluralism with its demand for evenhandedness and respect for religious rights, rights of families, rights of parents, with respect to the upbringing and education of their children. So I simply put that on the table for you to comment on in light of, as I say, your very eloquent plea for religious studies in the schools.

DR. NAYLOR. Thank you. The method you described is not the one I would take and not the one that I propose to schoolteachers. Part of what I see religious studies doing is countering the notion that religion and belief are synonymous. When I say that I'm a religious studies professor, people start asking me, "Well, what do you believe?" That reflects the bias I think of Christianity which is mostly—has most influenced our culture.

Christianity is a creed-driven religion. What you believe is very important in that particular religion. We know that religion is much larger than the category of belief. We also know individually that we may have strong religious beliefs and we don't even act on those beliefs. We do things that don't have to do with our belief or counter our beliefs. So I'm trying to suggest that belief is not all there is to study in religion. And

I'm actually suggesting, and my method is—my field is really history of religion in America. So what I'm proposing is that we, in studying American history and American culture, try to find and notice where religion matters, where it's present, where it is a phenomenon that we can observe and that we can then look at as part of what makes American history and makes American culture.

So I was sitting in earlier on the previous panel on evolution, and it was an example of this sort of almost theological kind of debates about belief. And I'm convinced that religion is much larger. That's why I talked about those dimensions of religion, that there's much more to study about religion, and in that study beyond belief, not discounting belief and certainly not ignoring it because people act historically out of some belief, but looking at what happens when they do that and how that shapes culture. Let me give a quick example. I often use the example of the burned over district which was the frontier region of New York State in the first third of the 19th century. A schoolteacher could study that in terms of geography, in terms of the building of the Erie Canal, the sort of economic fluctuations. There were gender issues. As you know, women's rights really came out of there. And also that was a primary place of the development of American religions. Several new religions came out of there. The Latter-day Saints, the Oneida Community. Shakers didn't—found themselves there, but they were in that region. The original Rappers from which Spiritualism came.

So this is a region. By looking at a place, for instance, by taking religion seriously on the ground as we said in Santa Barbara—religion in the air is a typical approach, and these ideas that are the basis of arguments, that's been a typical approach. But by looking at religion on the ground in a particular place, what happens, just getting some of the facts about what happens, I think you can diffuse some of this argumentation and you can find people—you can have people finding common ground. You can have people seeing that, well, religion operates in this way, this particular religion does, but another religion, look what they did. It's similar over there. Or maybe it's not similar. But it's still—it's another religion worthy of respect.

So part of what I'm suggesting is not a religious studies course or unit that questions the basic assumptions of religious belief, but an ap-

proach that gives content beyond that belief, and shows how religion has affected culture, how it has shaped culture, how it's been involved in American history.

COMMISSIONER GEORGE. The content being historical—

DR. NAYLOR. Yes.

COMMISSIONER GEORGE.—anthropological cultural, the impact in other words of religion on past and present.

DR. NAYLOR. Sure.

COMMISSIONER GEORGE. Have you given any reflection, not necessarily of course that you have, but to the proposal of a kind of world religion's or comparative religion's perspective that would take us and take students beyond just the impact of religion in the United States to an understanding of the way that people in different parts of the world and people in different religions and faith communities see the world through the lenses of their spiritual traditions, and does that present a set of problems more worth worrying about, and that can't be dealt with as easily perhaps as—as we would, looking at the impact of American religion on American culture?

DR. NAYLOR. Sure, I think that—

COMMISSIONER GEORGE. I mean, people who are teaching Buddhism/Islam comparative religion.

DR. NAYLOR. Yeah, roughly 100 years ago when comparative religion began really or religious studies began as a discipline, as Westerners began to discover other religions and began to consider them religions or categorize them as religions, the problem was that they still held to the belief that their religion, usually Christianity, was the superior one and these other ones had defects. I think the comparative religion approach does have difficulties, and frankly I think it's for advanced kind of study. And I wouldn't recommend it on a secondary level. I would recommend starting with the region. For instance, we do a course in my college, Religion in Los Angeles. So we investigate how our region was shaped by various religious people, events, and perspectives. So I guess the world religions, comparative religion seems to be at an advanced level, and even there it has some problems.

COMMISSIONER GEORGE. Mr. Warren, in your activities where you bring members of faith communities and leaders of churches together with schools, have you found yourself running

into any criticism that the involvement of church people in the shaping of health or other programs in schools creates an entanglement, what in constitutional law is called an entanglement problem, has anybody criticized you or your activities in this regard?

MR. WARREN. No, no, they haven't.

COMMISSIONER GEORGE. Are you free of that? They don't have any objections of bringing ministers into the schools and having them help to shape policy?

MR. WARREN. No, because one of the main things that we do is have an attorney come and talk about what our—you know, some things that you can and cannot do based on the law, and so we begin to get into helping administrators to see that, yes, you can within your school setting talk about, teach about religions, and kind of share some ways about how you can do that. Let administrators know that students can pray in the schools and what the law says about that and some ways of doing that. So what we do is set the groundwork and framework for what the law says so that the administrators understand it and that the faith leaders can understand it, and then going from that groundwork, and as they begin to develop strategies, they keep that in mind.

COMMISSIONER GEORGE. Mr. Meidl, you've been associated with two highly successful organizations that bring together Christians and Jews. Could you comment on—I realize that you are yourself a Christian.

MR. MEIDL. Yes.

COMMISSIONER GEORGE. So it's not representing the Jewish being on the panel, but in your work with Christians and Jews in these united groups, can you comment on your perceptions of the contemporary Jewish community's anxiety, or has there been a reduction of anxiety about problems of establishment in the schools when attempts are made to accommodate religious practice? For many years, of course, the official Jewish organization, some of the larger Jewish organizations, have been very tentative, skeptical about legislation that was meant to promote accommodation, for example, the Equal Access Act and so forth, because of concerns that this would result in unfair proselytizing in the schools and so forth. Have you perceived any shifting in that regard? Is there a greater comfort level with efforts of accommodation?

MR. MEIDL. I would say the easy answer is yes, and the more complex answer is there are different layers, at least two. One is the American Jewish Congress' view and position which is always staunch and always vigilant. Mark Stern has commented on our program at its initiation.

COMMISSIONER GEORGE. And he has testified before the Committee about his change of view on equal access.

MR. MEIDL. And I know that Dr. Haynes considers that a tremendous piece of progress in the last 15, 20 years of their work. Yes, there is that position which is perhaps institutional, and then there's what we find in the field. In the field, it's really going to be dependent upon the confidence and trust that's built within the divergent groups of the community. And somewhat piggy-backing on the previous question, as in our program, we need to do a significant amount of advance work to find out who the legitimate and credible players are that can represent a moderated program such as ours. Moderated, I mean, balanced.

And if we go into a community, whether Christian or Jew, and we have someone who is not seeking common ground, we instantly find that we're not going to have good success. So it's very dependent upon who the person is within the community as to whether or not they're going to advance the cause, but I would say yes, in the field, we see less of an apprehension and less of an accusation that a program such as ours is a Trojan horse for the religious right, and, therefore, we should not support it because that accusation has been made. And thankfully, making friends and inviting people to come and dialogue, we are able to diffuse that in most cases quickly.

COMMISSIONER GEORGE. And Dr. Jacobsen, finally—

MR. JACOBSEN. I'm not a doctor, but thank you.

COMMISSIONER GEORGE. Mr. Jacobsen. Reverend Jacobsen.

CHAIRPERSON BERRY. Just make him a doctor.

COMMISSIONER GEORGE. I think it was in the Scopes case where they made both the lawyers honorary colonels. Colonel Jacobsen. [Laughter.]

COMMISSIONER GEORGE. Do you find a—I've been told by pastors with whom I've had contact that sometimes a good side effect of a bad situation when it comes to conflict in schools over health curricula and these other moral and cultural issues, that a good side effect of a bad

situation is that other sorts of divisions which have been damaging communities, particularly those over race and ethnicity, all of a sudden begin to fade because people across racial and ethnic divides find themselves on the same side of—with the same concerns about what's going on in the schools, about what's going on with their children and so forth, and begin working together and become acquainted. Now, this is not an argument I've [inaudible] an argument for having conflict over cultural issues. But I found that fascinating, and I wonder if in your own experience you've found that racial and ethnic divisions sometimes fade away when these other issues become more salient.

MR. JACOBSEN. I think America is notorious for marriages of convenience in terms of policy. So, yeah, that happens, but they quickly break down as well if there is not anything more substantive to them than just the issue. I don't like to deal with things once the conflict has emerged. It's my last choice going into a community. I'd rather be there early on. Unfortunately, most school districts aren't proactive enough about these kinds of issues to get something going before there is a crisis.

But I think you're right. I think people do find each other. What I've found in the kind of sessions I've done, bringing people together that normally are not allies and find themselves at least citizens of the same community and parents of children, and they do find a lot of commonality. That when I leave a district, hopefully—after it's been crisis that brought me there, hopefully, I've left them with relational connections that are going to help them in a variety of things down the road, hopefully. And I think I've seen that happen in most of the communities I've been at that I get reports later that that has happened.

COMMISSIONER GEORGE. Thank you.

CHAIRPERSON BERRY. Any other Commissioner? Commissioner Lee.

COMMISSIONER LEE. This is for Dr. Naylor. In response to Commissioner George's inquiry, you mentioned that instead of teaching a global religions way, you would rather concentrate on the historical role of religion. Then you cited this specific example of LA. Now, let's use LA as an example, going back. If we were to teach about religion so that students could learn about different religions or they could respect other students and respect their own religious views. If

you use Los Angeles as an example, over the past three decades, two and a half, three decades, LA has changed tremendously demographically. And in the year 2000, there's a strong likelihood that the minorities will be the majority. So how would you develop a curriculum to teach about religion that does not include religious practices of a majority of your population?

DR. NAYLOR. Well, I would take account—let me use the course that I'm talking about, Religion in Los Angeles, and I think it's not only the case of pluralism is alive and well in Los Angeles; it's really across the country. I have colleagues who have, you know—religion in Illinois which is an extremely diverse place and Pennsylvania and all over the place.

But I certainly would use the variety of religious expression that's a part of Los Angeles as part of our course. We use LA as a laboratory. But I was suggesting that I think it's important to look at history and how religions have developed. For instance, in the LA case, how has migration and immigration affected religious traditions that were already established, and what did the new religions bring, and how did they adapt and change to the new environment. Because in a sense, all of the world's religions are reflected, are represented, in America. So to study American religion is in fact to study world religions. But they change because of the American circumstance, because of the first amendment, because of religious freedom. They change, and they become in fact American expressions of world religions.

So all of that would be a part of the course, including last year, we had field trips to the Islamic center, to a Buddhist monastery, to a Jewish synagogue, to a Greek Orthodox cathedral, to a local Protestant church, actually, a couple of different Protestant churches. So field visits, field trips are also a part of that. Now, that's on the college level. Some of that's transferable to the secondary schools, but as you know, the secondary school curriculum is so troubled, let's say, that it's not likely that they're going to even create a full course on religion, a religious studies course. So what I'm trying to do is to just get teachers to take note of the presence of religion because it is in fact everywhere throughout American history, including the history of the last 30 years as you mentioned. So that's really my—and maybe it's modest, just to take note of religion, and not dismiss it and not

ignore it and not rule it out while you're noting more important political and sociological issues.

CHAIRPERSON BERRY. I think we have let you off the hook too easily, Dr. Naylor—

DR. NAYLOR. All right.

CHAIRPERSON BERRY. Because the earlier discussions we had in those discussions, some speakers did what we call "privileging the Christian religion" because it is important to our culture and that there is a sense of which you cannot separate American cultural history from Christianity so that therefore the claims of other religions, whether it's Buddhism, Islam, or any other religion, no matter how many people who profess those religions happen to live in a particular locale and how many students are there, the claims are not the same, and that therefore, there is a sort of privileging of Christianity because of its cultural significance. Would you agree with that?

DR. NAYLOR. How do you mean privileging, I mean, of attention to—

CHAIRPERSON BERRY. I mean, in terms of if you—one speaker thought that if you had a course on the Bible as literature, I think it was, or the Bible as history or the Bible as literature, I think, one speaker earlier talked about. Then you would not necessarily need to have a course on the Bible as—the Koran as literature, even if all the students in the school or most of them professed Islam or, you know, Buddhism as a field of study because the students were Buddhist. I think that was the example we were discussing. So that there is a certain—when I use the word, privilege, I don't mean it in a pejorative sense. I mean, in a sense of we talk about it in cultural studies. Privilege means something and value means something else. That there would be sort of a privileging of Christianity because of its importance to our culture history, to everyone's culture history, that it's so embedded in our culture without being identified necessarily because of someone's religious faith and that that's not the same thing for these other religions no matter how diverse we become. So what's your answer to that? We're letting you off the hook without forcing you to address this point.

DR. NAYLOR. Certainly in terms of time and attention, I would give more attention to, say, Protestant Christianity, which I think has been the strongest influence upon American culture among the various religions. Of course, to say Protestant Christianity is to speak pluralistically

because there are all kinds of Protestant Christianities in American history. There's not just one strain of that in 18th century America, in 19th century, 20th century America. We're pluralistic from the beginning. So yes, I would pay more attention, but I—perhaps because of my own experience as a minority person in a variety of ways, I certainly would pay attention to what else was happening while a particular group was dominating. What battles were being lost, who was being left out. I would pay attention to that.

CHAIRPERSON BERRY. All right.

COMMISSIONER GEORGE. Are you satisfied with that, or shall we press it?

CHAIRPERSON BERRY. Not really. Okay. I guess. Vice Chairman Reynoso has a question.

VICE CHAIRPERSON REYNOSO. Yes. Mr. Meidl, because you have an interesting background in terms of these issues, and yet when you were speaking as a father, you said something that we hear quite often, and I wondered how that should fit into our discussion. You said that you found that when your two—that your two boys who are in public school basically report to you or you gather that in their schools religion is taboo. And yet we've been—we've had a panel about how one might integrate religion in school without its being taboo, and I just wonder what your observations are in terms of what you would have as your druthers in terms of not having religion be taboo and yet be one that does not just have religion in schools but in such a way that no religion is discriminated against.

MR. MEIDL. I don't think I'm a good case study because I live in Wheaton, Illinois, which is an Evangelical mecca. And so there's almost a reaction to that fact. Many of the teachers' assistants come from Wheaton College and are very fearful of being too overt about their faith, and so I think we have a reactive climate that probably isn't as natural as it may be in other places. I know that when we were in California, it felt more natural. I was in the Bay Area for a number of years.

All that I would hope to see or what I would hope to see in our environment, is that children within their school, Jewish friends that we have, would feel equally as comfortable to describe why they're taking off for Yom Kippur and what Hanukkah is about and that they could teach a Hanukkah song and tell them why these colors are significant. That's important to me because of who I am and who I've become in terms of my

diversified friends and colleagues. And I surely can tell them about it at home and I do. And I show them films and we talk about things.

But I know it's there. It's organic and it's existent in the school and I want it to be able to come out naturally and legitimately and legally, and that's one of the reasons I feel so strongly about this program. And I think Mr. Jacobsen earlier used the word proactive or preemptive and preventative; that's really what our program is about. We're not looking for controversy. What we're looking for is volunteers and interested people, teachers and administrators, clergy, et cetera, within a community saying, "Yes, I understand what this issue is about. Let's bring it here before it becomes a problem. Let's create some bunkers and boundaries and safeguards, and let's have a couple business cards and lawyers that we can contact within our area that are acknowledged scholars in this particular arena." We find that this is very successful, and I hope you don't hear much about us. I hope that the other panel members don't have to come in and mediate, that we're keeping things well in the field.

VICE CHAIRPERSON REYNOSO. Thank you.

CHAIRPERSON BERRY. Commissioner Anderson.

COMMISSIONER ANDERSON. Maybe I could press a little bit more. As I remember the earlier discussion, no matter how many Buddhists there are in the United States in the next 30 years, it's never going to change the constitutive role of Christianity in the first 200 or 300 years of this country. So if the question becomes how does one understand American culture historically, you cannot really abstract yourself from the role of Protestant Christianity and Roman Catholic Christianity. If the question becomes one of comparative religion and maybe comparative culture and how do we make sense of the changing demographics and how do we afford individuals respect, then a course which discusses Buddhism and Islam as well as Christianity in a school district which has a large population of Buddhist students and Islamic students and Christian students makes pedagogical sense. But at least as far as I recall the discussion is at a different kind of level. Now, whether you want to call the one privileged and the other something other than privileged, I don't know. But as I remember what we were talking about, it was more in that direction that

you really have two different levels of concerns here. How would you relate to that?

DR. NAYLOR. I'm not sure what you're asking me. I acknowledge this sort of the weight of the influence of Protestant Christianity in American history and in shaping American culture, but even embedded in that weight are questions of what happened to those Jews in Charleston and in Providence in the 1600s while the Protestants were beginning to dominate. And those are valid and useful questions to raise about how—on the one hand, how those religious—those minority religious communities survived and thrived and built themselves and shaped some part of American culture. And on the other hand, how the dominance of that Protestant group empowered them and led them on to other projects. So I'm acknowledging the large influence of one particular group which I've suggested is itself pluralistic, but that doesn't deny the presence and meaningfulness of other groups. Now, once I got out of the 1600s and I got to the 1800s and looked at the transcendentalists and their embrace of some Buddhist and Hindu principles, then that's another way of talking about those traditions. But—is that answering your question?

COMMISSIONER ANDERSON. Let me ask you another question. You look at three of the most influential modern thinkers, Marx, Freud, Nietzsche, they all considered religion to be either a social or psychological disorder. To what extent in your work do you run up against either overtly or covertly that kind of attitude toward religion? The reason I ask is the other type of anthropological view which I think Jefferson and many of the founders accepted was that the reality of a divinity is just that, a reality, and that the relationship between individuals and that reality was one of the most important relationships and therefore had to be protected through a strong free exercise, if you will, clause—a strong clause of prohibiting government intervention in this matter of free conscience. It's the establishment clause.

Now somebody who views religion as a psychological disorder could very strongly agree with Jefferson on the need for separation of church and state and against establishment. However, when it comes to encouraging, accepting free exercise and accommodation of religion, you could have a very different view of that matter. Do you find any evidence of that in terms of, quote, building bridges, common

ground? Can you reach common ground to somebody on that when they think of religion as a disorder, psychological disorder?

DR. NAYLOR. I guess I have encountered those views among faculty people, sometimes among students. I'm one for really asking the question, well, what would Freud say about American religion and what would Nietzsche say about it and what would Marx say about it. It seems to me that they had very little understanding of this, I think, very distinctive set of religious traditions that emerged in America precisely because of the first amendment, and I think there's really something different going on in American religion. And so some of their dismissals and critiques of religion are precisely tied to the establishment of religion in Europe, to sort of the orthodoxy of religion in Europe. And what happened in America was totally different and I think deserves another kind of analysis. In a sense, that's what we've tried to provide. But, yes, I have encountered people who might see religion as some illness and what can I do with that? [Laughter.]

COMMISSIONER ANDERSON. Well, you might not give them the best times in the morning to have their Bible meetings. But has any other member of the panel experienced any of that?

MR. JACOBSEN. I've experienced some of that. And the answer to can you build common ground with that—is no, if you're looking at a disorder, no. But can people, say, take some distance from it personally but allow other people the freedom to embrace it, that would be real important for a common ground kind of activity.

COMMISSIONER ANDERSON. Okay. That's all I have.

CHAIRPERSON BERRY. All right. We want to thank the panel very, very much. This has been illuminating and this brings this series of proceedings on religion and schools to a close. And I want to thank the panel, the Commissioners, the staff, Eddie Hailes and Emma Monroig, and everyone else for the work that they did. And I also

want to say that for the Commissioners—thank you. You're dismissed. Thank you very much—Charlie Rivera who is the head of the public affairs at the Commission, director of public affairs, has indicated that he is about to retire. And since I don't know whether we will be able to persuade him to stay until the next Commission meeting, I thought that since we were gathered here today, I might tell you this. He just indicated that today. I think it's because he's been on a wonderful vacation. Charlie was at the Commission when I had my first encounter with it during the Nixon administration as a consultant. And he left and then he went away, and he came back again. And he's been there, and he's done great work in all the time that he's been at the Commission. He knows its history, its traditions, where the bodies are buried and unearthed. And I will miss him. We will all miss him. And I will miss you especially. And I just wanted to be able to say that in a public way, although I think we're going to try to persuade you to stay for a little while longer. But if you won't, and I see you shaking your head. Charlie, stand up.

Okay. Thank you very much and that concludes the proceedings.

COMMISSIONER GEORGE. Madam Chairperson.

CHAIRPERSON BERRY. Would you like to say something?

COMMISSIONER GEORGE. I would. I'd like to extend my thanks to you, and I'm sure the other Commissioners agree, for the exemplary way in which you've chaired these hearings which I think were very successful. And I'm very grateful. And I also want to express my gratitude to the Staff Director and to Eddie Hailes for all the hard work that he's put into this and to the other members of the staff. Thank you.

CHAIRPERSON BERRY. Okay. Thank you very much.

[Whereupon, at 4:52 p.m. the briefing was concluded.]

Statement of Chairperson Mary Frances Berry, Vice Chairperson Cruz Reynoso, and Commissioners Christopher F. Edley Jr., Yvonne Y. Lee, and Elsie M. Meeks

While public schools are one of the Nation's storm centers of controversy involving religious differences, they are also one of the principal institutions charged with transmitting the common identity and mission of the United States from one generation to the next. Thus, if the Nation's public schools fail to teach our young people how to live with differences, we endanger our grand experiment in religious liberty and our unity as a nation. As President William Jefferson Clinton said to 350 students recently gathered at the Voices Against Violence Conference, which coincided with the 6-month anniversary of the April 1999 Columbine school shooting massacre in Colorado, "You live in the most modern of all worlds, and yet the biggest problem we've got is the oldest problem of human society: People being scared of people who are different from them."

The Commission proceedings in Washington, D.C.; Seattle, Washington; and New York City highlighted two of the most effective tools currently being used to diffuse and decrease tensions in the area of schools and religion: the *Equal Access Act* and the *Statement of Principles of Religious Expression in Public Schools* issued at the direction of President Clinton by the U.S. Department of Education in 1995 and revised in 1998 (*Statement of Principles*). The *Equal Access Act*, passed by Congress in 1984, allows student-initiated religious groups to meet, without school sponsorship, during noninstructional time. The *Statement of Principles* grew out of a document titled *Religion in the Public Schools: A Joint Statement of Current Law* issued in April 1995 by a broad coalition of 36 religious and civil liberties groups. Based on 50 years of court rulings, on common sense, and on a healthy respect for religious diversity, the *Statement of Principles* declared that the Constitution "permits much private religious activity in and around the public schools and does not turn the schools into religion-free zones."

We hope that the interest in schools and religion issues generated by these proceedings will lead to a greater awareness, understanding, and use of the *Equal Access Act* and the *Statement of Principles* in school districts throughout the Na-

tion. We concur with (former) Commissioner Robert George, who calls for an even wider dissemination of the *Statement of Principles* and for increased training of school board members, administrators, teachers, students, parents, and religious leaders in the effective use and implementation of the *Equal Access Act* and the *Statement of Principles*. Testimony put forth at the hearings strongly confirms that, when the *Equal Access Act* and the *Statement of Principles* are observed and followed, there is a decline in the contentious argument and litigation that normally accompanies issues involving religion in the schools, there is an increase in mutual trust and understanding among the parties involved, and, most importantly, the right to be free from discrimination based on religion is protected.

There are very few venues in American society where people must encounter people who are different—people who are not like themselves in terms of race, religion, economic circumstance, and in other ways. Public schools are one venue in which Americans have an opportunity to confront each other and learn tolerance. Moreover, encounters among students take place on a daily basis and in a manner that oftentimes allows them to become, despite their differences, friendly acquaintances and even good friends. We believe that such acquaintances and friendships strengthen our nation by making the students more open, perhaps for the rest of their lives, to the idea of working with, living near, and worshipping with people who are different from themselves.

This is not to say that we are overly optimistic. Our life experiences and our ongoing work at the U.S. Commission on Civil Rights tell us that most Americans spend the vast majority of their time—especially their time outside of work—encountering only people who are like themselves. But we still have hope and confidence that our public schools are playing an important role in tempering that fundamental reality.

The late Supreme Court Justice William Brennan said the following in his concurring opinion in *Abington Township School District v. Schempp*, 374 U.S. 203, the 1963 school prayer case:

It is implicit in the history and character of American public education that the public schools serve a uniquely public function: The training of American citizens in an atmosphere free of parochial, divisive, or separatist influence of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic.

These words are applicable to the larger concerns taking place within our nation's public school system today, including the increasing racial and economic isolation of students. Gary Orfield, director of the Harvard Project on School Desegregation, reports that schools are "re-segregating faster than at any time since the *Brown* decision," the landmark 1954 Supreme Court ruling that ignited the desegregation movement. The attendant results of such isolation and alienation include decreased opportunities for engagement among students from different races, socioeconomic backgrounds, religions, and so forth.

Moreover, during the past decade, there has been increased parental dissatisfaction with our public school system. A recent Phi Delta Kappa/Gallup poll reports that the top three reasons for the dissatisfaction, in descending order, are the lack of discipline, the fighting and violence, and the lack of financial support. While some favor fixing the current system, others favor creating alternative public school options (such as charter schools). Still others want to implement policies and programs such as vouchers and tuition tax credits that would enable parents, including low- and moderate-income parents, to send their children to private and/or church-related schools. The Phi Delta Kappa/Gallup poll reports that 51 percent of the respondents favored allowing parents to send their school-age children to public, private, or church-related schools *with the government paying all or part of the tuition.*

It is unclear whether, or to what extent, charter schools, voucher programs, and tuition tax credit proposals will replace the current public school system. It is also unclear whether the new schools and programs would exacerbate, or would mitigate, the current trend of students becoming increasingly isolated and segregated based along racial, socioeconomic, religious, and other lines. Of course, it is important to note that not all private schools are segregated and isolated; indeed, there are some expensive, selective private schools that have great diversity in terms of the religious, racial, and socioeconomic backgrounds of the students.

This brings us back to Justice Brennan's exhortation in *Schempp* that public schools be organized in a manner that allows children to "assimilate a heritage common to all American groups and religions." If we continue along the path we appear to be traveling now, what will happen to our common identity, to our sense of common purpose? We believe that our nation's public school system plays a vital role in forging this common heritage. Furthermore, we suspect that one of the reasons why it is effective at carrying out this important mission is that students have a unique opportunity to spend a few years of their young lives—crucial years when values and characters are being formed and developed—with students who are different.

In the coming years, as new schools, policies and programs are put into place in the never ending efforts of school reform, we hope that the legislators, policymakers, and school officials involved in the process will consider how their changes will impact the ability of schools to forge a common identity among the students. After all, the ability of our schools to create this common heritage plays a pivotal role in developing our civic virtue, in maintaining our unity as a nation, and in ensuring that our successful experiment in religious liberty continues to thrive.

Statement of Commissioners Carl A. Anderson and Russell G. Redenbaugh

The hearings undertaken to implement the Schools and Religion Project mark an important initiative by the Commission to further protect the exercise of one of our nation's most cherished civil rights. We agree with former Commissioner Robert George, the principal force behind these hearings, who pointed out so well the extent to which "our public schools have, indeed, been converted into religion-free zones." As Chairperson Berry, Vice Chairperson Reynoso, and Commissioners Edley, Lee, and Meeks affirm in their own statement to accompany the transcripts of the hearings, much more needs to be done to ensure full distribution and implementation of the *Equal Access Act* and the *Statement of Principles of Religious Expression in Public Schools*.

We had hoped to be able to join with Chairperson Berry, Vice Chairperson Reynoso, and Commissioners Edley, Lee, and Meeks in their statement; however, it became evident that a consensus would not be possible. Their statement highlights the conflicting issues inhering in the fundamental guarantees of the First Amendment regarding religion: the nonestablishment of religion and the principle of freedom of religious expression. The more obvious issue, raised in the hearings, is the secularization of public schools with its restrictions on religious expression. The other issue, not addressed in the hearings, involves initiatives for parental school choice. The former limits the freedom of religious expression. The latter, according to school choice opponents, could threaten the Establishment Clause and have the unintended consequence of "re-segregating" America's schools. While that is a topic deserving of its own hearings, we are compelled to address both concerns here.

Public Schools and America's Religious Heritage

The key area in which we part company with our fellow Commissioners lies in their reliance upon the view of Justice William Brennan, as stated in *Abington Township School District v. Schempp*, that:

It is implicit in the history and character of American public education that the public schools serve a uniquely public function: The training of American citizens in an atmosphere free of parochial, divisive, or separatist influence of any sort—an atmosphere in

which children may assimilate a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic.

It is a misstatement of American history to describe our heritage as one that is "neither theistic nor atheistic, but simply civic and patriotic." Our nation's foremost advancements in human and civil rights have followed religious and spiritual renewals among our people. What historians term our country's first great spiritual awakening preceded our War for Independence and the writing of our Constitution and the Bill of Rights. The religious revival in America at the turn of the 18th century led to the abolitionist movement and the end of slavery. A third great religious renewal at the beginning of the 19th century led to the labor reform movement. And finally, following the Second World War, the modern civil rights movement found its impetus and leadership from yet another spiritual awakening of our people. It found its legitimacy in a morality based on religious principles and expressions. As Dr. Martin Luther King, Jr., wrote in his 1963 letter from the Birmingham jail:

We will win our freedom because the sacred heritage of our nation and the eternal will of God are embodied in our echoing demands. One day the South will know that when these disinherited children of God sat down at lunch counters they were in reality standing up for the best in the American dream and the most sacred values in our Judaeo-Christian heritage; and thusly, carrying our whole nation back to those great wells of democracy which were dug deep by the founding fathers in the formulation of the Constitution and the Declaration of Independence.

We are a people who have chosen as our guiding principle, "In God We Trust"; we pledge to be "one Nation, under God, with liberty and justice for all." We declare that each of us is endowed by the Creator with the inalienable right to life, liberty, and the pursuit of happiness. The exploration and expansion of our country cannot be understood without consideration of the religious motivation of such figures as Roger Williams, William Penn, Junipero Serra, Jacques Marquette, Charles Carroll, and Joseph Smith. Even the names of our cities reflect the Nation's relig-

ious heritage: Saint Louis, The Angels, Saint Barbara, Holy Faith, Bethlehem, Saint Augustine, Bethesda, Goshen, to name just a few. So many of our great works of music—from Aaron Copland's "Appalachian Spring" and Leonard Bernstein's "Kaddish" Symphony to John Coltrane's "A Love Supreme"—find their source in the religious experience of our people, as do the works of great American writers and philosophers such as Hawthorne, Melville, Cather, Emerson, and James. To say that America is grounded in religion does not mean that America is a theocracy. It does mean, however, that the history and character of our people are unintelligible when severed from our religious heritage.

It should be remembered that often these religious expressions are of experiences not of the majority but, rather, of persecuted minorities. In fact, some have seen the effort to reduce this heritage to one that is simply "civic and patriotic" as a veiled attempt to erase the diverse religious and ethnic heritage of which all Americans should be proud and which, in other contexts, this Commission rightly has sought to preserve.

We are concerned that Justice Brennan's rationale, when carried to its logical conclusion, could produce an educational approach attempted earlier in this century: to mandate by law compulsory public education in order to achieve "one hundred percent Americanism." Rather than relying upon the *Schempp* decision, we would recall an earlier case, *Pierce v. Society of Sisters*, in which the Supreme Court struck down such a compulsory education law in Oregon—a law which had been championed by the Ku Klux Klan. In that decision, the Supreme Court affirmed: "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State."

In *Pierce*, the Court recognized that parents have the primary responsibility for their children's educational, moral, and religious upbringing. The State's responsibility in these matters is, after all, secondary, not primary. National unity is a goal that all of us share, but it may not be bought at the price of the fundamental liberties associated with the family. As the Commission's hearings revealed, the secularization of public education has gone too far when it constrains citi-

zens from exercising their rights to practice and express their religious beliefs.

School Choice and Integration

While the Commission's Schools and Religion hearings had nothing to do with vouchers, charter schools, or school choice, we welcome this opportunity to address the concerns our colleagues have raised regarding school choice and integration. Specifically, the question they have posed is whether tolerance, diversity, and integration itself somehow might be threatened by policies and programs involving either "alternative public school options" (such as charter schools) or "vouchers and tuition tax credits that would enable parents, including low- and moderate-income parents, to send their children to private and/or church-related schools."

The suggestion that school choice may lead to increased "resegregation" is based on sophistry and is not supported by the facts. It wrongly implies that private schools would be exempt from the principles of nondiscrimination that apply to public schools and that, if offered the chance to escape from failing inner-city schools, only majority students would apply, leaving the more disadvantaged behind. This argument cannot be sustained by the data, which clearly show that ability, ambition, and the desire to succeed are not race-based. It fails to address the central problem: Too many of our nation's children are trapped in an educational system that is badly in need of reform—a reform that can only occur when there is choice and competition.

The facts are straightforward: First, private schools, on average (not just the "expensive" or "selective" ones, as our colleagues suggest), are better racially integrated than the public schools. Second, because school choice detaches schooling from housing, which can be highly segregated along racial and economic lines, and because public schools replicate and reinforce that segregation, school choice initiatives that include religious schools can make a significant contribution to promoting integration and democratic civic culture. Third, much of the evidence so far suggests that school choice can have a major impact on efforts to close the racial achievement gap. For example, a major study just released by the Heritage Foundation shows that, even adjusting for socioeconomic factors, African American students at Catholic schools in our nation's capital significantly outscored their public school counterparts

on the National Assessment of Educational Progress math exam. While previous research also has found a distinct difference in achievement between public and private school students nationwide, the Heritage study is the first to compare test scores for students in a major U.S. city.

What works in Washington, D.C., can also work in Cleveland. An indepth study of the school choice program there was recently conducted by Dr. Jay P. Greene of the Harvard Program on Education Policy and Governance and the University of Texas at Austin. Dr. Greene found that students in Cleveland choose to go from the less well-integrated public schools to better-integrated choice schools, and this integration is achieved without economic or religious homogeneity. His study reveals that:

The average choice student is at a school that has 59.3% of its students with family incomes below the federal poverty level, right in line with the average figure for the city . . . the average choice student attends a private school where 54.0% of the students are Catholic. Yet 43.1% of choice students attend schools with fewer than 50.0% Catholic students . . . [C]hoice students, on average, have significantly lower family incomes than do Cleveland City public school students (\$15,769 vs. \$19,948), are significantly more likely to be raised only by their mother (68.2% vs. 40.0%), and are significantly more likely to be African American (68.7% vs. 45.9%).

In short, the picture that emerges from the Cleveland school choice program does not at all suggest that school choice participants are a particularly elite group. On the contrary, they seem relatively disadvantaged. Thus, if our interest is to achieve better integration, we ought to support school choice, not just in Cleveland but in cities throughout the country.

There are several other recent studies that reinforce the case for school choice. In research published in *The American Economic Review* and *The Journal of Public Economic Theory*, Dr. Thomas Nechyba, a professor of economics at Duke University, analyzes the potential impact of school vouchers on public schools through computer models of school districts in New York City and its suburbs. Like Dr. Greene, Dr. Nechyba found that not only can vouchers benefit students trapped in the worst schools, but they can also help change whole neighborhoods by giving residents an incentive to stay inside the city limits:

Vouchers would help reverse the forces that stratified classes in the city and suburbs. When your children's school is determined strictly by where you live, people in good school districts try to protect their schools and their tax base by zoning out low-income people. Even when the poor aren't zoned out, they're priced out, because the price of a house includes a high premium for the schools.

Suggesting that this research might serve as a tool for redressing educational inequities across different school districts, Dr. Nechyba sums up his findings by saying, "With targeted vouchers you not only improve the opportunities for disadvantaged students, you can also improve neighborhoods. You'll end up with a more integrated society."

In looking at the potential for improving education, and promoting integration, through school choice initiatives, it is especially important that we consider the critical role played by the Nation's Catholic schools. In a 1997 *Heritage Foundation Backgrounder* on "Why Catholic Schools Spell Success for America's Inner-City Children," Nina Shokrai outlines an abundance of research demonstrating "the impact of Catholic schools on a range of outcomes such as grades, standardized test scores, dropout rates, college attendance, and future wage gains." The starting point for Ms. Shokrai's analysis is a 1990 Rand Corporation study that looked at 13 public, private, and Catholic high schools in New York City that attracted minority and disadvantaged youth. Of the Catholic school students in that sampling, 70 to 90 percent were African American or Hispanic. The study found that:

- The Catholic high schools graduated 95 percent of their students each year, compared to slightly more than 50 percent of the seniors in the public schools.
- Over 66 percent of the Catholic school graduates received the New York State Regents diploma, while only about 5 percent of the public school students received this distinction.
- 85 percent of the Catholic high school students took the SAT, compared with just 33 percent of the public high school students.
- For the Catholic school students the average combined SAT score was 803, compared to 642 for the public school students.

- 60 percent of the Catholic school African American students scored above the national average for African American students on the SAT, and over 70 percent of public school African American students scored below the same national average.

The weight of these findings has led Heritage (and others) to conclude that "Congress can use the strong and widespread data available on the success of Catholic school education to strengthen and promote proposals that would increase significantly the educational opportunities and choices available to America's inner-city poor." This conclusion is consistent with an earlier study of Catholic schools published by Harvard University Press which observed: "It is not clear to us that public schools can better serve disadvantaged children who want to learn" (A. Bryck, V. Lee, and P. Holland, *Catholic Schools and the Common Good*, 1993).

While school choice is no magic solution for the current crisis in education, the evidence is growing that competition, not money, is key to improving the public schools. It should be noted that since 1983, there has been a 257 percent increase in funding for public education, even though student enrollment has grown only 21 percent. In stating his belief that "public education should be a solution for our children, instead of a problem," Alvin Williams, executive director of Black America's Political Action Committee, emphasizes that "[w]hile there are plenty of resources available for the education of our children, the lack of competition for those resources means schools have no incentive to improve." School choice provides that incentive. As Dr. Nechyba's research found:

If we factor in even a modest improvement in public schools, we see dramatic increases in the overall quality of education as well as a more even distribution of opportunities. Low-income kids in the city would have access to private schools and to better public schools in their neighborhood. They would also have easier access to better public schools elsewhere, because suburban property values wouldn't be as artificially inflated.

Perhaps this is why support for school choice has grown so rapidly. A 1997 Gallup Poll put approval from African Americans for voucher programs at 72 percent and from urban residents at 59 percent. The strongest supporters of all are poor minorities. Rev. Floyd H. Flake, a former

Congressman now serving as pastor of Allen A.M.E. Church in Queens, New York, eloquently states that "there are no excuses for failing our children." For those who argue that it is unfair to allow some children to opt out of the current system while others stay, Rev. Flake makes this analogy: "It's like saying there has been a plane crash. But because we cannot save every child, we are not going to save any of our children; we let them all die."

It would be wonderful to have a public school system that all children could attend together. However, as we found in our hearings, this cannot be possible with the present system, with its systematic exclusion of religion and religious viewpoints from school curricula and systemic problems of overcrowding, substandard achievement, and high dropout rates. Vouchers and tax credits are not a panacea, but real solutions to these problems will be impossible until we change the focus from *saving the system* to *saving the children*. If our chief concern is to expand educational opportunity, if our primary goal is to help the disadvantaged, if our main interest is to promote integration and democratic civic culture, then the full weight of our support should go to school choice initiatives.

We think the future of education will more closely resemble a learning environment such as that envisioned in the Bryck, Lee and Holland study: "Increasingly the public sector is spoken of as a 'system of publicly supported schools' rather than a centrally controlled bureaucracy. From this perspective, there is no reason why schools organized like Catholic schools could not (and should not) be major components in such a system."

In closing, we would recall the statement of former U.N. Ambassador Andrew Young, who serves on the board of the Children's Scholarship Fund. The CSF, this year alone, received 1.25 million applications for scholarships to help low-income families send their children to the public, private, or parochial school of their choice. Ambassador Young says that these are "cries for help" comparable to Rosa Parks' refusal to give up her bus seat, and "I predict that we will one day look back on the 1.25 million who applied for educational emancipation—for the chance to seek the light and oxygen of a nourishing education—not as victims, but as unwitting heroes with whom a great awakening was begun."

Additional Statement of Chairperson Mary Frances Berry, Vice Chairperson Cruz Reynoso, and Commissioners Christopher F. Edley Jr., Yvonne Y. Lee, and Elsie M. Meeks

We believe it is necessary to reply to the statement of Commissioners Anderson and Redenbaugh by reiterating and extending our views. To repeat, the hearings we conducted, reported in the attached transcripts, provide testimony that public schools are accommodating religion. Our public schools are characterized by concerted and continual efforts to maximize protection of the right to free exercise of religion. Even the most vigorous proponents of religious expression in public schools agree that in the few instances when denials take place they are most often the result of misinformation and are corrected once a complaint is made. The point is that private school options, whatever their value, cannot be premised on a perceived necessity to abandon the public schools in order to escape religious discrimination.

The statement of Justice Brennan in *Schempp* appeals to us precisely because it affirms the importance of free exercise of religion as part of our civic heritage. That heritage includes accommodating a diversity of religions, and not singling out any particular one for preferential treatment. This heritage also includes respecting the rights of students who subscribe to no religion instead of "privileging" students who champion their faith.

We are concerned about diversity and integration in the public schools because there is so much racial isolation. In 1997, 69 percent of African Americans attended schools composed primarily of students of color, up from 64 percent in 1973. For Latinos, the increase is much steeper: The increase went from 57 percent to 75 percent over the last 25 years. We are deeply concerned, moreover, about the quality of education children receive. We want to improve, not just save, our public schools.

We are not surprised that parents of color and low-income families would be attracted to vouchers or any other proposed solution to their educational problems, given the racial and ethnic inequality that exists and the poor quality of much of public education for poor children and students of color in this nation. Notwithstanding

the apparent attraction to these proposed alternatives to public schools, however, most children still attend public schools, including the urban and rural poor whose schools are most often racially isolated and of poor quality.

For example, in the Edgewood School District (which is located in San Antonio, Texas, and has a predominantly Latino population), 90 percent of the 13,490 students attending the public schools in 1997-98 were considered economically disadvantaged by the Texas Department of Education. A voucher program was announced in April 1998 for the following school year. Vouchers were offered to all students from low-income families in grades K-12. Officials reported that during the 1998-99 school year, only 837 students used the vouchers to attend either a private school in the San Antonio metropolitan area or a public school outside the Edgewood school district.

These figures suggest that even when voucher programs are implemented, an overwhelming majority of poor children will nevertheless continue to attend public schools, at least in the initial stages of the program. This pattern also appears to hold true in Milwaukee, Wisconsin, where only a fraction of those students receiving vouchers (one of every six voucher students) actually left Milwaukee Public Schools (MPS), according to a 1998 study by the Institute for Wisconsin's Future (IWF), a think tank in Milwaukee. Of 6,000 students participating in the Milwaukee voucher plan, 4,550 already were attending private school and paying their own way, while another 450 were just entering kindergarten. Under the law, 15 percent of students enrolled in the MPS (or approximately 15,000 students) are eligible to participate in the voucher program. Seventy-one percent of MPS students are low-income students. The IWF report revealed that only 1,000 students in MPS decided to take advantage of a program that allegedly was designed for their benefit. These discoveries have led some critics of voucher programs to fear that these programs primarily subsidize private schools rather than provide, as

its advocates proclaim, alternatives for children in public schools.

We take no position one way or the other on vouchers or school choice. Only very preliminary research exists to date concerning these recent experiments. We will study the new voucher, choice and charter school proposals and monitor their evolution to see if they have the potential

to improve quality and socioeconomic and racial integration.

But for now, we express our pleasure that free exercise of religion is being accommodated in the public schools. We also express our chagrin about the racial divide in American education and American life and the disparities in quality of education provided to our nation's children.

Statement of Former Commissioner Robert P. George*

When he appeared at James Madison High School in Vienna, Virginia, on July 12, 1995, to publicly endorse, and to direct the Secretary of Education and the Attorney General to provide each school district in America with a copy of the "Guidelines on Religion in the Public Schools," President William Jefferson Clinton emphasized that it was important for everyone, including school administrators, to realize that "the First Amendment does not convert our schools into religion-free zones."

The hearings which the U.S. Commission on Civil Rights has held over the past 5 months were designed to examine whether the religious liberty rights of students and teachers were, in fact, being protected. Sadly, we found that in many respects our public schools have, indeed, been converted into "religion-free zones."

The problem is not merely one of lack of information. The Guidelines have been sent, on two occasions, to every school district in America. The problem is one of commitment—a lack of commitment to respect the religious civil rights of students and teachers as seriously as we respect other civil rights. For instance, while I applaud the Secretary of Education for distributing the Guidelines, I must note that very little has been done to make sure the Guidelines actually reach teachers, students and their parents. DOEd has not gathered statistical or other information regarding even the preliminary question whether the Guidelines have been distributed by the school superintendent, nor have they gathered information about the more important question whether the public schools are, or are not, complying with the Guidelines. I have heard no credible excuse for this from DOEd. Surely, such a massive bureaucracy, which reaches into public schools in numerous ways to protect other civil rights, could undertake this simple task without undue exertion or expense.

Nor have I heard credible reasons why DOEd does not undertake additional steps. Why does it

fail to offer inservice training, or training videos, done by a balanced panel of experts, on the Guidelines? (This panel might be composed of the principal organizations which drafted the statement, "Religion in the Public Schools: A Joint Statement of Current Law," which, as Secretary Riley notes, formed the basis for the Guidelines.)

Again, while both the President and Secretary Riley noted the importance of every school district using the Guidelines to develop its own districtwide policy regarding religious expression, what has been done, beyond mere exhortation, to encourage this? So far as I can tell, nothing has been done, except for the holding of three "summits" by Secretary Riley in the 3 years since the Guidelines were originally issued. I would say this hardly evidences a serious, sincere commitment to promote the distribution and usage of the Guidelines in developing districtwide policies in school districts across America.

This is all the more a shame because both the Secretary and the President note that using the Guidelines to develop a districtwide plan will also serve to build consensus and to identify common ground among members of the community before rancorous disputes erupt. One of our witnesses, Charles Haynes of the First Amendment Project of the Freedom Forum, testified in detail about how this process can, and has, worked successfully, particularly in Utah and California, to bring communities together and to help the entire local community understand and respect one another and their First Amendment religious liberty rights.

Mr. Haynes and other witnesses also helped us identify one area in which there are still very serious problems, which go far beyond a lack of information. That area is the curriculum. As we learned, public school curricula across America do not, by and large, take religion seriously. Apart from brief treatment in the "history" por-

* The inclusion of former Commissioner George's statement, who was present at all three Schools and Religion proceedings, was agreed upon during a Commission meeting and is a courtesy extended to him. This courtesy is not to be considered as a precedent.

tion of the curriculum, religion, and religious viewpoints, are simply ignored. As Warren Nord told us, this is often the result of hostility to religions, not of mere ignorance. As Charles Haynes told us, a truly "liberal" education would inform students about the full range of viewpoints and let them choose among them. In many schools, in the name of "neutrality," religious understandings of the world are simply excluded, while materialistic views are the norm. This simply must be changed, for if "neutrality" means anything constitutionally, it surely means "fairness," and a fair presentation of religion and religious points of view in the curriculum is what is lacking. Everyone would benefit from a careful consideration of the points raised by Haynes and Nord in their new book, *Taking Religion Seriously Across the Curriculum*, and by Gilbert Sewell of the American Textbook Council and another of our witnesses, in his new booklet, "Learning about Religion, Learning from Religion." University schools of education should, of course, prepare teachers and administrators to take religion seriously, by offering certification in religious studies (certification which State departments of education should *require*), else classes in the public schools will not be offered or will likely be poorly taught. Finally, one can only hope that when the Guidelines are reissued in the future, they too will go beyond a mere recitation of the current law to the presentation of a positive vision of the role of religion and religious views in the curriculum and in the school, a vision which is fully consistent with the First Amendment and recognizes the value and role of religion in our nation.

Returning to the Guidelines for a moment, I must note strong disagreement with one portion of them. By saying only that, in light of the *City of Boerne v. Flores* case, students do not have a *Federal* right to opt out of classes which students or their parents find objectionable for religious reasons, the Guidelines leave the misleading impression that no such right exists. However, such rights may, and probably do, exist under *State* law. And such a right is undoubtedly also protected under doctrines of parental rights, which were conspicuously left unaffected in the area of education by *Employment Division v. Smith*, 485 U.S. 660 (1990). The right to opt out is highly important because, in my opinion, nothing plays a bigger role in driving students

away from the public schools than a failure to recognize such a right. If the Secretary is correct that the right to opt out is no longer protected by Federal law, then I think it is imperative that Congress act to make it so.

As noted above, the Guidelines were issued by DOEd in consultation with the Attorney General. As our nation's highest law enforcement official, the Attorney General has, among many other things, the responsibility to enforce the law protecting religious freedom in the public schools. Yet, so far as we were able to determine during these hearings, there is no one at the Justice Department who is charged with overseeing enforcement of the Equal Access Act. This act, which is a prominent part of the Guidelines, guarantees that student "bible clubs" are given the same access to school facilities as are other noncurriculum clubs. So far as we were able to determine, no one in DOJ is responsible for apprising other Federal agencies, including, significantly, DOEd, about legal developments regarding equal access. Finally, in those places in which the Federal Government has the fundamental responsibility for education (for instance, on military bases), we have received no information that DOJ is ensuring that the Guidelines are being followed.

The point is sometimes made that the Equal Access Act provides for a private cause of action. But so do the Federal securities laws; yet DOJ is active in ensuring that they are not violated. Why has DOJ failed to institute a single case against a school district where noncompliance with the Equal Access Act has been widespread? My point is this: other civil rights are not left solely to the resources of private citizens to protect and defend. DOJ has the resources; it simply chooses to spend them otherwise.

One place where DOJ could start is the public school system in the State of New York. Problems, particularly concerning equal access, arise there regularly. Yet, so far as our witnesses told us, it does not appear that the school system has followed the recommendations of Secretary Riley and the President to make sure that the Guidelines are distributed beyond superintendents to teachers, students, and parents, and to encourage the development of districtwide plans based on the Guidelines. Nor is inservice training provided. The New York State School Board Association, while filing briefs alleging establishment

violations on several occasions, has not, so far as I could determine, even once filed a brief supporting a claim that religious free exercise is being denied. It appears school officials continue to rely on a distinction between "religious worship" and "religious speech" which was rejected by the Supreme Court in *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981), and to interpret *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993), so narrowly as to extinguish it. Ironically, the failure of this school system to move beyond polemics to the common ground and mutual understanding which President Clinton, Secretary Riley, and Charles Haynes, among others, encourage appears to have increased the amount of litigation, and associated costs, which the system faces. A heightened sensitivity to the constitutionally guaranteed rights to religious freedom of its students would appear to be in order. Surely a program to instruct and train administrators, school board attorneys, and teachers in the Guidelines (including the Equal Access Act), and the wide dissemination of the Guidelines, followed by a program to develop a plan to implement the Guidelines in each school district, would both decrease litigation, build mutual trust, and protect students' religious civil rights.

I believe these hearings demonstrated that the Equal Access Act, *where it has been observed*, has been a success—all of our witnesses in Washington, for instance, agreed on this. (As noted above, I must conclude that New York is not one of those places where the act has been faithfully observed, as demonstrated by the array of witnesses at our New York hearing who complained about equal access violations.) Those witnesses were also unanimous, save one, in supporting the position that a religious club has the right to require that its officers espouse its beliefs. This is just plain common sense. An organization which cannot insist that its officers espouse its constituting principles has ceased meaningfully to exist. I encourage Congress to

make this right explicit in the statute. Also, given that all our witnesses agreed that the act has worked well in high schools, Congress should consider making it explicit that it extends to "middle schools" and "junior high schools" as well.

The hearings did not, in my opinion, enable the Commission to examine in sufficient detail the problems faced by teachers regarding their own rights to religious freedom. We are not speaking, obviously, of a teacher indoctrinating a student in the teacher's beliefs, but of a teacher having his own rights violated by the school system. In our Seattle hearing, we heard sufficient testimony to convince me that this is a significant problem, one which merits concern and examination.

It has been 3 years since the Guidelines were originally issued. In that time, it is clear to me that the Federal Government has failed to do enough to make sure that we move from rhetoric to implementation. In fact, so little has been done, that it encourages cynics who see the issuance of the Guidelines, far from being an attempt to ensure that religious rights are respected and religion is taken seriously, as a ploy to avoid a constitutional amendment. One hopes the cynics are mistaken. However, the only way we will know is if the Federal Government takes serious steps to follow through on the statement of the President and Secretary Riley. One thing our hearings surely demonstrated was that religious liberty currently is not sufficiently secured in our public schools, and that the public school culture has for too long regarded religion, contrary to the Constitution and to common sense, as an enemy. The opportunity to build common ground and to reach the mutual understanding which Charles Haynes and so many other witnesses discussed has too often been squandered. I encourage public school officials to take the right to free exercise of religion as seriously as they take other civil rights, and to no longer treat it as the forgotten child of our Constitution.

**RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS:
A STATEMENT OF PRINCIPLES**



**U.S. Department of Education
June 1998**



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE SECRETARY

"...Schools do more than train their children's minds. They also help to nurture their souls by reinforcing the values they learn at home and in their communities. I believe that one of the best ways we can help our schools do this is by supporting students' rights to voluntarily practice their religious beliefs in schools....For more than 200 years, the First Amendment has protected our religious freedom and allowed many faiths to flourish in our homes, in our work place and in our schools. Clearly understood and sensibly applied, it works.

*President Clinton
May 30, 1998*

Dear American Educator,

Almost three years ago, President Clinton directed me, as U.S. Secretary of Education, in consultation with the Attorney General, to provide every public school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools. In accordance with the President's directive, I sent every school superintendent in the country guidelines on Religious Expression in Public Schools in August of 1995.

The purpose of promulgating these presidential guidelines was to end much of the confusion regarding religious expression in our nation's public schools that had developed over more than thirty years since the U.S. Supreme Court decision in 1962 regarding state sponsored school prayer. I believe that these guidelines have helped school officials, teachers, students and parents find a new common ground on the important issue of religious freedom consistent with constitutional requirements.

600 INDEPENDENCE AVE., S.W. WASHINGTON, D.C. 20202

Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.

In July of 1996, for example, the Saint Louis School Board adopted a district wide policy using these guidelines. While the school district had previously allowed certain religious activities, it had never spelled them out before, resulting in a lawsuit over the right of a student to pray before lunch in the cafeteria. The creation of a clearly defined policy using the guidelines allowed the school board and the family of the student to arrive at a mutually satisfactory settlement.

In a case decided last year in a United States District Court in Alabama, (Chandler v. James) involving student initiated prayer at school related events, the court instructed the DeKalb County School District to maintain for circulation in the library of each school a copy of the presidential guidelines.

The great advantage of the presidential guidelines, however, is that they allow school districts to avoid contentious disputes by developing a common understanding among students, teachers, parents and the broader community that the First Amendment does in fact provide ample room for religious expression by students while at the same time maintaining freedom from government sponsored religion.

The development and use of these presidential guidelines were not and are not isolated activities. Rather, these guidelines are part of an ongoing and growing effort by educators and America's religious community to find a new common ground. In April of 1995, for example, thirty-five religious groups issued "Religion in the Public Schools: A Joint Statement of Current Law" that the Department drew from in developing its own guidelines. Following the release of the presidential guidelines, the National PTA and the Freedom Forum jointly published in 1996 "A Parent's Guide to Religion in the Public Schools" which put the guidelines into an easily understandable question and answer format.

In the last two years, I have held three religious-education summits to inform faith communities and educators about the guidelines and to encourage continued dialogue and cooperation within constitutional limits. Many religious communities have contacted local schools and school systems to offer their assistance because of the clarity provided by the guidelines. The United Methodist Church has provided reading tutors to many schools, and Hadassah and the Women's League for Conservative Judaism have both been extremely active in providing local schools with support for summer reading programs.

The guidelines we are releasing today are the same as originally issued in 1995, except that changes have been made in the sections on religious excusals and student garb to reflect the Supreme Court decision in Boerne v. Flores declaring the Religious Freedom Restoration Act unconstitutional as applied to actions of state and local governments.

These guidelines continue to reflect two basic and equally important obligations imposed on public school officials by the First Amendment. First, schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature. Schools may not discriminate against private religious expression by students, but must instead give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity. Generally, this means that students may pray in a nondisruptive manner during the school day when they are not engaged in school activities and instruction, subject to the same rules of order that apply to other student speech.

At the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity. Among other things, of course, school administrators and teachers may not organize or encourage prayer exercises in the classroom. Teachers, coaches and other school officials who act as advisors to student groups must remain mindful that they cannot engage in or lead the religious activities of students.

And the right of religious expression in school does not include the right to have a "captive audience" listen, or to compel other students to participate. School officials should not permit student religious speech to turn into religious harassment aimed at a student or a small group of students. Students do not have the right to make repeated invitations to other students to participate in religious activity in the face of a request to stop.

The statement of principles set forth below derives from the First Amendment. Implementation of these principles, of course, will depend on specific factual contexts and will require careful consideration in particular cases.

In issuing these revised guidelines I encourage every school district to make sure that principals, teachers, students and parents are familiar with their content. To that end I offer three suggestions:

First, school districts should use these guidelines to revise or develop their own district wide policy regarding religious expression. In developing such a policy, school officials can engage parents, teachers, the various faith communities and the broader community in a positive dialogue to define a common ground that gives all parties the assurance that when questions do arise regarding religious expression the community is well prepared to apply these guidelines to specific cases. The Davis County School District in Farmington, Utah, is an example of a school district that has taken the affirmative step of developing such a policy.

At a time of increasing religious diversity in our country such a proactive step can help school districts create a framework of civility that reaffirms and strengthens the community consensus regarding religious liberty. School districts that do not make the effort to develop their own policy may find themselves unprepared for the intensity of the debate that can engage a community when positions harden around a live controversy involving religious expression in public schools.

Second, I encourage principals and administrators to take the additional step of making sure that teachers, so often on the front line of any dispute regarding religious expression, are fully informed about the guidelines. The Gwinnett County School system in Georgia, for example, begins every school year with workshops for teachers that include the distribution of these presidential guidelines. Our nation's schools of education can also do their part by ensuring that prospective teachers are knowledgeable about religious expression in the classroom.

Third, I encourage schools to actively take steps to inform parents and students about religious expression in school using these guidelines. The Carter County School District in Elizabethton, Tennessee, included the subject of religious expression in a character education program that it developed in the fall of 1997. This effort included sending home to every parent a copy of the "Parent's Guide to Religion in the Public Schools."

Help is available for those school districts that seek to develop policies on religious expression. I have enclosed a list of associations and groups that can provide information to school districts and parents who seek to learn more about religious expression in our nation's public schools.

In addition, citizens can turn to the U.S. Department of Education web site (www.ed.gov) for information about the guidelines and other activities of the Department that support the growing effort of educators and religious communities to support the education of our nation's children.

Finally, I encourage teachers and principals to see the First Amendment as something more than a piece of dry, old parchment locked away in the national attic gathering dust. It is a vital living principle, a call to action, and a demand that each generation reaffirm its connection to the basic idea that is America -- that we are a free people who protect our freedoms by respecting the freedom of others who differ from us.

Our history as a nation reflects the history of the Puritan, the Quaker, the Baptist, the Catholic, the Jew and many others fleeing persecution to find religious freedom in America. The United States remains the most successful experiment in religious freedom that the world has ever known because the First Amendment uniquely balances freedom of private religious belief and expression with freedom from state-imposed religious expression.

Public schools can neither foster religion nor preclude it. Our public schools must treat religion with fairness and respect and vigorously protect religious expression as well as the freedom of conscience of all other students. In so doing our public schools reaffirm the First Amendment and enrich the lives of their students.

I encourage you to share this information widely and in the most appropriate manner with your school community. Please accept my sincere thanks for your continuing work on behalf of all of America's children.

Sincerely,



Richard W. Riley
U.S. Secretary of Education

RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

Student prayer and religious discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable nondisruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before or after school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureates: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

Official neutrality regarding religious activity: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Teaching about religion: Public schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

Religious excusals: Subject to applicable State laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. However, students generally do not have a Federal right to be excused from lessons that may be inconsistent with their religious beliefs or practices. School officials may neither encourage nor discourage students from availing themselves of an excusal option.

Released time: Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching values: Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

Student garb: Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

THE EQUAL ACCESS ACT

The Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the Act, the Department of Justice has advised that the Act should be interpreted as providing, among other things, that:

General provisions: Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving Federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer services and worship exercises covered: A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Equal access to means of publicizing meetings: A school receiving Federal funds must allow student groups meeting under the Act to use the school media -- including the public address system, the school newspaper, and the school bulletin board -- to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools, however, may inform students that certain groups are not school sponsored.

Lunch-time and recess covered: A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well as when it allows students to meet before and after the school day.

Revised May 1998

List of organizations that can answer questions on religious expression in public schools

<p>Religious Action Center of Reform Judaism</p> <p>Name: Rabbi David Saperstein Address: 2027 Massachusetts Ave., NW Washington, DC 20036 Phone: (202) 387-2800 Fax: (202) 667-9070 E-Mail: rac@uahc.org Web site: www.cdinet.com/RAC/</p>	<p>American Association of School Administrators</p> <p>Name: Andrew Rotherham Address: 1801 N. Moore St. Arlington, VA 22209 Phone: (703) 528-0700 Fax: (703) 528-2146 E-Mail: arotherham@aasa.org Web site: www.aasa.org</p>
<p>American Jewish Congress</p> <p>Name: Marc Stern Address: 15 East 84th Street New York, NY 10028 Phone: (212) 360-1545 Fax: (212) 861-7056 E-Mail: Marc_S_AJC@aol.com Web site:</p>	<p>National PTA</p> <p>Name: Maribeth Oakes Address: 1090 Vermont Ave., NW, Suite 1200 Washington, DC 20005 Phone: (202) 289-6790 Fax: (202) 289-6791 E-Mail: m_oakes@pta.org Web site: www.pta.org</p>
<p>Christian Legal Society</p> <p>Name: Steven McFarland Address: 4208 Evergreen Lane, #222 Annandale, VA 22003 Phone: (703) 642-1070 Fax: (703) 642-1075 E-Mail: clrf@mindspring.com Web site: www.clsnet.com</p>	<p>National Association of Evangelicals</p> <p>Name: Forest Montgomery Address: 1023 15th Street, NW #500 Washington, DC 20005 Phone: (202) 789-1011 Fax: (202) 842-0392 E-Mail: oga@nae.net Web site: www.nae.net</p>
<p>National School Boards Association</p> <p>Name: Laurie Westley Address: 1680 Duke Street Alexandria, VA 22314 Phone: (703) 838-6703 Fax: (703) 548-5613 E-Mail: lwestley@nsba.org Web site: www.nsba.org</p>	<p>Freedom Forum</p> <p>Name: Charles Haynes Address: 1101 Wilson Blvd. Arlington, VA 22209 Phone: (703) 528-0800 Fax: (703) 284-2879 E-Mail: chains@freedomforum.org Web site: www.freedomforum.org</p>

Appendix B

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release December 18, 1999

RADIO ADDRESS BY THE PRESIDENT TO THE NATION

The Oval Office

10:06 A.M. EST

THE PRESIDENT: Good morning. The holiday season is a time when America's remarkable religious diversity shines brightest—in so many homes and different places of worship and schools. Today I want to talk to you about the role of faith in our lives, in all of our religious diversity, and, particularly, in the education of our children.

America's founders were men and women of faith—many of whom fled oppression overseas to find freedom on our shores. They believed the best way to protect religious liberty was to guarantee, first of all, the right to practice religion by the dictates of their own conscience; and, second, to forbid our government from imposing or establishing any religious belief. In their wisdom, they enshrined these two principles in our Constitution.

But, of course, reconciling these principles has not always been easy, especially when it comes to our education system. Finding the proper place for faith in our schools is a complex and emotional matter for many Americans. But I have never believed the Constitution required our schools to be religion-free zones, or that our children must check their faiths at the schoolhouse door.

Americans expect our schools to teach our children the knowledge and skills they need to succeed in life. We also trust our schools to strengthen the moral foundation of our society, to reinforce the values taught at home and in our communities.

Studies show that children involved in religious activities are less likely to use drugs. Experience tells us they're more likely to stay out of trouble. Common sense says that faith and faith-based organizations from all religious backgrounds can play an important role in helping children to reach their fullest potential. That's why I've always supported individual student's rights to voluntarily practice religious beliefs, including prayer in school and to engage in religious activities on school grounds, but not to have any kind of enforced such activities.

Now, in 1995, our administration released a set of principles for protecting religious freedom in our public schools. We did so in response to parents and educators who asked for help in knowing what kinds of religious activities are permissible in public schools and what is not permissible. They asked for help in respecting the rights and beliefs of all students, from the most observant from all religious backgrounds to those who choose freely, as is their right, to completely abstain from any religious activity.

Those guidelines we issued make it clear that students do have the right to pray privately and individually in school, the right to say grace at lunch, the right to meet in religious groups on school grounds and to use

school facilities just like any other groups do. They have the right to read the Bible or other religious books during study hall or free class time, and the right to be free from coercion to participate in religious activity of any kind. Now, since we first issued those guidelines, appropriate religious activity has flourished in our schools and continuing in our country. Today I'm announcing the release of expanded guidelines, more practical help for teachers and principals, for parents and students for the whole community. Guidelines like this will help teachers better understand how to teach about religions and help faith-based organizations join the effort to improve public education.

Across America, schools and faith-based organizations are telling us they want to build new and effective partnerships, like the large number of faith-based groups involved in America Reads, or the Shiloh Baptist-Seaton Elementary School partnership, which offers after-school activities here in Washington, D.C. Faith-based organization in schools, though different in many ways, do often share important goals, expanding opportunities to learn, lifting children's lives. Our new guidelines will help them work together on common ground to meet constitutional muster, to avoid making students uncomfortable because they come from different religious traditions, while helping students make the most of their God-given talents. These guidelines also tell us that a consensus is emerging among educators and religious leaders, and among defenders of the 1st Amendment—so many of them have endorsed our efforts. Their voices echo the words of George Washington who said that Americans have—and I quote—abundant reason to rejoice that in this land every person may worship God according to the dictates of his own heart.

Today, as we count the days down to the end of the 20th century and the beginning of the 21st, we know that this fundamental and precious liberty is still strong. We are determined that it will remain so, not just for our own children, but for generations yet to come.

Thanks for listening.

END 10:11 A.M. EST

Appendix C

nea

NATIONAL EDUCATION ASSOCIATION

Robert F. Chase, President
Reg. Weaver, Vice President
Dennis Van Roekel, Secretary-Treasurer
Don Cameron, Executive Director

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1201 16th Street, N.W.
Washington, D.C. 20036-3290

September 17, 1999

Edward A. Hailes, Jr.
Deputy General Counsel
United States Commission on Civil Rights
624 Ninth Street, N.W.
Washington, D.C. 20425

Re: Schools and Religion

Dear Mr. Hailes:

I have been asked to respond to your recent letter addressed to National Education Association President Bob Chase regarding the hearings on Schools and Religion conducted by the United States Commission on Civil Rights during the summer of 1998.

We appreciate the opportunity to review and respond to the testimony of Vincent McCarthy, Senior Regional Counsel, Northeast Council for the American Center for Law and Justice. Simply put, Mr. McCarthy's characterization of NEA as "antipathetic" to the "religious viewpoint" of parents and children is both untrue and unfair. We find particularly offensive his suggestion that the "educational establishment" -- including, presumably, the NEA -- "seems to be moving with lightening speed toward the position that only the secular state should have the right to raise and instruct children." Nothing could be further from the truth.

NEA has long supported the right of parents to enroll their children in private and religious schools and to "raise and instruct" their own children. And the Association has long encouraged its members to respect the diversity and viewpoints -- religious and otherwise -- of all schoolchildren.

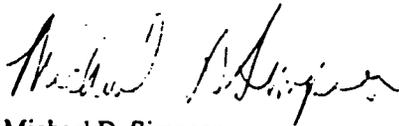
Indeed, NEA recently signed onto a joint statement entitled "A Teacher's Guide to Religion in the Public Schools." That statement was drafted by the nonpartisan First Amendment Center and has been endorsed by the Christian Legal Society, the National Association of Evangelicals, the National School Boards Association, and a host of other religious and school-related organizations. Among other things, the Teacher's Guide makes clear that public school students have the right to pray quietly and to engage in other forms of religious expression both inside the classroom and out, and have the right to be excused from classroom activities for religious reasons. The U. S. Department of Education is planning to send copies of the Guide to every public school building in the country this fall.

September 17, 1999
Re: Schools and Religion
Page 2

It is difficult to understand how an organization that has publicly recognized this level of religious freedom in the schools can fairly be described as "antipathetic" to the religious viewpoint of parents and children. Mr. McCarthy's intemperate remarks are unsupportable, unwarranted, and just plain wrong.

The topic of your hearings -- Schools and Religion -- obviously is an issue of great concern and interest to NEA. For this reason, we would like to receive copies of the executive summary and transcripts of the proceedings when they are published by the Commission.

Sincerely,



Michael D. Simpson
Assistant General Counsel

cc: NEA Executive Office

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Washington, DC 20425

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