SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING

June 12, 1998

U.S. Commission on Civil Rights
Schools and Religion Project

Schools and Religion Project: New York Hearing

U.S. Commission on Civil Rights

Agenda

SCHOOLS AND RELIGION PROJECT
NEW YORK CITY HEARING

June 12, 1998

The United States Court of International Trade Center
1 Federal Plaza
New York, NY 10007

9:00 - 9:30 A.M. **COMMISSION MEETING**

Opening and Overview

9:30 - 9:50 a.m. **OPENING**

Opening Statement: *Hon. Mary Frances Berry*
Chairperson, U.S. Commission on Civil Rights

Statement of Rules: *Hon. Cruz Reynoso*
Vice-Chairperson, U.S. Commission on Civil Rights

Welcome: *Lita (M.D.) Taracido*
Chairperson, New York State Advisory Committee

9:50 - 10:00 a.m. **BREAK**

10:00 - 11:30 a.m. **Panel One:** **Overview - Schools and Religion in New York**

Joseph P. Infranco, Esq., Miglion & Infranco, Commack, NY
Vincent McCarthy, Senior Regional Director, American Center for Law and Justice, New York, NY
Pamela Betheil, President, New York State School Boards Assoc., Albany, NY

11:30 - 11:45 a.m. **BREAK**

11:45 - 12:45 p.m. **Panel Two:** **Overview - Schools and Religion**

Jeffrey H. Ballabon, Member, Board of Directors, Toward Tradition, New York, NY
Susan Douglass, Principal Researcher/Writer, Council on Islamic Education, Falls Church, Virginia
Kevin Hasson, President, The Becket Fund, Washington, DC

12:45 - 1:45 p.m. **LUNCH BREAK**

1:45 - 3:15 p.m. **<u>Panel Three:</u> Religious Expression and Equal Access**

<u>Part One</u>

Christian Smith, Elementary School Student, Woodbury Heights, New Jersey
Lindsey Smith, Elementary School Student, Woodbury Heights, New Jersey
Rebekah Gordon, Elementary School Student, Brooklyn, New York
Anna Crespo, Elementary School Student, Freeport, New York

<u>Part Two</u>

The Rev. Steve Fournier, The Good News Club, Oneonta, New York
The Rev. Robert Hall, Bronx Household of Faith, Bronx, New York
The Rev. David Silva, Centro Bilico, Freeport, New York

3:15 - 4:15 p.m. **<u>Panel Four:</u> School District Representatives**

Evelyn B. Holman, Ph. D., Superintendent, Bay Shore School District, Bay Shore, New York
Frank W. Miller, Esq., Ferrara, Siorenza, Larrison, Barrett & Reitz, P.C., East Syracuse, New York
Representative, New York City Board of Education *(To be Confirmed)*

4:15 - 4:45 p.m. **OPEN SESSION**

4:45 p.m. **ADJOURNMENT**

Schools and Religion Project: New York Hearing

U.S. Commission on Civil Rights

Notice of Hearing

COMMISSION ON CIVIL RIGHTS

Hearing on Schools and Religions

AGENCY: Commission on Civil Rights.

ACTION: Notice of hearing.

SUMMARY: Notice is hereby given pursuant to the provisions of the Civil Rights Commission Amendments Act of 1994, Section 3, Pub. L. 103–419, 108 Stat. 4338, as amended, and 45 CFR Section 702.3, that a public hearing before the U.S. Commission on Civil Rights will commence on Friday, June 12, 1998, beginning at 9:00 a.m., in the United States Court of International Trade Center, located at 1 Federal Plaza, New York, NY 10007.

The purpose of the hearing is to collect information within the jurisdiction of the Commission, under 45 CFR Section 702.2, to examine the operation of the Equal Access Act and similar laws and the adherence by the public schools to these laws and the Constitution in regard to religious freedom. The Commission is authorized to hold hearings and to issue subpoenas for the production of documents and the attendance of witnesses pursuant to 45 CFR Section 701.2(c). The Commission is an independent bipartisan, factfinding agency authorized to study, collect, and disseminate information, and to appraise the laws and policies of the Federal Government, and to study and collect information with respect to discrimination or denials 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.

Hearing impaired persons who will attend the hearing and require the services of a sign language interpreter, should contact Betty Edmiston, Administrative Services and Clearinghouse Division at (202) 376–8105 (TDD (202) 376–8116), at least five (5) working days before the scheduled date of the hearing.

FOR FURTHER INFORMATION CONTACT: Barbara Brooks, Press and Communications, (202) 367–8312.

Dated: May 11, 1998.

Stephanie Y. Moore,

General Counsel.

[FR Doc. 98–12939 Filed 5–14–98; 8:45 am]

Schools and Religion Project: New York Hearing

U.S. Commission on Civil Rights

Opening Statement

OPENING REMARKS OF HON. MARY FRANCES BERRY
CHAIRPERSON, U.S. COMMISSION ON CIVIL RIGHTS

SCHOOLS AND RELIGION PROJECT
NEW YORK CITY HEARING

JUNE 12, 1998

This hearing of the United States Commission on Civil Rights will now come to order.

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. Segal Professor of American Social Thought, and Professor of History and Adjunct Professor Law at the University of Pennsylvania in Philadelphia, Pennsylvania.

Joining me today are Commissioners Carl Anderson, A. Leon Higginbotham, Jr., Constance Horner, Robert George, Yvonne Lee, Russell G. Redenbaugh and the Vice Chair of the Commission, Cruz Reynoso. Together we constitute the eight member Commission on Civil Rights.

Finally, I would like to introduce our Staff Director, Ruby Moy, and our Deputy General Counsel, Edward A. Hailes, Jr.

Today the Commission will focus on the 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 non-discriminatory manner. Through this investigation, we also seek to determine if further actions are necessary to ensure non-discrimination.

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 of three hearings which will address these issues. After the national perspective proceeding that the Commission conducted last month in Washington, D.C., today's hearing and the final 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: (1)to appraise the laws and policies of the Federal government; (2)to study and collect information; and (3)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 hearing.

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 a 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 functions and limitations of this Commission. As the Supreme Court of the United States explained, "This Commission 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 determination 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 inhabitants of these United States.

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 materials sent to the Commission at the

conclusion of this hearing. Anyone who desires 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 its 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 this Commission. It is a crime, punishable by a fine of up to $5,000, and imprisonment of up to five 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.

Schools and Religion Project: New York Hearing

U.S. Commission on Civil Rights

Statement of the Rules

STATEMENT OF THE RULES BY HON. CRUZ REYNOSO
Vice Chairperson, U.S. Commission on Civil Rights

SCHOOLS AND RELIGION PROJECT:
NEW YORK, NY HEARING

June 12, 1998

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 fuller 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 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 on 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 any witness' 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 behalf.

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 statements will be reviewed by the members of the Commission and made a part of the record.

The Chair has already advised you that Federal law protects all witnesses at a Commission hearing. These witnesses are protected by Title 18, U.S.C. Code, 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 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 room, whether testifying or not, all orders by the Chairperson must be obeyed. Failure by any person to obey an 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.

Schools and Religion Project: New York Hearing

U.S. Commission on Civil Rights

Welcoming Remarks

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

624 Ninth Street, N.W.
Washington, D.C. 20425

Hearing on "Schools and Religion"
New York, NY June 12, 1998

WELCOMING STATEMENT OF LITA (M.D.) TARACIDO
Chairperson, New York Advisory Committee

Good Morning. My name is Lita Taracido, and I chair the New York Advisory Committee to the United States Commission on Civil Rights. On behalf of the Committee, I welcome the Commissioners and participants to today's proceedings. I am pleased that the Commission has chosen to hold the second of it's three national hearings in New York City as it seeks to evaluate the scope of religious freedom and it's 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 served as the originator of several Establishment Clause cases which have been heard by the United States Supreme Court. For example, in the *Kiryas Joel* case, which involved redistricting a school district to coincide with a Hassidic Jewish village, the court in 1994 found that the primary effect of redistricting was impermissibly to advance religion. In *Agostini v. Board of Education of the City of New York,* the court in 1997 overturned a twelve year old decision in *Aguilar v. Felton.* In 1985 the *Aguilar* court held that a New York City program sending public school teachers into 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 reversing it's earlier decision held that the same practices did not violate separation of church and state principles under the Establishment Clause.

As more Americans, dissatisfied with traditional public education, consider parochial schools 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 beliefs in public schools in the hope that better learning environments will ensue. This effort has culminated in an increased number of student-led religious groups and clubs which conduct activities on school grounds. This trend, coupled with New York City's increasing demographic complexity making the city a religiously more diverse place, 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.

Schools and Religion Project: New York Hearing
U.S. Commission on Civil Rights

Oath

PROCEDURE FOR SWEARING WITNESSES

1. Call all witnesses for the panel.

2. Have each witness raise his/her hand.

3. Ask the following questions of the panel:

"DO YOU SWEAR OR AFFIRM THAT YOU WILL TESTIFY TRUTHFULLY TO THE BEST OF YOUR ABILITIES?"

4. Ask the witnesses to be seated.

IN THE EVENT THAT A WITNESS DOES NOT COME FORWARD, THE CHAIRPERSON OR THE RANKING COMMISSIONER SHOULD INSTRUCT THE U.S. MARSHAL PRESENT TO LOOK FOR THE WITNESS IN THE OUTSIDE VICINITY OF THE HEARING SITE.

Schools and Religion Project: New York Hearing

U.S. Commission on Civil Rights

Staff Report

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING

JUNE 12, 1998

The President's guidelines on Religious Expression in Public Schools were updated since the Commission's last Schools and Religion hearing in Washington, D.C. on May 20, 1998. Attached are the updated version of the guidelines, cases and documents relevant to the New York hearing, and the staff report.

1. Guidelines Religious Expression in Public Schools
2. Equal Access Act
3. New York Education Law Section 414
4. *Lamb's Chapel v. Center Moriches Union Free School District et. al.*
5. *Bronx Household of Faith v. Community School District No. 10, et. al.*
6. *Full Gospel Tabernacle v. Community School District No. 27, et. al.*
7. Staff Report

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

(B) Rate of interest

Interest on advances made under this subsection shall be at a rate determined by the Secretary (as of the close of the calendar month preceding the month in which the advance is made) to be equal to the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the anticipated period during which the advance will be outstanding and shall be compounded annually.

(f) Effective date

The amendments made by this section shall take effect on January 1, 1986.

(Pub. L. 99-519, § 5, Oct. 22, 1986, 100 Stat. 2990; Pub. L. 101-637, § 12, Nov. 28, 1990, 104 Stat. 4593.)

CODIFICATION

Section was enacted as part of the Asbestos Hazard Emergency Response Act of 1986, and not as part of the Asbestos School Hazard Abatement Act of 1984 which comprises this subchapter nor as part of the Education for Economic Security Act which comprises this chapter.

AMENDMENTS

1990—Subsec. (b)(1). Pub. L. 101-637, § 12(a), substituted a comma for "as in effect on October 22, 1986, and" in subpar. (A) and ", and" for period at end of subpar. (B), and added subpar. (C).

Subsec. (d). Pub. L. 101-637, § 12(b), struck out before period at end "as in effect on October 22, 1986".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 4014, 4017, 4021 of this title; title 15 section 2647.

SUBCHAPTER VI—EXCELLENCE IN EDUCATION PROGRAM

§§ 4031 to 4037. Repealed. Pub. L. 100-297, title II, § 2303, Apr. 28, 1988, 102 Stat. 324

Section 4031, Pub. L. 98-377, title VI, § 602, Aug. 11, 1984, 98 Stat. 1295, related to statement of purpose.

Section 4032, Pub. L. 98-377, title VI, § 603, Aug. 11, 1984, 98 Stat. 1296, related to definitions.

Section 4033, Pub. L. 98-377, title VI, § 604, Aug. 11, 1984, 98 Stat. 1296; Pub. L. 99-159, title II, § 251, Nov. 22, 1985, 99 Stat. 901; Pub. L. 99-425, title VII, § 701, Sept. 30, 1986, 100 Stat. 977, related to school excellence awards.

Section 4034, Pub. L. 98-377, title VI, § 605, Aug. 11, 1984, 98 Stat. 1296, related to selection of schools for awards.

Section 4035, Pub. L. 98-377, title VI, § 606, Aug. 11, 1984, 98 Stat. 1298, related to amount and conditions of awards.

Section 4036, Pub. L. 98-377, title VI, § 607, Aug. 11, 1984, 98 Stat. 1298, related to special school awards.

Section 4037, Pub. L. 98-377, title VI, § 608, Aug. 11, 1984, 98 Stat. 1298, related to research, evaluation, dissemination, and monitoring activities.

EFFECTIVE DATE OF REPEAL

Repeal effective July 1, 1988, see section 6303 of Pub. L. 100-297, set out as an Effective Date note under section 1201 of this title.

SHORT TITLE

Pub. L. 98-377, title VI, § 601, Aug. 11, 1984, 98 Stat. 1295, which provided that title VI of Pub. L. 98-377 was to be cited as the "Excellence in Education Act", was repealed by Pub. L. 100-297, title II, § 2303, Apr. 28, 1988, 102 Stat. 324.

SUBCHAPTER VII—MAGNET SCHOOLS ASSISTANCE

§§ 4051 to 4062. Repealed. Pub. L. 100-297, title II, § 2303, Apr. 28, 1988, 102 Stat. 324

Section 4051, Pub. L. 98-377, title VII, § 701, Aug. 11, 1984, 98 Stat. 1299; Pub. L. 99-159, title II, § 261, Nov. 22, 1985, 99 Stat. 901, related to authorization of appropriations.

Section 4052, Pub. L. 98-377, title VII, § 702, Aug. 11, 1984, 98 Stat. 1299, related to eligibility requirements.

Section 4053, Pub. L. 98-377, title VII, § 703, Aug. 11, 1984, 98 Stat. 1299; Pub. L. 99-159, title II, § 262, Nov. 22, 1985, 99 Stat. 901, related to statement of purpose.

Section 4054, Pub. L. 98-377, title VII, § 704, Aug. 11, 1984, 98 Stat. 1299, related to program authorization.

Section 4055, Pub. L. 98-377, title VII, § 705, Aug. 11, 1984, 98 Stat. 1300, defined term "magnet school".

Section 4056, Pub. L. 98-377, title VII, § 706, Aug. 11, 1984, 98 Stat. 1300; Pub. L. 99-159, title II, § 263, Nov. 22, 1985, 99 Stat. 902, related to uses of funds.

Section 4057, Pub. L. 98-377, title VII, § 707, Aug. 11, 1984, 98 Stat. 1300, related to applications and requirements.

Section 4058, Pub. L. 98-377, title VII, § 708, Aug. 11, 1984, 98 Stat. 1301, related to special considerations in approving applications.

Section 4059, Pub. L. 98-377, title VII, § 709, Aug. 11, 1984, 98 Stat. 1301; Pub. L. 99-159, title II, § 264, Nov. 22, 1985, 99 Stat. 902, related to prohibitions on use of grants.

Section 4060, Pub. L. 98-377, title VII, § 710, Aug. 11, 1984, 98 Stat. 1301, related to limitation on payments.

Section 4061, Pub. L. 98-377, title VII, § 711, Aug. 11, 1984, 98 Stat. 1301; Pub. L. 98-558, title VII, § 702, Oct. 30, 1984, 98 Stat. 2900, related to payments.

Section 4062, Pub. L. 98-377, title VII, § 712, Aug. 11, 1984, 98 Stat. 1302, related to withholding.

For similar provisions, see section 7201 et seq. of this title.

EFFECTIVE DATE OF REPEAL

Repeal effective July 1, 1988, see section 6303 of Pub. L. 100-297, set out as an Effective Date note under section 1201 of this title.

SUBCHAPTER VIII—EQUAL ACCESS

§ 4071. Denial of equal access prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and 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, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meet-

ing within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof—

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Federal financial assistance to schools unaffected

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

(Pub. L. 98-377, title VIII, § 802, Aug. 11, 1984, 98 Stat. 1302.)

SHORT TITLE

Section 801 of title VIII of Pub. L. 98-377 provided that: "This title [enacting this subchapter] may be cited as 'The Equal Access Act'."

§ 4072. Definitions

As used in this subchapter—

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

(Pub. L. 98-377, title VIII, § 803, Aug. 11, 1984, 98 Stat. 1303.)

§ 4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

(Pub. L. 98-377, title VIII, § 804, Aug. 11, 1984, 98 Stat. 1304.)

§ 4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

(Pub. L. 98-377, title VIII, § 805, Aug. 11, 1984, 98 Stat. 1304.)

SUBCHAPTER IX—STAR SCHOOLS PROGRAM

§§ 4081 to 4086. Repealed. Pub. L. 103-382, title III, § 364, Oct. 20, 1994, 108 Stat. 3975

Section 4081, Pub. L. 98-377, title IX, § 902, as added Pub. L. 100-297, title II, § 2302, Apr. 28, 1988, 102 Stat. 320; amended Pub. L. 102-103, title III, § 301, Aug. 17, 1991, 105 Stat. 499, related to purpose of star schools program.

Section 4082, Pub. L. 98-377, title IX, § 903, as added Pub. L. 100-297, title II, § 2302, Apr. 28, 1988, 102 Stat. 320; amended Pub. L. 102-103, title III, § 302, Aug. 17, 1991, 105 Stat. 499, authorized grants for telecommunications facilities and equipment, instructional programming, and technical assistance.

Section 4083, Pub. L. 98-377, title IX, § 904, as added Pub. L. 100-297, title II, § 2302, Apr. 28, 1988, 102 Stat. 321; amended Pub. L. 102-103, title III, § 303, Aug. 17, 1991, 105 Stat. 500, related to eligibility of telecommunications partnerships for grants.

Section 4084, Pub. L. 98-377, title IX, § 905, as added Pub. L. 100-297, title II, § 2302, Apr. 28, 1988, 102 Stat. 321; amended Pub. L. 102-103, title III, § 304, Aug. 17, 1991, 105 Stat. 501, related to applications for grants.

Section 4085, Pub. L. 98-377, title IX, § 906, as added Pub. L. 100-297, title II, § 2302, Apr. 28, 1988, 102 Stat. 323, related to dissemination of courses and materials under star schools program.

Section 4085a, Pub. L. 98-377, title IX, § 907, as added Pub. L. 102-103, title III, § 305(2), Aug. 17, 1991, 105 Stat. 502, related to continuing eligibility for grants.

Section 4085b, Pub. L. 98-377, title IX, § 908, as added Pub. L. 102-103, title III, § 305(2), Aug. 17, 1991, 105 Stat. 503; amended Pub. L. 103-227, title IX, § 961, Mar. 31, 1994, 108 Stat. 263, required independent evaluation of the star schools program.

1ST DOCUMENT of Level 1 printed in FULL format.

*** THIS SECTION IS CURRENT THROUGH 1997 SESSION ***

EDUCATION LAW
TITLE 1. GENERAL PROVISIONS
ARTICLE 9. SCHOOL BUILDINGS AND SITES

NY CLS Educ @ 414 (1998)

@ 414. Use of schoolhouse and grounds

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this section. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer [fig 1] firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, or to provide child care services during school hours for the children of pupils attending the schools of the district and, if there is additional space available, for children of employees of the district. Such determination shall be made by each district's board of education, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

(j) (Added, L 1991) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.

2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i) and (j) of subdivision one of this section. Any such use, pursuant to paragraphs (a), (c), (d) and (h) of subdivision one of this section, shall not allow the exclusion of any district child solely because said child is not

attending a district school or not attending the district school which is sponsoring such use or on which grounds the use is to occur.

HISTORY: Add, L 1947, ch 820, eff July 1, 1947, with substance transferred from @ 455.

Section heading, amd, L 1976, ch 257, eff July 1, 1976. Sub 1, open par, amd as first unnumbered par, L 1956, ch 810, @ 1, eff July 1, 1956; numbered as sub 1, open par and amd, L 1976, ch 257, eff July 1, 1976; amd, L 1977, ch 369, eff Aug 5, 1977.

Former sub 1, renumbered sub 1, par (a), L 1976, ch 257, eff July 1, 1976.

Sub 1, par (a), formerly sub 1, renumbered sub 1, par (a), L 1976, ch 257, eff July 1, 1976.

Sub 1, par (b), formerly sub 2, renumbered sub 1, par (b), L 1976, ch 257, eff July 1, 1976.

Sub 1, par (c), formerly sub 3, renumbered sub 1, par (c), L 1976, ch 257, eff July 1, 1976.

Sub 1, par (d), formerly sub 4, renumbered sub 1, par (d), L 1976, ch 257, eff July 1, 1976.

Sub 1, par (e), formerly sub 5, amd, L 1962, ch 127, eff Mar 13, 1962; renumbered sub 1, par (e), L 1976, ch 257, eff July 1, 1976.

Sub 1, par (f), formerly sub 6, renumbered sub 1, par (f), L 1976, ch 257, eff July 1, 1976.

Sub 1, par (g), formerly sub 7, as add, L 1956, ch 810, @ 2, eff July 1, 1956; renumbered, and amd, L 1976, ch 257, eff July 1, 1976.

Sub 1, par (h), formerly sub 8, as added, L 1975, ch 722; renumbered sub 1, par (h), and amd, L 1976, ch 257, eff July 1, 1976.

Sub 1, par (i), add, L 1984, ch 460, @ 3, eff July 18, 1984.

Sub 2, add, L 1976, ch 257, eff July 1, 1976; amd, L 1984, ch 460, @ 4, eff July 18, 1984.

Former sub 2, renumbered, sub 1, par (b), L 1976, ch 257, eff July 1, 1976.

Sub 1, par (d), amd, L 1988, ch 24, @ 6, eff Jan 1, 1989.

The 1988 act deleted at fig 1 "firemen"

Sub 1, par (i), amd, L 1993, ch 148, @ 1, eff June 28, 1993.

Sub 1, par (j), add, L 1991, ch 536, @ 1, eff July 23, 1991.

Sub 2, amd, L 1991, ch 536, @ 2, eff July 23, 1991, L 1992, ch 706, @ 1, eff Oct 29, 1992.

Syllabus

LAMB'S CHAPEL ET AL. *v.* CENTER MORICHES UNION FREE SCHOOL DISTRICT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 91-2024. Argued February 24, 1993—Decided June 7, 1993

New York law authorizes local school boards to adopt reasonable regulations permitting the after-hours use of school property for 10 specified purposes, not including meetings for religious purposes. Pursuant to this law, respondent school board (District) issued rules and regulations allowing, *inter alia*, social, civic, and recreational uses of its schools (Rule 10), but prohibiting use by any group for religious purposes (Rule 7). After the District refused two requests by petitioners, an evangelical church and its pastor (Church), to use school facilities for a religious oriented film series on family values and child rearing on the ground that the film series appeared to be church related, the Church filed suit in the District Court, claiming that the District's actions violated, among other things, the First Amendment's Freedom of Speech Clause. The court granted summary judgment to the District, and the Court of Appeals affirmed. It reasoned that the school property, as a "limited public forum" open only for designated purposes, remained nonpublic except for the specified purposes, and ruled that the exclusion of the Church's film was reasonable and viewpoint neutral.

Held: Denying the Church access to school premises to exhibit the film series violates the Freedom of Speech Clause. Pp. 390–397.

(a) There is no question that the District may legally preserve the property under its control and need not have permitted after-hours use for any of the uses permitted under state law. This Court need not address the issue whether Rule 10, by opening the property to a wide variety of communicative purposes, has opened the property for religious uses, because, even if the District has not opened its property for such uses, Rule 7 has been unconstitutionally applied in this case. Access to a nonpublic forum can be based on subject matter or speaker identity so long as the distinctions drawn are reasonable and viewpoint neutral. *Cornelius* v. *NAACP Legal Defense and Ed. Fund, Inc.*, 473 U. S. 788, 806. That Rule 7 treats all religions and religious purposes alike does not make its application in this case viewpoint neutral, however, for it discriminates on the basis of viewpoint by permitting school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject from a religious

Syllabus

standpoint. Denial on this basis is plainly invalid under the holding in *Cornelius*, *supra*, at 806, that the government violates the First Amendment when it denies access to a speaker soley to suppress the point of view he espouses on an otherwise includible subject. Pp. 390–394.

(b) Permitting District property to be used to exhibit the film series would not have been an establishment of religion under the three-part test articulated in *Lemon* v. *Kurtzman*, 403 U. S. 602. Since the series would not have been shown during school hours, would not have been sponsored by the school, and would have been open to the public, there would be no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or the Church would have been incidental. *Widmar* v. *Vincent*, 454 U. S. 263, 271–272. Nor is there anything in the record to support the claim that the exclusion was justified on the ground that allowing access to a "radical" church would lead to threats of public unrest and violence. In addition, the Court of Appeals' judgment was not based on the justification proffered here that the access rules' purpose is to promote the interests of the general public rather than sectarian or other private interests. Moreover, that there was no express finding below that the Church's application would have been granted absent the religious connection is beside the point for the purposes of this opinion, which is concerned with the validity of the stated reason for denying the application, namely, that the film series appeared to be church related. Pp. 395–397.

959 F. 2d 381, reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, O'CONNOR, and SOUTER, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 397. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 397.

Jay Alan Sekulow argued the cause for petitioners. With him on the briefs were *Keith A. Fournier*, *Mark N. Troobnick*, *James M. Henderson, Sr.*, *Thomas Patrick Monaghan*, *Walter M. Weber*, and *John Stepanovich*.

John W. Hoefling argued the cause for respondents. With him on the brief for respondents Center Moriches Union Free School District et al. was *Ross Paine Masler*. Respondent *Robert Abrams*, Attorney General of New York, filed a brief *pro se*. With him on the brief were *Jerry Boone*, Solic-

itor General, and *Lillian Z. Cohen* and *Jeffrey I. Slonim*, Assistant Attorneys General.*

JUSTICE WHITE delivered the opinion of the Court.

New York Educ. Law §414 (McKinney 1988 and Supp. 1993) authorizes local school boards to adopt reasonable regulations for the use of school property for 10 specified purposes when the property is not in use for school purposes. Among the permitted uses is the holding of "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public." §414(c).[1] The list of permitted uses does not include meetings for religious purposes, and a New York appellate court in *Trietley* v. *Board of Ed. of Buffalo*, 409 N. Y. S. 2d 912, 915 (App. Div. 1978), ruled that local boards could not allow student bible clubs to meet

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Roberts, Edward C. DuMont, Anthony J. Steinmeyer,* and *Lowell V. Sturgill, Jr.;* for the American Civil Liberties Union et al. by *David H. Remes, T. Jeremy Gunn, Steven R. Shapiro, John A. Powell,* and *Elliot M. Mincberg;* for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg, Laurence Gold,* and *Walter A. Kamiat;* for the Christian Legal Society et al. by *Kimberlee Wood Colby, Steven T. McFarland, Bradley P. Jacob,* and *Karon Owen Bowdre;* for Concerned Women for America et al. by *Wendell R. Bird* and *David J. Myers;* for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin* and *Dennis Rapps;* and for the Rutherford Institute by *James J. Knicely* and *John W. Whitehead.*

Jay Worona, Pilar Sokol, and *Louis Grumet* filed a brief for the New York State School Boards Association et al. as *amicus curiae* urging affirmance.

[1]Section 414(e) authorizes the use of school property "[f]or polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof."

on school property because "[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414." In *Deeper Life Christian Fellowship, Inc.* v. *Sobol*, 948 F. 2d 79, 83–84 (1991), the Court of Appeals for the Second Circuit accepted *Trietley* as an authoritative interpretation of state law. Furthermore, the Attorney General of New York supports *Trietley* as an appropriate approach to deciding this case.

Pursuant to §414's empowerment of local school districts, the Board of Center Moriches Union Free School District (District) has issued rules and regulations with respect to the use of school property when not in use for school purposes. The rules allow only 2 of the 10 purposes authorized by §414: social, civic, or recreational uses (Rule 10) and use by political organizations if secured in compliance with §414 (Rule 8). Rule 7, however, consistent with the judicial interpretation of state law, provides that "[t]he school premises shall not be used by any group for religious purposes." App. to Pet. for Cert. 57a.

The issue in this case is whether, against this background of state law, it violates the Free Speech Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, to deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today.

I

Petitioners (Church) are Lamb's Chapel, an evangelical church in the community of Center Moriches, and its pastor John Steigerwald. Twice the Church applied to the District for permission to use school facilities to show a six-part film series containing lectures by Doctor James Dobson.[2] A bro-

[2]Shortly before the first of these requests, the Church had applied for permission to use school rooms for its Sunday morning services and for Sunday School. The hours specified were 9 a.m. to 1 p.m. and the time

chure provided on request of the District identified Dr. Dobson as a licensed psychologist, former associate clinical professor of pediatrics at the University of Southern California, best-selling author, and radio commentator. The brochure stated that the film series would discuss Dr. Dobson's views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage. The brochure went on to describe the contents of each of the six parts of the series.[3] The District denied the first application, saying

period one year beginning in the next month. 959 F. 2d 381, 383 (CA2 1992). Within a few days the District wrote petitioner that the application "requesting use of the high school for your Sunday services" was denied, citing both N. Y. Educ. Law § 414 and the District's Rule 7 barring uses for religious purposes. The Church did not challenge this denial in the courts and the validity of this denial is not before us.

[3] "*Turn Your Heart Toward Home* is available now in a series of six discussion-provoking films:

"1) A FATHER LOOKS BACK emphasizes how swiftly time passes and appeals to all parents to 'turn their hearts toward home' during the all-important child-rearing years. *(60 minutes.)*

"2) POWER IN PARENTING: THE YOUNG CHILD begins by exploring the inherent nature of power, and offers many practical helps for facing the battlegrounds in child-rearing—bedtime, mealtime and other confrontations so familiar to parents. Dr. Dobson also takes a look at areas of conflict in marriage and other adult relationships. *(60 minutes.)*

"3) POWER IN PARENTING: THE ADOLESCENT discusses father/daughter and mother/son relationships, and the importance of allowing children to grow to develop as individuals. Dr. Dobson also encourages parents to free themselves of undeserved guilt when their teenagers choose to rebel. *(45 minutes.)*

"4) THE FAMILY UNDER FIRE views the family in the context of today's society, where a "civil war of values" is being waged. Dr. Dobson urges parents to look at the effects of governmental interference, abortion and pornography, and to get involved. To preserve what they care about most—their own families! *(52 minutes.)*

Note: This film contains explicit information regarding the pornography industry. Not recommended for young audiences.

"5) OVERCOMING A PAINFUL CHILDHOOD includes Shirley Dobson's intimate memories of a difficult childhood with her alcoholic father. Mrs. Dobson recalls the influences which brought her to a loving God who saw her personal circumstances and heard her cries for help. *(40 minutes.)*

"6) THE HERITAGE presents Dr. Dobson's powerful closing remarks. Here he speaks clearly and convincingly of our traditional values which, if properly employed and defended, can assure happy, healthy, strengthened homes and family relationships in the years to come. *(60 minutes.)*" App. 87–88.

that "[t]his film does appear to be church related and therefore your request must be refused." App. 84. The second application for permission to use school premises for showing the film series, which described it as a "Family oriented movie—from a Christian perspective," *id.*, at 91, was denied using identical language.

The Church brought suit in the District Court, challenging the denial as a violation of the Freedom of Speech and Assembly Clauses, the Free Exercise Clause, and the Establishment Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. As to each cause of action, the Church alleged that the actions were undertaken under color of state law, in violation of 42 U. S. C. § 1983. The District Court granted summary judgment for respondents, rejecting all the Church's claims. With respect to the free-speech claim under the First Amendment, the District Court characterized the District's facilities as a "limited public forum." The court noted that the enumerated purposes for which § 414 allowed access to school facilities did not include religious worship or instruction, that Rule 7 explicitly proscribes using school facilities for religious purposes, and that the Church had conceded that its showing of the film series would be for religious purposes. 770 F. Supp. 91, 92, 98–99 (EDNY 1991). The District Court stated that once a limited public forum is opened to a particular type of speech, selectively denying access to other activities of the same genre is forbidden. *Id.*, at 99. Noting that the District had not opened its facilities to orga-

nizations similar to Lamb's Chapel for religious purposes, the District Court held that the denial in this case was viewpoint neutral and, hence, not a violation of the Freedom of Speech Clause. *Ibid.* The District Court also rejected the assertion by the Church that denying its application demonstrated a hostility to religion and advancement of nonreligion not justified under the Establishment of Religion Clause of the First Amendment. 736 F. Supp. 1247, 1253 (1990).

The Court of Appeals affirmed the judgment of the District Court "in all respects." 959 F. 2d 381, 389 (CA2 1992). It held that the school property, when not in use for school purposes, was neither a traditional nor a designated public forum; rather, it was a limited public forum open only for designated purposes, a classification that "allows it to remain non-public except as to specified uses." *Id.*, at 386. The court observed that exclusions in such a forum need only be reasonable and viewpoint neutral, *ibid.*, and ruled that denying access to the Church for the purpose of showing its film did not violate this standard. Because the holding below was questionable under our decisions, we granted the petition for certiorari, 506 U. S. 813 (1992), which in principal part challenged the holding below as contrary to the Free Speech Clause of the First Amendment.[4]

II

There is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated. *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 46 (1983); *Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 129–130 (1981); *Greer* v. *Spock*, 424 U. S. 828, 836 (1976); *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966). It is also common ground that the District need not have permitted after-hours use of its property for any of the uses permitted by N. Y. Educ. Law § 414. The District, however, did open its property for 2 of the 10 uses permitted by § 414. The Church argued below that because under Rule 10 of the rules issued by the District, school property could be used for "social, civic, and recreational" purposes, the District had opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks. Hence, its view was that subject matter or speaker exclusions on District property were required to be justified by a compelling state interest and to be narrowly drawn to achieve that end. See *Perry*, *supra*, at 45; *Cornelius*, *supra*, at 800. Both the District Court and the Court of Appeals rejected this submission, which is also presented to this Court. The argument has considerable force, for the District's property is heavily used by a wide variety of private organizations, including some that presented a "close question," which the Court of Appeals resolved in the District's favor, as to whether the District had in fact already opened its property for religious uses. 959 F. 2d, at 387.[5] We need

[4] The petition also presses the claim by the Church, rejected by both courts below, that the rejection of its application to exhibit its film series violated the Establishment Clause because it and Rule 7's categorical refusal to permit District property to be used for religious purposes demonstrate hostility to religion. Because we reverse on another ground, we need not decide what merit this submission might have.

[5] In support of its case in the District Court, the Church presented the following sampling of the uses that had been permitted under Rule 10 in 1987 and 1988:

"A New Age religious group known as the 'Mind Center'
Southern Harmonize Gospel Singers
Salvation Army Youth Band
Hampton Council of Churches' Billy Taylor Concert
Center Moriches Co-op Nursery School's Quilting Bee
Manorville Humane Society's Chinese Auction
Moriches Bay Power Squadron

[Footnote 5 is continued on p. 392]

not rule on this issue, however, for even if the courts below were correct in this respect—and we shall assume for present purposes that they were—the judgment below must be reversed.

With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in

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Unkechaug Dance Group
Paul Gibson's Baseball Clinic
Moriches Bay Civic Association
Moriches Chamber of Commerce's Town Fair Day
Center Moriches Drama Club
Center Moriches Music Award Associations' 'Amahl & the Night Visitors'
Saint John's Track and Field Program
Girl Scouts of Suffolk [C]ounty
Cub Scouts Pack 23
Boy Scout Troop #414." 770 F. Supp. 91, 93, n. 4 (EDNY 1991).

The Church claimed that the first three uses listed above demonstrated that Rule 10 actually permitted the District property to be used for religious purposes as well as a great assortment of other uses. The first item listed is particularly interesting and relevant to the issue before us. The District Court referred to this item as "a lecture series by the Mind Center, purportedly a New Age religious group." *Id.*, at 93. The Court of Appeals described it as follows:

"The lecture series, 'Psychology and The Unknown,' by Jerry Huck, was sponsored by the Center Moriches Free Public Library. The library's newsletter characterized Mr. Huck as a psychotherapist who would discuss such topics as parapsychology, transpersonal psychology, physics and metaphysics in his 4-night series of lectures. Mr. Huck testified that he lectured principally on parapsychology, which he defined by 'reference to the human unconscious, the mind, the unconscious emotional system or the body system.' When asked whether his lecture involved matters of both a spiritual and a scientific nature, Mr. Huck responded: 'It was all science. Anything I speak on based on parapsychology, analytic, quantum physicists [sic].' Although some incidental reference to religious matters apparently was made in the lectures, Mr. Huck himself characterized such matters as 'a fascinating sideline' and 'not the purpose of the [lecture].'" 959 F. 2d, at 388.

light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U. S., at 806, citing *Perry Education Assn.*, *supra*, at 49. The Court of Appeals appeared to recognize that the total ban on using District property for religious purposes could survive First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral. The court's conclusion in this case was that Rule 7 met this test. We cannot agree with this holding, for Rule 7 was unconstitutionally applied in this case.[6]

The Court of Appeals thought that the application of Rule 7 in this case was viewpoint neutral because it had been, and would be, applied in the same way to all uses of school property for religious purposes. That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.

There is no suggestion from the courts below or from the District or the State that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted by Rule 10. That subject matter is not one that the District has placed off limits to any and all speakers. Nor is there any indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have

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[6] Although the Court of Appeals apparently held that Rule 7 was reasonable as well as viewpoint neutral, the court uttered not a word in support of its reasonableness holding. If Rule 7 were to be held unreasonable, it could be held facially invalid, that is, it might be held that the rule could in no circumstances be applied to religious speech or religious communicative conduct. In view of our disposition of this case, we need not pursue this issue.

been from a religious perspective. In our view, denial on that basis was plainly invalid under our holding in *Cornelius*, *supra*, at 806, that

> "[a]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."

The film series involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint. The principle that has emerged from our cases "is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 804 (1984). That principle applies in the circumstances of this case; as Judge Posner said for the Court of Appeals for the Seventh Circuit, to discriminate "against a particular point of view . . . would . . . flunk the test . . . [of] *Cornelius*, provided that the defendants have no defense based on the establishment clause." *May* v. *Evansville-Vanderburgh School Corp.*, 787 F. 2d 1105, 1114 (1986).

The District, as a respondent, would save its judgment below on the ground that to permit its property to be used for religious purposes would be an establishment of religion forbidden by the First Amendment. This Court suggested in *Widmar* v. *Vincent*, 454 U. S. 263, 271 (1981), that the interest of the State in avoiding an Establishment Clause violation "may be [a] compelling" one justifying an abridgment of free speech otherwise protected by the First Amendment; but the Court went on to hold that permitting use of university property for religious purposes under the open access policy involved there would not be incompatible with the Court's Establishment Clause cases.

We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental. As in *Widmar*, *supra*, at 271–272, permitting District property to be used to exhibit the film series involved in this case would not have been an establishment of religion under the three-part test articulated in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971): The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.[7]

The District also submits that it justifiably denied use of its property to a "radical" church for the purpose of proselytizing, since to do so would lead to threats of public unrest and even violence. Brief for Respondent Center Moriches

[7] While we are somewhat diverted by JUSTICE SCALIA's evening at the cinema, *post*, at 398–399, we return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled. This case, like *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987), presents no occasion to do so. JUSTICE SCALIA apparently was less haunted by the ghosts of the living when he joined the opinion of the Court in that case.

Union Free School District et al. 4–5, 11–12, 24. There is nothing in the record to support such a justification, which in any event would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject the District otherwise opens to discussion on District property.

We note that the New York State Attorney General, a respondent here, does not rely on either the Establishment Clause or possible danger to the public peace in supporting the judgment below. Rather, he submits that the exclusion is justified because the purpose of the access rules is to promote the interests of the public in general rather than sectarian or other private interests. In light of the variety of the uses of District property that have been permitted under Rule 10, this approach has its difficulties. This is particularly so since Rule 10 states that District property may be used for social, civic, or recreational use "only if it can be non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event." App. to Pet. for Cert. 57a. At least arguably, the Rule does not require that permitted uses need be open to the public at large. However that may be, this was not the basis of the judgment that we are reviewing. The Court of Appeals, as we understand it, ruled that because the District had the power to permit or exclude certain subject matters, it was entitled to deny use for any religious purpose, including the purpose in this case. The Attorney General also defends this as a permissible subject-matter exclusion rather than a denial based on viewpoint, a submission that we have already rejected.

The Attorney General also argues that there is no express finding below that the Church's application would have been granted absent the religious connection. This fact is beside the point for the purposes of this opinion, which is concerned with the validity of the stated reason for denying the

Church's application, namely, that the film series sought to be shown "appeared to be church related."

For the reasons stated in this opinion, the judgment of the Court of Appeals is

Reversed.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

Given the issues presented as well as the apparent unanimity of our conclusion that this overt, viewpoint-based discrimination contradicts the Speech Clause of the First Amendment and that there has been no substantial showing of a potential Establishment Clause violation, I agree with JUSTICE SCALIA that the Court's citation of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), is unsettling and unnecessary. The same can be said of the Court's use of the phrase "endorsing religion," see *ante*, at 395, which, as I have indicated elsewhere, cannot suffice as a rule of decision consistent with our precedents and our traditions in this part of our jurisprudence. See *Allegheny County* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 655 (1989) (opinion concurring in judgment in part and dissenting in part). With these observations, I concur in part and concur in the judgment.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I join the Court's conclusion that the District's refusal to allow use of school facilities for petitioners' film viewing, while generally opening the schools for community activities, violates petitioners' First Amendment free-speech rights (as does N. Y. Educ. Law §414 (McKinney 1988 and Supp. 1993), to the extent it compelled the District's denial, see *ante*, at 386–387). I also agree with the Court that allowing Lamb's Chapel to use school facilities poses "no realistic danger" of a violation of the Establishment Clause, *ante*, at

dates or invalidates the government action in question—and therefore cannot join the opinion of the Court today.*

I cannot join for yet another reason: the Court's statement that the proposed use of the school's facilities is constitutional because (among other things) it would not signal endorsement of religion in general. *Ante*, at 395. What a strange notion, that a Constitution which *itself* gives "religion in general" preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general. The attorney general of New York not only agrees with that strange notion, he has an explanation for it: "Religious advocacy," he writes, "serves the community only in the eyes of its adherents and yields a benefit only to those who already believe." Brief for Respondent Attorney General 24. That was *not* the view of those who adopted our Constitution, who believed that the public virtues inculcated by religion are a public good. It suffices to point out that during the summer of 1789, when it was in the process of drafting the First Amendment, Congress enacted the Northwest Territory Ordinance that the Confederation Congress had adopted in 1787—Article III of which provides: "Religion, morality, and knowledge, *being necessary to good government and the happiness of mankind*, schools and the means of education shall forever be encouraged." Unsurprisingly, then, indifference to "religion in general" is *not* what our cases, both old and recent, demand. See, *e. g.*, *Zorach* v. *Clauson*, 343 U. S. 306, 313–314 (1952) ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions"); *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664 (1970) (upholding property tax exemption for church property); *Lynch*, 465 U. S., at 673 (the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions . . . . Anything less would require the 'callous indifference' we have said was never intended" (citations omitted)); *id.*, at 683 ("[O]ur precedents plainly contemplate that on occasion some advancement of religion will result from governmental action"); *Marsh*, *supra*; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987) (exemption for religious organizations from certain provisions of Civil Rights Act).

* * *

For the reasons given by the Court, I agree that the Free Speech Clause of the First Amendment forbids what respondents have done here. As for the asserted Establishment Clause justification, I would hold, simply and clearly, that giving Lamb's Chapel nondiscriminatory access to school facilities cannot violate that provision because it does not signify state or local embrace of a particular religious sect.

*The Court correctly notes, *ante*, at 395, n. 7, that I joined the opinion in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987), which considered the *Lemon* test. Lacking a majority at that time to abandon *Lemon*, we necessarily focused on that test, which had been the exclusive basis for the lower court's judgment. Here, of course, the lower court did not mention *Lemon*, and indeed did not even address any Establishment Clause argument on behalf of respondents. Thus, the Court is ultimately correct that *Presiding Bishop* provides a useful comparison: It was as impossible to avoid *Lemon* there, as it is unnecessary to inject *Lemon* here.

Srrfral

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL, and JACK ROBERTS, Plaintiffs, -against- COMMUNITY SCHOOL DISTRICT No. 10, and CHARLES WILLIAMS, in his official capacity as President of the Board of Education for Community School District # 10, Defendants.

95 Civ. 5501 (LAP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1996 U.S. Dist. LEXIS 18044

December 5, 1996, Decided
December 5, 1996, FILED

DISPOSITION: [*1] Plaintiffs' motion for summary judgment denied, and defendants' cross-motion for summary judgment granted.

COUNSEL: For THE BRONX HOUSEHOLD OF FAITH, plaintiff: Joseph P. Infranco, Migliore & Infranco, P.C., Commack, NY. For JACK ROBERTS, plaintiff: Joseph P. Infranco, (See above).

For COMMUNITY SCHOOL DISTRICT NO. 10, defendant: Patricia B Miller, O. Peter Sherwood, New York, NY. For CHAS. CHARLES WILLIAMS, in his official capacity as President of the Board of Education for Community School Board District No. 10, defendant: Patricia B Miller, (See above). For THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, defendant: Patricia B Miller, (See above).

JUDGES: LORETTA A. PRESKA, U.S.D.J.

OPINIONBY: LORETTA A. PRESKA

OPINION: MEMORANDUM AND ORDER

LORETTA A. PRESKA, District Judge:

This action arises from defendants' denial of plaintiffs' request to rent the Merseau Middle School for religious worship. Plaintiffs Bronx Household of Faith, Robert Hall and Jack Roberts allege that Community School District # 10 ("School District") in the Bronx has violated the Free Exercise and Free Speech Clauses of the First Amendment, the Equal Protection Clause, and the Religious Freedom Restoration [*2] Act by denying them use of Public School M.S. 206B for

religious worship. The parties have cross-moved for summary judgment. For the reasons stated below, plaintiffs' motion is denied, and defendants' cross-motion is granted.

BACKGROUND

Responding to a need for a larger building in which parishioners could convene on Sunday mornings, the evangelical Christian church, Bronx Household of Faith, sought permission to rent M.S. 206B, Anne Cross Merseau Middle School in September of 1994. (P11 Joint Stipulation of Facts ("Stip.")). The School District denied the church permission based on its "Standard Operating Procedures: Topic 5: Regulations Governing the Extended Use of School Facilities" ("SOP") and New York Education Law @ 414 (McKinney's 1995), both of which prohibit rental of school property for the purpose of religious worship. (Stip. PP 15-16)

The SOP sets out a hierarchy of permitted uses. "The primary use of school premises must be for Board of Education programs and activities." (SOP5.3) "After Board of Education Programs and activities, preference will be given to use of school premises for community, youth and adult group activities." (SOP5.5) In addition to these [*3] uses and uses where admission, donations and the like are collected, Section 5.6 states that school premises may also be used for the following purposes:

5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations.

5.6.2 For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be nonexclusive and open to the general public.

5.6.3. For polling places for holding primaries, elections and special elections for the registration of voters; and for holding political meetings where representatives of different viewpoints may be heard; but no meetings sponsored by political organizations shall be permitted unless expressly authorized by a vote of the Board of Education.

5.6.4 For civic forums and community centers in accordance with applicable law.

5.6.5 For recreation, physical training and athletics, including competitive contests of children attending nonpublic, nonprofit schools.

5.6.6 For such other uses as may be authorized by law.

(Stip. P 6) Specifically, section 5.9 provides:

No outside organization [*4] 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 purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

(Stip. P 15) Section 5.8 also restricts commercial use of school premises.

Similarly, New York Education Law @ 414 permits use of school facilities for meetings, with the following exception:

such use shall not be permitted if such meeting, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization . . . .

(SOP 5.9)

During the 1994-95 school year, the School District permitted a variety of groups to use the school facilities for the enumerated purposes. Although the School District did permit the Grace Lutheran Church to rent the school, the church rented the school not for religious worship but for conducting a program [*5] on Black History Month (Stip. P 7), a use entirely consistent with the enumerated purposes in SOP5. The School District has never, in fact, rented the school facilities for the purposes of either religious worship or religious instruction. (Stip. P 18)

After the Bronx Household's second request to rent the space and have the School District policy changed, pastors Robert Hall, Jack Roberts and the Bronx Household brought suit in the Supreme Court of the State of New York, County of the Bronx, under 42 U.S.C. @ 1983. The School District then removed the case to federal court. Plaintiffs moved, and defendants cross-moved for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. For the following reasons, plaintiffs' motion is denied and defendants' cross-motion is granted.

DISCUSSION

Under Rule 56(c), "[a] motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law." Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 36 (2d Cir. 1994); see Fed. R. Civ. P. [*6] 56(c). See generally Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). An issue of fact is genuine when "a reasonable jury could return a verdict for the nonmoving party," and facts are material to the outcome of the particular litigation if application of the relevant substantive law requires their determination. Anderson, 477 U.S. at 248.

"A party who moves for summary judgment has the burden of showing that no genuine issue of material fact exists and that the undisputed facts entitle it to judgment as a matter of law." Rule v.

Brine, Inc., 85 F.3d 1002, 1011 (2d Cir. 1996); accord Chambers, 43 F.3d at 36. "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial," however, "the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 [*7] (2d Cir. 1995); accord Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223-24 (2d Cir. 1994) ("The moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case."). The moving party, in other words, does not bear the burden of disproving an essential element of the nonmoving party's claim.

If the moving party meets its burden, the burden shifts to the nonmoving party to come forward with "affidavits, depositions, or other sworn evidence as permitted by Fed. R. Civ. P. 56, setting forth specific facts showing that there exists a genuine issue of material fact." Rule, 85 F.3d at 1011; accord Fed. R. Civ. P. 56(e); Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 525-26 (2d Cir. 1994). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.

Instead, the nonmovant must "'come forward with enough evidence to support a jury verdict in its favor, and the motion will not be defeated merely . . . on the basis of conjecture or surmise.'" Trans Sport v. Starter Sportswear, 964 F.2d 186, [*8] 188 (2d Cir. 1992) (citation omitted).

"In ruling on a motion for summary judgment, the district court is required to draw all factual inferences in favor of, and take all factual assertions in the light most favorable to, the party opposing summary judgment." Id.; accord Chambers, 43 F.3d at 36. "The function of the district court in considering the motion for summary judgment is not to resolve disputed issues of fact but only to determine whether there is a genuine issue to be tried." Rule, 85 F.3d at 1011. Accordingly, "assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment." Id. Similarly, "any weighing of the evidence is the prerogative of the finder of fact." Id. "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." Chambers, 43 F.3d at 37 (emphasis added).

I. Plaintiffs' Free Speech Claim

Plaintiffs challenge the constitutionality of SOP5 on the grounds that SOP5 prohibits them from [*9] renting public property, namely the middle school, for religious worship, thereby violating their First Amendment right to free speech. Additionally, plaintiffs challenge the constitutionality of New York Education Law @ 414, pursuant to which SOP5 was promulgated, on the same grounds.

The extent to which government may regulate expressive activity on public property depends upon the character of the public property in question. See Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44, 103 S. Ct. 948, 954, 74 L. Ed. 2d 794 (1984). The Supreme Court has recognized three possible classifications for publicly-owned property and has

articulated the extent to which expressive activity may be regulated on each. See Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 802, 105 S. Ct. 3439, 3448, 87 L. Ed. 2d 567 (1985).

With respect to the first category of public property, "traditional public fora," the state's power to regulate expressive activity is most limited. "Traditional public fora" include streets and parks -- those areas that "have immemorially been held in trust for the use of the public . . . and have been used for purposes of [*10] assembly, communicating thoughts between citizens and discussing public questions." Hague v. CIO, 307 U.S. 496, 515, 59 S. Ct. 954, 964, 83 L. Ed. 1423 (1939). Any content-based regulation of a traditional public forum is enforceable only when "necessary to serve a compelling state interest" and must be "narrowly drawn" to serve that purpose. Perry, 460 U.S. at 45, 103 S. Ct. at 955.

The second category of public property includes "public property which the state has opened for use by the public as a place for expressive activity." Perry, 460 U.S. at 46. A nonpublic forum generally refers to property that is not open for communicative purposes "either by tradition or by designation." Lamb's Chapel v. Center Moriches Un. Free Sch. Dist., 959 F.2d 381 (2d Cir. 1992) (citing Perry, 460 U.S. at 46, 103 S. Ct. at 955), rev'd on other grounds, 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). The government may transform such property into a public forum, however, by designating it for communicative purposes. A public elementary school, for example, although public property, is a nonpublic forum with respect to the general community. See Deeper Life Christian [*11] Fellowship v. Board of Educ., 852 F.2d 676, 679 (2d Cir. 1988) (citing Brandon v. Board of Educ., 635 F.2d 971, 980 (2d Cir. 1980), cert. denied, 454 U.S. 1123, 102 S. Ct. 970, 71 L. Ed. 2d 109 (1981)). The state may transform an elementary school into a traditional forum by opening it to the public, either by policy or practice, for communicative purposes. Although the state is never obligated to open a nonpublic forum, once it does, any regulation is subject to the same scrutiny as that governing a traditional forum. Fighting Finest, Inc. v. Bratton, 1996 U.S. App. LEXIS 28748, No. 95-9042, slip op. 7935, 7944-45 (2d Cir. Sept. 9, 1996).

The third category of public property is the designated or "limited public forum." Within this category "property remains a nonpublic forum as to all unspecified uses and exclusion of uses." Deeper Life, 852 F.2d at 679-80 (citations omitted). Any regulation of expressive activity in a nonpublic forum need only be reasonably related to a legitimate government concern. See International Soc'y For Krishna Consciousness v. Lee, 925 F.2d 576, 580 (2d Cir. 1991), cert. granted, 502 U.S. 1022, 112 S. Ct. 855 (1992). The regulation "need only be viewpoint [*12] neutral to pass constitutional muster." Cornelius, 473 U.S. at 802, 105 S. Ct. 948, 956 (1983); Perry, 460 U.S. at 47 ("The State may reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."). Thus, the state is free to transform a nonpublic forum into a public forum for certain subjects of expression or activity. Once it opens up a nonpublic forum for expression on a particular topic or designated range of topics, however, it may not discriminate based on the viewpoint of any speaker on a permissible topic. See Rosenberger v. Rector & Visitors of Univ. of Va., 132 L. Ed. 2d 700, U.S. , 115 S. Ct. 2510

(1995) (stating that viewpoint discrimination is impermissible "when directed against speech otherwise within the forum's limitations").

To determine whether the denial of the Bronx Household's request to use the school for religious worship is constitutionally permissible, I must determine, as a threshold matter, which type of forum is involved. Although a grade school is generally considered a nonpublic forum, [*13] see Deeper Life, 852 F.2d at 679, through SOP5 the School District has transformed the school into either a public forum or a limited public forum. To determine which type of forum has been created, I look not only to New York Education Law @ 414 and SOP5 but also to the practices and the intent of the school in creating the forum. See Fighting Finest, Inc. v. Bratton, 1996 U.S. App. LEXIS 28748, No. 95-9042, slip op. 7935, 7947 (listing factors determining which forum has been created, including nature of the property, intent, and conditions of access).

The first prong of the inquiry entails an examination of the laws governing this forum. Plaintiff contends that the language of SOP5 is so broad that virtually every topic is permissible except religious worship. Neither SOP5 nor NY Educ. Law @ 414, however, designates a public forum excluding solely religious worship. The language of SOP5, which tracks that of @ 414, creates a hierarchy of permissible uses that clearly prioritizes use of school premises for Board of Education programs and excludes virtually all exclusive organizations. n1 Section 5.9 prohibits "religious services or religious instruction," and Section 2.11 extends this prohibition [*14] to virtually all exclusive groups through the following language:
Such permit shall not be permitted if such meetings are under the exclusive control . . . of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization, other than organizations of veterans and volunteer firemen.

----------Footnotes----------

n1 Despite the apparent variety of subject matter for which SOP5 provides access, it is not all-encompassing. At oral argument, plaintiffs' counsel suggested that the SOP's permitting social, civic and other community welfare topics must, by its very breadth, be read to encompass religious worship, and the prohibition on religious worship removed. He noted, inter alia, that churches do more for the welfare of the community than many of the other entities and activities which have been accepted by the School District. Historically and constitutionally in this country, however, religion cannot be lumped with other social, civic and community welfare activities. From our earliest Pilgrim forefathers, it has been the tradition in this country for government and religion to remain separate. Establishment Clause, U.S. Constitution. Therefore, the assumption that broadly stated purposes such as "civic" and "community" must also encompass "religious" is unfounded.

----------End Footnotes---------- [*15]

Such exclusive societies presumably could not serve the community in the same manner that nonexclusive social, civic and cultural groups would. Under New York Education Law @ 414, pursuant to which SOP5 was promulgated, "access to the school property is permitted only where it serves the interests of the public in general, rather than that of sectarian groups." See Deeper Life Christian Fellowship, 852 F.2d at 680. Therefore, because SOP and New York Education Law @ 414 clearly limit access to the school to those purposes enumerated and effectively prohibit use by all exclusive groups, SOP5 and New York Education Law @ 414 indicate the creation of a limited public forum and not a public forum.

The next step of our inquiry necessitates a close scrutiny of the practices of the School District in applying the SOP. The facts as to the School District's past practice are not in dispute. Paragraphs seven, eight and ten of the Stipulated Facts list the non-school groups that have met in schools within the School District during the 1994-95 school year. All the meetings, including those held by the Bronx Household and other churches and religious-affiliated groups, were for activities [*16] expressly authorized by SOP5. As the parties have stipulated, none of the meetings was for religious worship. (Stip. P 8) Thus, the School District's past practices indicate the creation of a limited public forum.

The last step of the forum analysis requires a careful assessment of the School District's intent in opening access to the school to non-school groups. See Longo v. U.S. Postal Service, 953 F.2d 790 (2d Cir. 1992) ("The government does not create a public forum through unconscious, unspoken practices or by permitting limited discourse but 'only by intentionally opening a nontraditional forum for public discourse.'"). The past practices of the School District are one indicia of its intent. See Deeper Life Christian Fellowship v. Board of Educ. 852 F.2d 676 (2d Cir. 1988) (citations omitted) (stating that the intent of the school in creating a forum "is a fact-oriented inquiry, and the past practice of the School Board in regard to its use of the property at issue is a proper consideration in that inquiry"). The School District's past practices reveal no intent to create an open forum. The SOP is the only other indicium of the School District's intent. Because the [*17] School District has never deviated from the purposes enunciated in the SOP, it cannot be said to have evinced any intent other than that intent embodied in SOP. Although the SOP establishes relatively broad categories of permissible uses, the restriction contained in SOP5.9 as well as the explicit restrictions contained in section 2 of the SOP n2 indicate an intent to limit access to the forum.

----------Footnotes----------

n2 Plaintiffs' counsel conceded at oral argument that this section is "rife with restrictions."

----------End Footnotes----------

Examining the SOP, New York Education Law @ 414, the past practices and the intent of the School District, I find that the School District has created a limited public forum, and not a public forum. Because the School District has created a limited forum, any regulation of that forum need only be reasonably related to a legitimate government concern. Perry, 460 U.S. at 47.

The language of both SOP5 and New York Education Law @ 414 strongly suggests that the restrictions exist to preserve the nonexclusive nature of the [*18] property. I find that SOP5 and New York Education Law @ 414 constitute reasonable regulations of expression related to the legitimate government concern of preserving and prioritizing access to the middle school primarily for educational purposes and, secondarily, for nonexclusive public and community activities.

II. Plaintiffs' Establishment Clause Claim

Plaintiffs claim that SOP5 and New York Education Law @ 414 violate the Establishment Clause of the First Amendment because the denial of access to the school premises inhibits the Bronx Household from practicing its religion. Under the Establishment Clause of the First Amendment to the Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Plaintiffs assert that the government has a "duty to accommodate" religious speech in a public forum and that such accommodation does not violate the Establishment Clause. Because I find that the state has not created a public forum and thus must demonstrate only a legitimate purpose to justify its ban of exclusive groups and has done so, I need not address this argument.

III. Plaintiffs' Equal Protection [*19] Claim

Plaintiffs also assert that a content based restriction of free speech in a public forum violates the Equal Protection Clause. Plaintiffs urge me to review SOP5 and Education Law @ 414 under a standard of strict scrutiny. Because the plaintiffs' argument is premised on the existence of an open forum, I need not address this contention either.

CONCLUSION

Because I find that SOP and New York Education Law @ 414, together with the practices and intent of the School District in question create a limited public forum and not a public forum, plaintiffs' motion for summary judgment is denied, and defendants' cross-motion for summary judgment is granted.

Dated: New York, New York

December 5, 1996

LORETTA A. PRESKA, U.S.D.J.

LEVEL 1 - 1 OF 1 CASE

FULL GOSPEL TABERNACLE and JORGE VEGA, Plaintiffs, -against- COMMUNITY SCHOOL DISTRICT 27, COMMUNITY SCHOOL BOARD 27 OF THE CITY OF OZONE PARK, MICHAEL WEITZ, in his official capacity as Principal of Public School 105 Queens, SHEILA MCELHATTEN, in her official capacity Secretary to the Director of Operations, BRENDA ISAACS, in her capacity as Community Superintendent of Community School District 27, KENNETH L. GROVER, in his official capacity as Deputy Superintendent of Community School District 27, JAMES EGAN, DONNA MARIE CALTABIANO, ERNEST BROWN, SHALOM BECKER, JAMES G. ADAMS, RICHARD J. ALTABE, GERALDINE CHAPEY, STEVEN GREENBERG, and JAMES SANDERS, JR., in their official capacity as members of Community School Board 27, and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF NEW YORK, Defendants, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Intervenor.

94 Civ. 7906 (CSH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

979 F. Supp. 214; 1997 U.S. Dist. LEXIS 14522

September 24, 1997, Decided

September 24, 1997, Filed

DISPOSITION: [**1] Plaintiffs' motion for summary judgment denied and defendants' cross-motion for summary judgment granted. Plaintiffs' motion for preliminary injunction denied. Complaint dismissed with prejudice.

COUNSEL: For Plaintiffs: JOSEPH P. INFRANCO, ESQ., Commack, NY.

For Plaintiffs: MARK N. TROOBNICK, ESQ., THE AMERICAN CENTER FOR LAW AND JUSTICE, Washington, D.C.

For Defendants: ALAN M. SCHLESINGER, Assistant Corporation Counsel, Of Counsel, PAUL A. CROTTY, Corporation Counsel of the City of New York, New York, NY.

For Attorney General, Intervenor: JEFFREY I. SLONIM, Assistant Attorney General, Of Counsel, DENNIS C. VACCO, Attorney General of the State of New York, New York, NY.

JUDGES: CHARLES S. HAIGHT, JR., U.S.S.D.J.

OPINIONBY: CHARLES S. HAIGHT, JR.

OPINION: [*215] MEMORANDUM OPINION AND ORDER

HAIGHT, Senior District Judge:

Plaintiffs, a church and its pastor, n1 seek access after school hours to a public school located in Community School District 27 to conduct religious worship services. Defendants, the Board of Education of the School District of the City of New York ("Board of Education"), Community School District 27, and certain of its officers and employees, have denied plaintiffs [**2] access to school facilities on the ground that N.Y. Educ. Law § 414, and the Board of Education's policy implementing that law, prohibit the use of school facilities for religious worship services. Plaintiffs initiated this suit pursuant to 42 U.S.C. § 1983, alleging that the defendants' policy, and the law on which it is based, violate the First and Fourteenth Amendments to the United States Constitution.

n1 Plaintiffs' motion to substitute Jorge Vega, the new pastor of Full Gospel Tabernacle, for Robert Castro as a party to this action is granted. The Clerk of the Court is directed to amend the case caption accordingly.

Plaintiffs now move for summary judgment granting them the relief they seek in their complaint, namely, a declaratory judgment and permanent injunction preventing the defendants from denying plaintiffs access to school district facilities because they intend to use those facilities to hold religious worship ser-

vices. The defendants cross-move for summary judgment, asserting that § 414 is [**3] constitutional on its face and as applied to the plaintiffs. Defendants also argue that allowing the plaintiffs to use public school facilities for religious worship services would violate the Establishment Clause of the First Amendment.

[*216] For the reasons set forth below plaintiffs' motion is denied and defendants' motion is granted.

I.

Under Fed. R. Civ. P. 56(c), the moving party is entitled to summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering such a motion, "a district judge must view the evidence in the light most favorable to the non-moving party and must draw all inferences in favor of that party." Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 382 (2d Cir. 1996). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Accordingly, summary judgment [**4] is warranted where, "after adequate time for discovery . . . [the nonmoving party] fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

II.

The following facts are undisputed.

Full Gospel Tabernacle ("Full Gospel") is a Christian church currently meeting in a building owned by the church in Far Rockaway, New York. In late April 1994, Full Gospel determined that an alternative venue was needed for Sunday worship services to accommodate the church's growing membership. Accordingly, on May 6, 1994, Reverend Robert Castro, the pastor of Full Gospel Tabernacle, filed an application with Public School 105 Queens ("P.S. 105"), a school located within Community School District 27 ("CSD 27"), to rent the school's auditorium, classrooms, and cafeteria for each Sunday in June. Kenneth Grover, Deputy Superintendent of CSD 27, denied the application on May 16, 1994, citing Board of Education Standard Operating Procedure 5.9 (hereinafter referred to as "SOP 5.9"), which provides in part [**5] that "no outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school." n2

n2 The full text of SOP 5.9 is as follows:

> 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 purpose of discussing religious material or material which contains religious viewpoint or for distributing such material is permissible.
>
> This regulation purports to implement N.Y. Educ. § 414, see infra.

Reverend Castro applied again in late May 1994 to use the facilities of P.S. 105 every Sunday in July. Again his application was denied. Full Gospel then retained legal counsel, and filed the instant action on November 2, 1994.

Through discovery, plaintiffs learned that several other churches in the area had been allowed to conduct religious activities in school district buildings [**6] after school hours pursuant to permits issued by CSD 27. n3

n3 The following organizations were also granted permits to use school facilities after school hours: American Legion for a County Convention Awards Assembly; Dance Dimension for dance recital rehearsals; the Department of Sanitation for basketball; Belle Harbor Property Owners Association for a Board of Directors Meeting; Rockaway Action for Mural Painting; Mercaz Hatorah for a basketball program; Congressman Schumer for a Town Hall meeting; Queens Kiwanis Club Girls Softball Team; Tappin-Feet for a dance recital; Local 372 for a union meeting; LWG Co-op Inc. for a shareholder's meeting; ARYA SAMAJ USA for a cultural evening; Eye of Tiger Karate for a karate tournament. CSD 27 has also granted permits to the Church of St. Paul, the New Hope Baptist Church, the Salvation Tabernacle and the Way of Life Gospel Center for gospel recitals. A permit was also issued to Rabbi Shlomo Volner for a Purim party. Pl. Rule 3(g) Stmt., P 10.

In October 1993, CSD 27 [**7] granted Rita Speller, pastor of the Deliverance Temple Church, a permit to hold a Halloween party at P.S. 155. Following the Halloween party, Reverend Speller applied for, and received, [*217] permits to use the school facilities on Sundays and some weekday evenings almost every week from November 1993 through November 1994. Although Reverend Speller's initial application listed the activity as a Halloween party, no description of the activities to be conducted was included on subsequent permit application forms, and according to Reverend Speller's testimony, no one from the school district ever inquired about her intended use of the facilities. Speller Dep. at 18. Each permit was approved by Sheila McElhatten, secretary to the Director of Operations for CSD 27.

Reverend Speller testified that she used the school facilities to conduct the worship services of the Deliverance Temple Church. Speller Dep. at 26-27. On Sundays she would preach, teach the Bible to her congregation and engage in prayer. Speller Dep. at 7-8. On weekday evenings the facilities were used for a variety of activities, including a religious play, inspirational music and dance, and Bible discussion groups. Speller Dep. [**8] at 9-12. In November 1994, Reverend Speller was told she could no longer use the school's facilities because it had come to the attention of school officials that she was conducting religious services on the premises. Speller Dep. at 23.

In June and July 1994, CSD 27 granted Lisa and Rubin Mitchell, pastors of the Jesus Family Fellowship, permits to use the auditorium of Junior High School 198 every Tuesday and Sunday in July and August 1994. Reverend Lisa Mitchell described the five services they held at JHS 198 as follows:

> We would come in and have what's called a group prayer, congregational prayer. Then we would go into praise and worship, sing different praise and worship songs accompanied by music. From there, Reverend Mitchell, he would get up and deliver the message, the service for that evening.

Mitchell Dep. at 12. Following Reverend Mr. Mitchell's sermon, the Reverends would engage in an "altar call," where they would "invite someone to receive the Lord as their Savior." Mitchell Dep. at 12. The service would then conclude with a closing prayer. Mitchell Dep. at 12. On Sundays, the Mitchells would also conduct religious instruction for children. Mitchell [**9] Dep. at 15.

The Mitchells testified that they informed McElhatten at the time they applied for the permit that they intended to use the school facilities for church services. Mitchell Dep. at 41. According to their testimony, McElhatten granted them a permit anyway, after concluding that the Mitchells' intended purpose fell within the second sentence of SOP 5.9, which allows use of school facilities for the "purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material . . . ." Mitchell Dep. at 68. However, on July 21, 1994, Kenneth Grover, deputy superintendent of CSD 27, informed the Mitchells that their permit was rescinded effective immediately, citing SOP 5.9. When the Mitchells demanded an explanation, they were told that McElhatten had issued the permit in error. Mitchell Dep. 55-62.

The district does not deny that these incidents occurred. However, it contends that these permits were erroneously approved due to flaws in the permit application process which have been remedied since a new Director of Operations was hired in September 1994.

Typically, an application to use school facilities after school hours is [**10] first reviewed by the custodian and the principal for the school which the organization seeks to use. Brawer Decl., P 8-10. The application is then forwarded to the district office for review and possible approval. Brawer Decl., P 10. Through the fall of 1994, this review at the district level was performed by McElhatten as secretary to the Director of Operations for CSD 27. Brawer Decl., P 11.

However, for most of 1994, the position of Director of Operations for CSD 27 was vacant. Brawer Decl., P 7. When a new Director of Operations was hired for CSD 27 in September 1994, he discovered that McElhatten had granted several permits without any description of the activity and, in some cases, like those described above, for uses not permitted by Board of Education regulations. Brawer Decl., P 12. To remedy this problem on a temporary basis, Grover instructed [*218] McElhatten in the Fall of 1994 to forward any unusual applications to his office for review. Brawer Decl., P 13.

Since December 1994, the Director of Operations for CSD 27 reviews all permit applications personally, to ensure that all activities are fully described on the application and that no application is granted for an activity [**11] prohibited by Board of Education regulations. Brawer Decl., P 20. In addition, a memorandum was sent to all principals and

custodians in the district reminding them that SOP 5.9 prohibits the use of school facilities for religious worship services. Brawer Decl., P 23. Since enacting these procedures, the district has been successful in ensuring that school facilities are not used for religious worship services or instruction, and permits have been denied when such use was requested. Brawer Decl., P 26.

Regardless, plaintiffs argue that the district's refusal to give Full Gospel access to school district facilities for religious worship services, in light of the other religious and secular activities which have taken place in school district buildings, violates the Free Speech Clause and the Free Exercise Clause of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. In response, defendants argue that the district's policy and § 414 are constitutional on their face, and as applied to the plaintiffs, and that granting plaintiffs the relief they request would violate the Establishment Clause of the First Amendment.

III.

"Nothing in the Constitution requires [**12] the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 799-800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). In recognition of this principle, the Supreme Court has articulated a forum analysis, identifying three categories of public property for free speech purposes. An individual's right to speak on public property is thus "largely dependent on the nature of the forum in which the speech is delivered." Bronx Household of Faith v. Community School District No. 10, 127 F.3d 207, 1997 WL 567035, *3 (2d Cir. 1997).

First, there are traditional public forums, such as streets and parks, which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). The [**13] second category, referred to in the caselaw as designated public forums, "consists of public property which the State has opened for use by the public as a place for expressive activity." Id. Content-based exclusions from both traditional and designated public forums must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. 460 U.S. at 45-46. The third category, non-public forums, includes public property which is not by tradition or designation a forum for public communication. Perry, 460 U.S. at 46.

In addition, the Second Circuit has recognized a sub-set of designated public forums termed limited public forums. See, e.g., Deeper Life Christian Fellowship v. Board of Education, 852 F.2d 676, 679 (2d Cir. 1988). This sub-category includes property designated by the government for use by certain groups or for the discussion of certain subjects. Perry, 460 U.S. at 46 n.7; Cornelius, 473 U.S. at 802. As to those particular groups and subjects, the forum is an open one, and any regulation based on content must be narrowly tailored to serve a compelling government interest. Perry, 460 U.S. at 46. However, "under the limited public [**14] forum analysis, property remains a nonpublic forum as to all unspecified uses, and exclusion of uses -- even if based upon subject matter or the speaker's identity -- need only be reasonable and viewpoint-neutral to pass constitutional muster." Deeper Life, 852 F.2d at 679-80 (citations omitted). "Where the proposed use falls outside of the limited forum, the State is subject [*219] to only minimal constitutional scrutiny." Bronx Household of Faith, 127 F.3d 207, 1997 WL 567035, at *3 (citations and internal quotations omitted).

Both parties agree that a public elementary school is not a traditional public forum. See Deeper Life, 852 F.2d at 679 ("Public elementary schools are not, as to the general community, traditional public fora."). However, plaintiffs argue that CSD 27 school facilities have become designated public forums, either by virtue of § 414 or by the school district's practice of allowing a wide variety of secular and religious groups to use the facilities on a regular basis. Defendants dispute this characterization of the school facilities and argue that the facilities are only limited public forums, from which certain subjects, including religious worship services, have been [**15] constitutionally excluded. Since the level of scrutiny applied to plaintiffs' claims depends on the type of forum at issue, I must first resolve this threshold dispute.

Plaintiffs argue that § 414 of the New York Education Law designates public school facilities as open public forums. In support of this argument, plaintiffs quote portions of the statute, which states that school facilities may be used for "the purpose of instruction in any branch of education, learning or the arts" and for "holding social, civic

and recreational meetings and entertainments, and other uses pertaining to the welfare of the community . . . ." N.Y. Educ. Law § 414(a), (c). According to plaintiffs, this broad language reflects the legislature's intent to designate public schools as open public fora.

However, the statute also specifically lists eight categories of permissive use. N.Y. Educ. Law § 414 (a)-(j). If the language quoted by the plaintiffs, standing alone, created an open public forum, the remainder of the statute would be rendered meaningless. It is well-settled that reading a statute in this manner is disfavored. Allen Oil Co. v. Commissioner of Internal Revenue, 614 F.2d 336, 339 (2d [**16] Cir. 1980) ("Normally, a statute must if reasonably possible, be construed in a way that will give force and effect to each of its provisions rather than render some of them meaningless.").

Moreover, a number of activities are specifically excluded from the list of permissible purposes. n4 For example, school facilities may not be used for meetings or entertainment which are exclusive or not open to the general public, or which are being held for a commercial purpose. N.Y. Educ. Law § 414 (c)-(d). In addition, meetings sponsored by political organizations are not permitted unless specifically authorized by the district or the board of education. N.Y. Educ. Law § 414 (e). While a public school can be used for graduation exercises held by not-for-profit schools, that use is [*220] conditioned upon no religious service being performed. § 414(j); see n.4 supra.

n4 A more complete excerpt of § 414 follows:

> The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:
> (a) For the purpose of instruction in any branch of education, learning or the arts.
> (b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.
> (c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.
> (d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization . . . .
>
> The statute goes on to authorize use of public schools as polling places, and for civic forums and community centers, places of instruction for the mentally retarded, athletics, child care services during non-school hours, and "graduation exercises held by not-for-profit schools, provided that no religious service is performed." § 414 (e)-(j) (emphasis added).

[**17]

Thus, reading the statute as a whole, I conclude that § 414 does not designate public school facilities as open public forums, but rather creates a limited public forum. This conclusion is reinforced by school district policy, expressed in SOP 5.9, which specifically excludes religious worship services as a permissible use. See Bronx Household of Faith, 1997 WL 567035, at *5 (holding that the limitation imposed by SOP 5.9 "is characteristic of a limited forum, for it represents the exercise of the power to restrict a public forum to certain speakers and to certain subjects.").

In the alternative, plaintiffs argue that defendants have created an open forum by practice by allowing a wide variety of secular and religious groups to use the school district's facilities on a regular basis. I find this argument unpersuasive, given the uncontested facts presented on this motion.

In Perry, 460 U.S. at 39, the plaintiffs, a rival teachers' union, challenged the elected union's exclusive right of access to school mail facilities. In support of their access claim, plaintiffs argued that the school mail facilities had become an open forum because of the "periodic use of the system by [**18] private non-school-connected groups . . . ." Id. at 47. The Supreme Court rejected this argument:

> If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by

the general public, then [plaintiffs] could justifiably argue a public forum has been created. This, however, is not the case. There is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations . . . to use the facilities. This type of selective access does not transform government property into a public forum.

Id. at 47.

A similar analysis is appropriate here. It is undisputed that § 414, and the Board of Education procedures implementing the statute, establish some criteria upon which permission to use school facilities is either granted [**19] or denied. The school facilities are not open to indiscriminate use by the general public and applications for permits are reviewed by the school principal and custodian, and then again at the district level. Although it is clear that some applications were granted in contravention of Board policy, such departures from declared policy are hardly sufficient to create a contrary policy. Plaintiffs have presented no evidence that permission to use school facilities is granted as a matter of course to all who file an application. See Cornelius, 473 U.S. at 804 ("Although the record does not show how many organizations have been denied permission . . . ., there is no evidence suggesting that the granting of the requisite permission is merely ministerial.").

At most the proof shows that access has been granted to some groups. However, as the Supreme Court stated in Perry, "this type of selective access does not transform government property into a public forum." 460 U.S. at 47; see also Cornelius, 473 U.S. at 805; cf. Widmar, 454 U.S. 263 at 265-68, 70 L. Ed. 2d 440, 102 S. Ct. 269 (holding that university created open forum through its policy of providing university facilities for the meetings of all registered [**20] student groups without qualification). The public elementary schools located within CSD 27 are simply not places that have been "devoted to general, unrestricted public assembly by long tradition or by policy or practice." Bronx Household of Faith, 1997 WL 567035, at *5.

Thus, I conclude that the school facilities at issue in this case are limited public forums by virtue of § 414 and school district policy. n5 [*221] See Bronx Household of Faith, 1997 WL 567035, at *5. As such, a speaker may be excluded from using school facilities after school hours "if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose special benefit the forum was created . . . ." Cornelius, 473 U.S. at 806 (internal citations omitted). Defendants assert that plaintiffs were denied access on the basis of a permissible subject matter distinction, since § 414 does not include religious worship services as a permissible use and SOP 5.9 explicitly prohibits use of the facilities for religious worship services.

n5 Accordingly, I reject plaintiffs' claim that § 414 and SOP 5.9 are facially unconstitutional since they "exclude religious speech from an otherwise open forum based upon its religious content." Pl. Mem. in Support of Mot. for Sum. Judgmt. at 19 (emphasis added). As discussed in text, CSD 27 public school facilities are not open public forums.

[**21]

However, once access is permitted based on subject matter or speaker identity, the constitutional right of access extends to other entities or speech of a similar character. Perry, 460 U.S. at 48; see also Travis v. Owego-Apalachin School District, 927 F.2d 688, 692 (2d Cir. 1991) ("Once [the government] allows expressive activities of a certain genre [in a limited public forum], it may not selectively deny access for other activities of that genre."). Plaintiff argues that, even if the school district's facilities are considered limited public forums, they have been opened to religious worship services, despite SOP 5.9, as evidenced by the permits granted to Rita Speller of the Deliverance Temple, and Lisa and Rubin Mitchell of the Jesus Family Fellowship. As such, plaintiffs contend that the defendants' refusal to grant Full Gospel a permit to conduct similar religious worship services on school property after school hours amounts to unconstitutional viewpoint discrimination.

The past practice of the school district in granting access to its facilities is a relevant factor in determining whether the school district has opened its limited forum to religious worship services. [**22] See Deeper Life I, 852 F.2d at 680;

see also Travis, 927 F.2d at 693. In Travis, the school district granted a permit to an organization called "On the Level Music!" to hold a Christmas concert in the middle school auditorium called "A Concert For the King -- Christmas in Owego." 927 F.2d at 693. The program consisted of twelve Christian hymns and a Bible reading by the mayor of Owego. Id. Several years later, Birthright of Owego, a pro-life pregnancy counseling organization, requested permission to use the middle school auditorium for a magic show by a Christian illusionist. Id. at 690. The program was to consist of an ordinary magic show, followed by a short message promoting the Christian gospel. Id. at 693. Despite the similarities between the two programs, the school district denied Birthright a permit on the basis that the proposed magic show would involve religious activity. Id. at 691.

Birthright and the Christian illusionist, Toby Travis, sued the school district, alleging that the district's refusal to grant them a permit violated their free speech rights. The district court granted plaintiffs summary judgment on their free speech claim. On appeal, [**23] the Second Circuit held that the Christmas program had created "at least a limited public forum for fund-raisers with religious themes." Id. As such, "permitting a fund-raiser with a religious theme while excluding one with a different religious theme is not viewpoint-neutral as a matter of law . . . ." Id. at 694. Since the school district failed to provide a constitutionally sufficient explanation for the different treatment, the Court of Appeals affirmed the District Court's grant of summary judgment to plaintiffs. See also Trinity United Methodist Parish v. Board of Education, 907 F. Supp. 707 (S.D.N.Y. 1995) (holding that school district could not deny permit to church seeking to hold magic show by christian illusionist when it subsequently granted permit to another church for gospel concert).

Plaintiffs argue that similar facts are present here. It is undisputed that the defendants granted permits to the Deliverance Temple Church and the Jesus Family Fellowship and that both organizations held religious worship services and instruction on school property after school hours on a regular [*222] basis. Accordingly, relying on Travis, plaintiffs argue that the defendants [**24] are constitutionally obligated to grant them permission to conduct religious worship services on school property after school hours, since such activity has been permitted in the past.

The instant case is distinguishable from Travis. In Travis, the defendants asserted that they had genuinely misunderstood the religious nature of the Christmas concert. 927 F.2d at 693. The Court rejected this defense, and charged the defendants with the knowledge that the program was an openly religious affair. Id. However, it was critical to the court's analysis that

there is no evidence in the record that the School District, having learned that it had mistakenly permitted a religious program in violation of its policy, took steps to prevent a similar mistake in the future, and that such corrective measures caused the denial of [plaintiff's] application.

Id.. Moreover, counsel for the school district in Travis could not even guarantee that the school district would deny permission for another Christmas program in the future. Id.

Unlike the school district in Travis, the Board of Education in the case at bar promulgated a clear policy, binding upon the [**25] defendant school district, that prohibits the use of school facilities for religious worship services. n6 It is undisputed that McElhatten, a secretary in the school district office, failed to properly implement this policy by granting a permit to the Deliverance Temple Church without any description of the activity to be conducted and one to the Jesus Family Fellowship, after erroneously interpreting SOP 5.9. n7 In addition, it appears from the record that defendants were not aware that McElhatten had granted permits for religious worship services in violation of SOP 5.9 until plaintiffs brought the matter to the school district's attention. n8 It is undisputed that once school district officials became aware of these violations of district policy, the erroneously issued permits were immediately revoked.

n6 In Travis, the court of appeals noted that the school district's policy was to treat applicants whose programs have religious themes on an ad hoc basis. 927 F.2d at 694. As a result, the court of appeals modified the district court's injunction to prohibit denial of access to the Travis plaintiffs, "unless the School District expressly adopts a new policy that treats all programs with a religious theme equally." Id. Such a policy is present in the case at bar in the form of SOP 5.9. The permit denial in this case was not due to an ad hoc decision in the absence of a clear policy, but rather McElhatten's failure to properly implement the district's policy.

[**26]

n7 Plaintiffs also point to permits granted to the Salvation Tabernacle Church and several other churches for gospel concerts as evidence that the school district has opened its facilities to religious worship services and instruction. However, the Second Circuit has held that a concert that consists of gospel and spiritual music is a musical program, not a religious event which opens the forum for other religious activity. Lamb's Chapel v. Center Moriches Union Free School District, 959 F.2d 381, 387 (2d Cir. 1992), rev'd on other grounds, 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993). One could also characterize a gospel concert as music from a religious perspective. See SOP 5.9. Although the "sacred concert" held by the Salvation Tabernacle Church included an opening prayer and closing salvation message, these were very brief and did not constitute the bulk of the program.

n8 It is important to note that plaintiffs' application for a permit was denied by Kenneth Grover, deputy superintendent of CSD 27, not McElhatten.

Moreover, review of permit applications was transferred [**27] from McElhatten to Kenneth Grover, deputy superintendent of CSD 27, and later permanently transferred to the Director of Operations for CSD 27. In addition, all principals and custodians were reminded by memorandum that SOP 5.9 prohibits use of school premises for religious worship services and that it is their responsibility to ensure adherence to the policy. These school officials were also charged with the responsibility to inquire further about an organization's proposed purpose if that purpose is unclear, by requesting a flyer or other documentation from the organization. n9 [*223] If the school principal or custodian becomes aware that the policy has been violated despite these precautions, they are to report any violations to the district office and send a warning letter to the organization.

n9 Plaintiffs suggest that this type of further inquiry into the religious nature of an organization's proposed purpose would cause an entanglement between church and state. However, in Bronx Household of Faith, 1997 WL 567035, at *8, the court of appeals held that the distinction between religious services and the discussion of permissible topics from a religious viewpoint was not a difficult distinction for school authorities to make.

[**28]

Significantly, since these corrective measures were taken, no permits have been issued for religious worship services or instruction, and requests to use school facilities for such activity has been denied. Accordingly, unlike the defendants in Travis, defendants in this case "took steps to prevent a similar mistake in the future" once they learned that the policy had been violated. Moreover, in contrast to the corrective measures evaluated unfavorably by Judge Parker in Trinity, see 907 F. Supp. at 716, defendants' steps in this case appear to be effective.

In sum, the defendants have not opened a limited public forum for religious worship services by virtue of the fact that permits were granted on two prior occasions for such use, in light of the facts that these permits were granted by an individual who failed to properly implement the district's clear policy against such use, and the district promptly corrected these errors and took effective steps to prevent such a mistake in the future. n10 Since the Second Circuit has already held that SOP 5.9 is a reasonable regulation, see Bronx Household of Faith, 1997 WL 567035, at *7, plaintiffs' exclusion from school facilities [**29] was therefore constitutional, as long as the exclusion of religious worship services is viewpoint neutral.

n10 I recognize that in Bronx Household of Faith, the court of appeals observed several times that the school district in that case had never previously rented a school for the religious purposes intended by the plaintiff in that case. See, e.g., 1997 WL 567035 at *5 ("What is not permitted under SOP 5.9 is the use of school premises for worship or instruction, and it is important to note that the parties have agreed that District # 10 never has rented a school property for that purpose.") But I do not read that language as holding or suggesting that a minor school bureaucrat's uninformed and inadvertent permission for such use by other churches, in derogation of district policy, confers upon the plaintiff church at bar a permanent license to hold religious services in public schools. This is the logical conclusion of plaintiffs' argument, but the school district's contrary policy, clearly declared, cannot so lightly be cast aside.

[**30]

IV.

Plaintiffs argue that the exclusion of religious services is unconstitutional viewpoint discrimination, regardless of forum designation. Plaintiffs point out that § 414 allows "instruction in any branch of education, learning or the arts," "social, civic and recreational meetings . . . and other uses pertaining to the welfare of the community." Plaintiffs contend that religious worship services and instruction is speech within these categories from a religious, rather than secular, perspective. As such, according to plaintiffs, the exclusion of religious worship services and instruction constitutes unconstitutional viewpoint discrimination.

In support of their argument, plaintiffs rely on Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993). In that case, the defendant school district, on the basis of § 414, denied the plaintiff a permit to use school facilities after school hours to show a six-part film on parenting from a Christian perspective. 508 U.S at 388-89. The district court and the court of appeals both rejected the plaintiff's claims, holding that the school property was a limited public forum from [**31] which activities with a religious purpose had been constitutionally excluded. Id. at 389-90. The Supreme Court reversed, holding that it was unconstitutional viewpoint discrimination to allow school property to be used for the expression of views on family issues and child-rearing, without also allowing the property to be used for the expression of a religious viewpoint on the same subjects. Id. at 394 ("The film series involved here no doubt dealt with a subject otherwise permissible . . ., and it exhibition was denied solely because the series dealt with the subject from a religious standpoint."). Plaintiffs argue that this holding applies equally to the case at bar.

The distinction between content and viewpoint is "not a precise one." Rosenberger v. [*224] Rector and Visitors of the University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 2517, 132 L. Ed. 2d 700 (1995) (university's denial of printing cost funding to student newspaper with Christian editorial viewpoint condemned as viewpoint discrimination). In the case at bar, although SOP 5.9 prohibits the use of school facilities for religious worship services, it allows "the use of school premises by outside organizations [**32] or groups after school for the purpose of discussing religious material or material which contains religious viewpoint or for distributing such material." (emphasis added). In Bronx Household of Faith, 1997 WL 567035, at *7-8, the Second Circuit held that this distinction is tenable and "not difficult for school authorities to make," id. at *8, and that the exclusion of religious worship services does not amount to unconstitutional viewpoint discrimination. I am bound by this very recent appellate decision. n11

n11 The Second Circuit decided Bronx Household of Faith on September 15, 1997.

Since the exclusion of religious worship services is reasonable in light of the purposes served by the forum and viewpoint neutral, see Bronx Household of Faith, 1997 WL 567035, at *8, plaintiffs' free speech rights were not violated by the defendants' denial of their permit application.

V.

Plaintiffs also assert claims under the Free Exercise and Establishment Clauses of the First Amendment, as well [**33] as the Equal Protection Clause of the Fourteenth Amendment. Identical claims were rejected by the Second Circuit in Bronx Household of Faith, 1997 WL 567035, at *8-9. Plaintiffs also assert a claim under the Religious Freedom Restoration Act of 1993. However, that claim must be dismissed with prejudice in light of the Supreme Court's determination in City of Boerne v. Flores, U.S. , 138 L. Ed. 2d 624, 117 S. Ct. 2157, 2172 (1997), that the Religious Freedom Restoration Act is unconstitutional. See Bronx Household of Faith, 1997 WL 567035, at *10.

VI.

For the foregoing reasons, plaintiffs' motion for summary judgment is denied and defendants' cross-motion for summary judgment is granted. Plaintiffs' earlier motion for a preliminary injunction is also denied for the reasons state above. n12 The Clerk of the Court is directed to dismiss the complaint with prejudice.

n12 Plaintiffs' recent Motion for Ruling is granted. In addition, although plaintiffs' attorneys, Mark N. Troobnick, Esq. and Jay Alan Sekulow, Esq., assert that their motions to appear pro hac vice are also pending, those motions were granted on December 6, 1994.

[**34]

It is SO ORDERED.

Dated: New York, New York

September 24, 1997

CHARLES S. HAIGHT, JR.

U.S.S.D.J

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING

CONFIDENTIAL STAFF REPORT

Prepared for the U.S. Commission on Civil Rights

TABLE OF CONTENTS

Chapter One: Introduction 1

Chapter Two: Curriculum 5

Teaching Religion 5
Religion in Textbooks 6
Teaching Evolution Versus Teaching Creationism 8

Chapter Three: Individual Students' and Teachers' Rights.....11

Religious Freedom 11
Religious Expression of Students in Public Schools 11
Religious Expression of Teachers in Public Schools 19

Chapter Four: Equal Access 23

Constitutional Right to Public Access to School Facilities 23
The Equal Access Act 26

Chapter Five: Government Funding and Religious Schools 30

Introduction 30
General Legal Principles Regarding Government Funding and Religious Schools 30
Vouchers 32
Tax Credits and Tax Deductions..... 33
Special School Districts.....34

ACKNOWLEDGEMENTS

This report was prepared by Staff Attorneys Sicilia Chinn, Lynn Dickinson, Peter Reilly, and Maxine Sharpe in preparation for the Washington, D.C. hearing. The report was prepared under the direction and supervision of Emma Gonzalez-Joy, Team Leader, Edward Hailes, Jr., Deputy General Counsel/Project Director and Stephanie Y. Moore, General Counsel.

Chapter One: Introduction

Origins of Religious Freedoms

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."*[1]

Religious liberty has been safeguarded in the Federal courts since the beginning of the republic by these two clauses of the First Amendment. Before 1940 the U.S. Supreme Court held that these clauses did not allow the Federal government to dictate the expressive rights of students in public schools, which were, instead, under the purview of State constitutions. In 1940, however, the Supreme Court held that the fundamental concept of liberty embodied in the 14th Amendment, which applies to state action, also embraces the liberties guaranteed by the First Amendment.[2] Consequently, the doors of the Federal courts were opened to challenges of state and local actions concerning religious issues.

During the 1960s and 1970s, the Supreme Court issued a number of controversial decisions dealing with separation of church and state. During this period the emphasis was on setting parameters for separation of church and state intended to ensure fairness in a modern multi-religious society. The Supreme Court emphasized the rights of the individual, and for the first time, in *Tinker v. Des Moines Independent School District,*[3] the rights of public school students and teachers to express themselves during the school day on school property were recognized. Also recognized by the Court were legitimate reasons that modify such expression, such as the interest of school officials to maintain discipline and to communicate lessons.

During the last 18 years there has been an expansion of the religious expressive rights of groups rather than those of individuals. In 1981, the Supreme Court in *Widmar v. Vincent,*[4] recognized the right of university students under the First Amendment to meet for religious purposes in school facilities after school when similar groups are so authorized. Then in 1984, Congress enacted the Equal Access Act.[5] In enacting the law, Congress sought to end perceived discrimination against religious groups requesting access to school premises for extracurricular activities.

The debate as to the meaning and interaction of the two religion clauses continues today. The debate is, in part, about history and constitutional interpretation centering around the

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[1] U.S. CONST. amend. I.

[2] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[3] 393 U.S. 503, 506 (1969).

[4] 454 U.S. 444 (1981).

[5] 20 U.S.C. §§ 4071-4074 (1997).

proper role of religion in public life. Those who advocate for the separation of church and state argue that the founders intended that the Establishment Clause should deprive the government of power either to aide or hinder religion. Others insist that the state retains power, with certain limitations, constitutionally to advance religion as a moral good. At a minimum, there is some consensus that the Free Exercise Clause was intended to preserve for each individual the right, with some limitations on conduct, to follow the dictates of their own conscience.

The focus of much debate is on the meaning of the Establishment Clause. The writings of both Jefferson and Madison have been relied upon by some as instructive as to the meaning of the First Amendment. On January 16, 1786, Virginia passed the Bill for the Establishment of Religious Freedom, drafted by Thomas Jefferson. The bill ended support for the Anglican Church and guaranteed full religious liberty for all citizens of the State. Thomas Jefferson is quoted as stating that the Constitution gives no power over religion to the Federal government:

> Believing that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.[6]

James Madison is recognized as the primary advocate of Federal protection of religious liberty. In 1947 in *Everson v. Board of Education*[7] the importance of his work and the impact of Virginia's stance on religious freedom on the language of the First Amendment was summarized as follows:

> Ratification thus accomplished, Madison was sent to the first Congress. There he went at once about performing his pledge to establish freedom for the nation as he had done in Virginia. Within a little more than three years from his legislative victory at home he had proposed and secured the submission and ratification of the First Amendment as the first article of our Bill of Rights. All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship.[8]

Ironically, Madison, who was responsible for the language of the First Amendment, was willing to support the Constitutional Convention, even without an amendment to protect

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[6] 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861).

[7] 330 U.S. 1 (1947).

[8] *Id.* at 39. The Court also quoted Thomas Jefferson's letter to the Danbury Baptists in *Everson;* however, some critics maintain that reference to Jefferson's letter was based on a mistaken understanding of Constitutional history.

religious liberty. In his journal he explained what he thought ensured this religious liberty:

> Happily for the states, they enjoy the utmost freedom of religion. This freedom arises from the multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society. For where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.[9]

Chief Justice William Rehnquist, following the historical tradition of Patrick Henry and John Cotton, is the modern day advocate for those who favor government encouragement of religion. The Chief Justice wrote in his dissent in *Wallace v. Jaffree*[10] as follows:

> The Establishment Clause did not require neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*. . . .
>
> The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.[11]

Overview of The Schools and Religion Hearing Project

The U.S. Commission on Civil Rights will conduct three one day hearings: Washington DC, New York, NY, and a location yet to be selected.

The hearing in Washington DC will feature experts to discuss issues of discrimination against religion from a national perspective. The hearing will focus on major issues concerning schools and religion, in particular the following: (1) how and to what extent, if any, religion might be integrated into classroom lesson plans and school textbooks in a manner that conforms to current laws and court opinions; (2) how well are schools both accommodating students' and teachers' religious practices and protecting their freedom from harassment and coercion; and (3) what impact, if any, the *Statement of Principles of Religious Expression,* discussed below, has had in public schools, and whether the right of equal access of religious groups to school facilities is adequately protected.

New York City was selected as a hearing site because its people represent diverse religious beliefs and it is located in a State which in recent years has been the site of several significant schools and religion disputes. The hearing in New York City will

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[9] Norman Cousins, ed., *In God We Trust: The Religious Beliefs and Ideas of the American Founding Fathers* (New York: Harper & Brothers, 1958), pp. 314-315.

[10] 472 U.S. 38 (1985).

[11] *Id.* at 106-07 (Rehnquist, J., dissenting).

address the following issues, which are more fully addressed below: (1) government funding and religious schools; (2) equal access; and (3) religious rights of teachers.

As part of the hearing project, the U.S. Commission on Civil Rights will examine the impact of the *Statement of Principles of Religious Expression in Public Schools* issued by the U.S. Department of Education (DoE) three years ago. In 1995, there was widespread confusion in the aftermath of Supreme Court decisions generally perceived as contradictory. This confusion led to a concerted effort by diverse groups to educate the public on the rights of religious expression of students in public schools. These groups included those who supported and those who opposed an expansion of the rights of religious expression. Jointly they drafted a pamphlet entitled *Religion in the Public Schools: A Joint Statement on Current Law,*[12] which, in April 1995, was signed by a coalition of 30 religious and civil liberties organizations.

Shortly after, in July 1995, President Clinton sent to the Secretary of Education a set of guidelines on the constitutionally protected right of school children to religious expression in public schools. The Secretary then sent the *Statement of Principles of Religious Expression in Public Schools* to all school superintendents in the country. The *Statement of Principles* details what is permissible under existing law and is only advisory, not an official policy that schools are legally bound to follow. Generally, the *Statement of Principles* says that students have the same right to engage in individual and group prayer and religious discussion during the school day as they do to engage in other comparable activities. 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 non-disruptive activities. Local school authorities retain substantial authority to impose rules of order or other teaching-related restrictions on student activities, but they may not discriminate against religious activity or speech.

One issue that the *Statement of Principles* did not address was student-led prayers at graduation ceremonies. The legal status of student-led prayer has been uncertain since 1992, when the Supreme Court ruled in *Lee v. Weisman*[13] that school districts cannot permit clergy members to deliver prayer at graduations. The statement also did not provide guidance with regard to prayers at sporting events or parameters on performing religious music. Representatives of various civil rights and religious groups agree that the distribution of the *Statement of Principles* has been beneficial, but disagree on the extent of its impact.

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[12] *Religion In The Public Schools: A Joint Statement of Current Law* (Apr. 1995) (hereafter cited as *Joint Statement*), p. 1. 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 a number of additional organizations. Ibid.

[13] 505 U.S. 577 (1992).

Chapter Two: Curriculum

Teaching religion

Although the Supreme Court has consistently rejected efforts to teach religion in the public schools, it has permitted teaching *about* religion.[14] While teaching religion amounts to illegal religious indoctrination, teaching *about* religion is learning about religion in the historical, cultural, economic and social development of the United States and other nations.

Thus, while the Bible cannot be studied as religious doctrine, it may be studied as literature.[15] Indeed, Bible courses are being taught throughout the country: according to the National Council on Bible Curriculum in Public Schools, its Bible instruction materials have been adopted by public school districts in 22 states. While the Council, in order to avoid litigation, will not reveal the precise location of those districts utilizing its materials, it is known that in North Carolina at least 20 school districts now offer some sort of Bible instruction, and Texas has 219 public school courses throughout the State in biblical history or literature. In addition, nine counties in Florida offer Old or New Testament history.

Oliver Thomas, counsel to the National Council of Churches, and co-author of Finding Common Ground: A First Amendment Guide to Religion and Public Education, maintained in a recent interview with Commission staff that while the curriculum developed by the National Council on Bible Curriculum in Public Schools is "well intentioned," it was "clearly flawed" in some significant ways. Said Mr. Thomas:

> The curriculum was based upon some fundamental assumptions that were wrong. You don't teach Bible as history – that's suggesting that something is factual that may or may not be factual, and is a matter of faith. I think there was a failure to appreciate that it's not just history that's in the Bible, but it's sacred history, it's a revealed tradition. So we encouraged them to either do a course teaching kids about the Bible and Bible literacy, or Bible as literature. . . I think they've modified it to a point where it's OK – but the original curriculum was flawed.[16]

While religion is being incorporated into the curricula of many school districts, some proponents of religious incorporation argued that, nationwide, the vast majority of districts largely lack such a component. Professor Warren Nord, director of the Program

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[14] School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

[15] Hall v. Board of Sch. Comm'rs of Conecuh County, 656 F.2d 999 (5th Cir. 1981); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

[16] Oliver Thomas, Esq., Counsel, National Council of Churches, telephone interview, Apr. 30, 1998 (hereafter cited as Thomas Interview) (unverified).

in Humanities and Human Values at the University of North Carolina at Chapel Hill, and author of Religion & American Education: Rethinking a National Dilemma,[17] argues that religion is virtually excluded from public school education. Said Professor Nord in a recent interview with Commission staff:

> By virtue of excluding religion from the curriculum, I've come to the conclusion that public education discriminates against religion. The problem is sufficiently deep that it even begins to make sense to talk about a kind of secular indoctrination against religion. The problem is largely a philosophical one for me: we teach students to think about the world in secular categories that conflict with or at least stand in some tension with religious categories. And this is a problem which occurs across the curriculum. While we do teach students things about religion in history courses and literature courses, the problem is that when we look at courses that help students understand the world here and now – science courses, sex education courses, economics, civics, etc. – what role should religion have there, and the usual argument is, well, religion is something different, it's something else that we can compartmentalize.[18]

Professor Nord argues that society therefore eliminates religion from all those "here and now" subjects, which he concludes results in an "uncritical socialization" into a "secular mentality" or a secular way of thinking about the world. Professor Nord argues that on both educational grounds, in terms of what constitutes a good education, as well as constitutional grounds, in terms of what the courts require, religious voices need to be included in the curricular conversation, and need to be "taken much more seriously" than they are at the present time.[19]

Religion in Textbooks

Two types of controversies usually develop around religion and textbooks: the first involves what they *say*; the second involves what they *fail to say*, or what they leave out. In one example, five school board members in Austin, Texas objected last year to a new biology textbook because, they said, it failed to point out the weaknesses in the theory of evolution. The book was finally adopted on a vote of 9 to 5. The vote – which was rather contentious – was part of a $177 million dollar textbook purchase by the school board. Some have argued that this and similar episodes have forced textbook publishers to anticipate contentious and protracted school board approval processes for their products – thereby causing the publishers to avoid controversy altogether by deleting and/or watering down all potentially controversial material. Moreover, the State of Texas is one of the largest textbook purchasers in the Nation and, thus, has a large influence on books marketed in other states.

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[17] Warren Nord, *Religion & American Education: Rethinking a National Dilemma* (Chapel Hill: The University of North Carolina Press, 1995).

[18] Professor Warren Nord, University of North Carolina Chapel Hill, telephone interview, May 1, 1998 (hereafter cited as Nord Interview).

[19] Ibid.

With respect to what textbooks leave out, in 1987 a lawsuit filed in Alabama alleged that history books left out historical facts regarding religion, and failed to discuss the place of religion in modern American society. The district court agreed, finding that the history books "uniformly ignore the religious aspect of most American culture." The appellate court, however, ruled that the education officials had control over the curriculum and had the discretion to continue using the books.[20]

In his interview with Commission staff, Professor Nord stated:

> As we get to the last century or two, religion largely disappears from the standards and the textbooks. They don't take theology seriously, or religious ways of making sense of history seriously – that is, they assume history is a secular discipline. . . . Of all the national standards, the history and civic standards are the best when it comes to religion. The other standards are completely inadequate. None of the other standards really takes religion seriously. And in almost all cases the textbooks are worse than the standards.[21]

It was this same issue – the lack of religion in school textbooks – which led Dr. Charles C. Haynes, Scholar in Residence at the Freedom Forum First Amendment Center, to become involved in the area of schools and religion. A recent article in the *Wall Street Journal*[22] profiles Dr. Haynes, who currently runs a mediation and training program addressing the way religion is treated in thousands of schools nationwide. Dr. Haynes was also one of the principal organizers and drafters of *Religious Liberty, Public Education, and the Future of American Democracy*, a statement of principles sponsored by 21 major educational and religious organizations.

Since researching textbooks in 1986 and concluding that, in his estimation, scant attention was being paid to religion, Dr. Haynes, who formerly worked as a consultant to the research foundation of Americans United for Separation of Church and State, has teamed up with Oliver Thomas to design religion policies for schools that could be endorsed by people on both ends of the political spectrum. The program they developed is called "Finding Common Ground." Dr. Haynes indicated in his interview with Commission staff that public school curriculum is still "very poor" when it comes to treatment of religion:

> At best we have religion mentioned now more often than we did five or ten years ago, and when we actually got out there working with schools, we found we had a *long* way to go. And to change things is a very labor intensive and difficult process. In recent years, this change has accelerated partly because of our work, and partly because of the

[20] Smith v. Board of Sch. Comm'rs of Mobile County, 827 F.2d 684 (11th Cir. 1987).

[21] Nord Interview.

[22] Edward Felsenthal, "Cease-Fire: End of a Culture War? How Religion found Its Way Back to School; Theologian Charles Haynes Finds Signs of Truce in Long-Running Battle 'After 150 Years of Shouting,'" *The Wall Street Journal*, Mar. 23, 1998.

> guidelines that the [Clinton] administration issued [in 1995] based on a consensus of what current law is. And other factors: the change in the culture, and the entrance into the political arena of religious voices, mostly conservative, and [various legal trials that have occurred around the country involving schools and religion].[23]

Dr. Haynes said during the interview that the "Finding Common Ground" project is an effort to present a shared vision of religious liberty in the schools that most people – whether they are on the right or the left, religiously or politically[24] – could support. Said Dr. Haynes: "Our contention was that unless we offered the schools a safe harbor on these issues, they cannot move forward and will be forever polarized and doomed to shout past one another about religion and values in the schools."[25]

Oliver Thomas, counsel to the National Council of Churches and co-author with Dr. Haynes of Finding Common Ground: A First Amendment Guide to Religion and Public Education, suggested during an interview with Commission staff that there are also forces working to *prevent* the finding of common ground. Mr. Thomas contends that numerous individuals have a "great deal at stake" in continuing the current culture wars: "There's a lot of money being made by telling people that kids cannot pray in schools or that the Christian right is taking over. . .You get fundraising letters on both sides that demonize and caricature the opposition, and . . . groups on both the right and left are making money. . . "[26]

Teaching evolution versus teaching creationism

The debate over the teaching of evolution versus creationism was made famous more than 70 years ago in the "monkey trial," which led to the conviction of John Scopes for teaching evolution in a Tennessee school. The Supreme Court, however, made clear 30 years ago that it is unconstitutional to restrict the teaching of evolution.[27] And in 1987, the Supreme Court held that it is unconstitutional to require educators who teach evolution, to also teach creationism.[28]

Despite the Supreme Court rulings, the National Academy of Sciences issued in April 1998, a 140 page document entitled "Teaching About Evolution and the Nature of Science," which argues that many public school students receive little or no exposure to

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[23] Dr. Charles C. Haynes, Freedom Forum, telephone interview, Apr. 29, 1998 (hereafter cited as Haynes Interview) (unverified).

[24] The groups working with the "Finding Common Ground" project range from Pat Robertson's organization to the ACLU, the Christian Legal Society, the Union of American Hebrew Congregation, and the National Association of Evangelicals. Thomas Interview.

[25] Haynes Interview.

[26] Thomas Interview.

[27] Epperson v. Arkansas, 393 U.S. 97 (1968).

[28] Edwards v. Aguillard, 482 U.S. 595 (1987).

the theory of evolution – which the academy considers "the most important concept in understanding biology."

The National Academy reports that teachers are reluctant to teach evolution because of pressures from special interest groups to downplay or eliminate it as part of the science curriculum. However, the academy states that the guide is not an attempt to abolish discussion of creationism, pointing out that it focuses only on how all forms of life have evolved over time – not on the question of how the very first cell in the process may have originated.

In some states, it has been reported that several school boards have ordered teachers to give equal time to creationism, and lawmakers in a few states want to remove the term "evolution" from their science curricula altogether. In Alabama, biology textbooks now include a disclaimer telling students that evolution is only a "controversial theory."

Controversies arising out of the "evolution" theory are sometimes resolved without court intervention. In Colorado recently a student objected to a video tape because it depicted evolution as "scientific fact" rather than theory. The school district formed a review committee and decided the best course of action was to withdraw the tape from the curriculum.

It is not yet clear how the National Academy of Sciences report will be received by people who determine school curricula. However, since these matters are controlled locally, school districts are not required to accept the advice in the report.

National Council of Churches counsel Oliver Thomas argued during his interview with Commission staff that the "only place" to find common ground between conservative religious people and the scientific community is to "just teach the controversy." Said Mr. Thomas:

> Let the students know that the vast majority of scientists interpret the data in this particular way, and make sure the students understand evolutionary theory. Don't suggest to [the students] that it's equally weighted – let them know that a small minority voice is challenging that paradigm, and that minority voice has support from a lot of people outside the scientific community. . .Let the students know that this [controversy] is going on and will continue to go on . . . I don't have a problem teaching kids evolutionary theory, but I think it needs to be done in the context of a richer, honest conversation about the fact that there are dissenting views.[29]

Professor Nord of the University of North Carolina at Chapel Hill had similar views regarding the teaching of evolution:

[29] Thomas Interview.

> The public discussion [of the evolution verses creationism debate] has become hopelessly polarized and people are scared to death of it, and, as a result, students don't learn much of what they should. They should learn how biologists understand evolution. They should also learn a variety of religious ways of understanding nature, some of which stand in tension or conflict with how biologists understand how biology works.[30]

[30] Professor Nord added that "part of the problem is that the discussion is so polarized that there are usually only two views: Christian fundamentalism on one side, and modern biology on the other, when in fact there are at least a half dozen major views, and there are all kinds of mainline and liberal views of evolution which accept evolution, but put it in a broader theological context for making sense of it." Nord Interview.

Chapter Three: Individual Students' And Teachers' Religious Freedom

Religious Expression of Students in Public Schools

The proper boundaries of individual student religious expression and practice at school has long been a controversial issue. One representative of a Christian organization described the manner in which the issue came to the forefront as follows:

> When you had Christian prayer in school in the 1940s, that was no big deal. It was not offensive; it was part of the culture. . . . But after World War II, the world came to America. . . . We could no longer take for granted that everyone was Christian. How do you mandate Christian prayer when the whole country has changed?[31]

After members of a variety of religions began migrating to the United States, religious practices that had previously received the acceptance of homogeneous communities became problematic.[32] Controversies developed and eventually the U.S. Supreme Court was asked to decide whether school-sponsored prayer could continue. In 1962, the Court stated that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[33] In that landmark case, *Engel v. Vitale*, the Court held that a school district policy requiring that a certain prayer be read aloud by each class at the beginning of every school day violated the Establishment Clause.[34]

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[31] Caryle Murphy, "At Public Schools, Religion Thrives; Students of All Faiths Increasingly Active," *The Washington Post*, May 7, 1998 (hereafter cited as Murphy, "Religion Thrives"), p. A-1 (quoting Benny Proffitt, "founder of First Priority, a Tennessee-based church group that helps Christian students set up religious groups at their schools"). "Between 1820 and 1930, 38 million immigrants came to America." United States Commission on Civil Rights, *Religion in the Constitution: A Delicate Balance* (Washington, DC: The Government Printing Office, Sept. 1983), p. 15.

[32] Marc D. Stern, Co-Director, Commission on Law and Social Action, American Jewish Congress, telephone interview, Apr. 29, 1998 (hereafter cited as Stern Interview) (stating that school prayer disputes often arise in formerly homogeneous communities that are becoming religiously heterogeneous); Terri Schroeder, Lobbyist, American Civil Liberties Union, telephone interview, Apr. 30, 1998 (hereafter cited as Schroeder Interview) (stating that the number of schools and religion disputes has increased as communities have become more diverse).

[33] Engel v. Vitale, 370 U.S. 421, 431 (1962).

[34] *See id.* at 424; *see also* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963) (holding that a State statute and a school board rule requiring Bible readings at the beginning of each school day violated the Establishment Clause).

In the years following that decision, according to some observers, many school districts "reacted by purging religion from their classrooms."[35] Again, according to some, in many instances, even individual student prayer and religious expression – as distinguished from the school-sponsored prayer practices expressly struck down by the Court – were deemed impermissible.[36] As noted in the introductory chapter of this report, due to the confusion regarding the scope of the Supreme Court's rulings, in April 1995 a number of organizations, "span[ning] the ideological, religious and political spectrum," issued a "statement of consensus on current law as an aid to parents, educators and students."[37] The guidelines attempt to clarify the law on issues including student prayers, official participation or encouragement of religious activity, student assignments and religion, distribution of religious literature, religious persuasion versus harassment, religious holidays, excuses from religiously objectionable lessons, student clothing, released time, and more.[38]

In addition to the *Joint Statement*, in July 1995 President Clinton ordered the Secretary of Education to "provide 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."[39] The President stated:

> 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.[40]

The Secretary of Education issued the guidelines, discussed above, in August 1995.[41]

Crediting these and other efforts, some have begun to note a "remarkable turnabout in the

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[35] Edward Felsenthal, "Cease-Fire; End of a Culture War? How Religion Found Its Way Back to School; Theologian Charles Haynes Finds Signs of Truce In Long-Running Battle 'After 150 Years of Shouting,'" *The Wall Street Journal*, Mar. 23, 1998, p. A-10 (hereafter cited as Felsenthal, "Cease-Fire").

[36] *See* Jay Alan Sekulow, James Henderson, and John Tuskey, "Proposed Guidelines for Student Religious Speech and Observance in Public Schools," *Mercer L. Rev.*, vol. 46 (1995), p. 1018 ("Many officials are still under the misguided assumption that the Establishment Clause requires schools to stifle [individual] student religious speech.."); Stern Interview (noting that some children are improperly prohibited from praying during their free time).

[37] *Religion In The Public Schools: A Joint Statement of Current Law* (Apr. 1995) (hereafter cited as *Joint Statement*), p. 1.

[38] Ibid., pp. 1-9.

[39] Richard W. Riley, U.S. Secretary of Education, letter to Superintendent, Aug. 10, 1995 (describing the order he received from the President) , U.S. Commission on Civil Rights files.

[40] President Clinton, July 12, 1995, *reprinted in*

[41] Richard W. Riley, U.S. Secretary of Education, *Religious Expression in Public Schools* (1995).

battle over religion in the schools."[42] "Public educators are . . . giving students unprecedented freedoms to observe their faiths at school, permitting everything from T-shirts with religious messages to student prayer meetings."[43] A recent article in *The Washington Post* reported that "signs abound . . . across the country that 36 years after the U.S. Supreme Court ruled compulsory, school-sponsored prayer unconstitutional, praying and other types of religious practices are flourishing in public schools."[44]

Staff interviews suggest that despite the consensus on current law reached among a wide variety of leaders in the religious community, disputes continue to arise, allegedly due in large part to a lack of information on the part of school administrators.[45] Thus, the Commission's Washington, DC hearing will address the extent to which schools are both accommodating children's religious practices and protecting members of minority faiths from coercion and harassment.

Legal Background

Students' constitutionally protected rights of freedom of religion and freedom of speech derive from the Religion and Speech Clauses of the First Amendment .

Freedom of Religion

The constitutional right of freedom of religion derives from both the Establishment Clause and the Free Exercise Clause.[46] The two religion clauses impose different requirements, which often are in tension with one another.[47] To safeguard religious

[42] Felsenthal, "Cease-Fire," p. A-1; Schroeder Interview (stating that religious expression is functioning very well in the public schools).

[43] Ibid.

[44] Murphy, "Religion Thrives," p. A- 1.

[45] Schroeder Interview (stating that many educators and administrators are unaware of what the law requires); Mohamed Nimer, Ph.D., Research Director, Council on American-Islamic Relations, telephone interview, May 8, 1998 (stating that many problems arise because Muslims are a newly emerging group in the U.S. and many people are unaware of Islamic practices); Julie Underwood, General Counsel Designate, National School Boards Association, telephone interview, Apr. 30, 1998 (stating that before the *Joint Statement* was issued, many school administrators were unaware of the legal requirements regarding religion at school). In addition, Steven T. McFarland, Director of the Center for Law and Religious Freedom at the Christian Legal Society, stated that he supported instructing teachers and other school officials about the principles set forth in the *Joint Statement*. Steven T. McFarland, telephone interview, Apr. 29, 1998.

[46] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); *see* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222-23 (1963).

[47] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.").

rights, the government must maintain a proper balance between the often competing concerns addressed by each clause of the First Amendment .[48]

The Free Exercise Clause was adopted to prevent the government from restraining the practice of any religious faith.[49] The freedom to exercise one's religion has two components: the freedom to believe and the freedom to act or engage in religious practices.[50] Because the freedom to engage in religious practices is not absolute, it may be subjected to some government-imposed burdens.[51] However, the government may not implement policies that have a coercive effect on the ability of individuals to exercise their religious beliefs freely.[52] Thus, the overriding principle that derives from the Free Exercise Clause is accommodation: the government may not unnecessarily curtail religious practices.[53]

The Establishment Clause was adopted to prevent the religious majority from using the arm of the state to infringe upon the beliefs of members of minority religions.[54] Accordingly, the government must remain neutral and may not promote one religion over others, religion over non-religion, or non-religion over religion.[55] The principle underlying the Establishment Clause, therefore, is neutrality: the government may not engage in discrimination based on religion.[56]

Taken together, the two religion clauses require that the government maintain a delicate balance between accommodating individual religious beliefs and doing so without promoting or advancing one belief over others.[57]

Free Speech

The U.S. Supreme Court has stated that under the Free Speech Clause[58] a student may express his or her beliefs as long as the student's expressive conduct does not "'materially

[48] *See id.* at 591-92; *Schempp*, 374 U.S. at 217-18.

[49] *See Schempp*, 374 U.S. at 222-23; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993) ("The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.").

[50] *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) ("[T]he [First] Amendment embraces two concepts, --freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

[51] *See* Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

[52] *See Schempp*, 374 U.S. at 222-23.

[53] *See Church of the Lukumi Babalu Aye*, 508 U.S. at 532.

[54] *See* Engel v. Vitale, 370 U.S. 421, 429-31 (1962).

[55] *See Schempp*, 374 U.S. at 222.

[56] *See id.*

[57] *See id.* at 225-26.

and substantially interfere with the requirements of appropriate discipline in the operation of the school'" or "impinge upon the rights of other students."[59] For example, obscene speech - which conflicts with schools' basic educational mission - may be prohibited.[60]

In the context of religious expression, confusion sometimes arises as schools attempt to abide by both the Free Speech Clause and the Establishment Clause. For example, in one case a school argued that banning student distribution of religious materials was necessary to avoid violating the Establishment Clause.[61] The Federal district court held that the school's policy prohibiting speech based on its religious content itself violated the Establishment Clause because it disfavored religion.[62] Thus, as a general matter, students have a right to engage in non-disruptive speech, and schools may not prohibit expression based on its religious content.[63]

Current Disputes

Disputes implicating the religious rights of individual students have arisen mostly in the South. The leading controversies that have arisen in the past few years are described briefly below.

Alabama

Individual students' rights of freedom of religion have formed the center of two disputes in Alabama communities where the vast majority of citizens seek the inclusion of prayer in school ceremonies.

The first dispute began when Michael Chandler, vice-principal of DeKalb County Schools and parent of a student, filed a lawsuit in February 1996. Chandler alleged that: (1) Alabama's school prayer statute violated the First Amendment; and (2) school systems were engaging in religious practices that violated students' religious liberty and unconstitutionally promoted religion.

On March 12, 1997, Federal District Judge Ira DeMent ruled on the first prong of Chandler's challenge, holding that the school prayer statute was unconstitutional.[64] Although one of the stated purposes of the law was "'to properly accommodate the free

[58] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[59] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[60] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[61] *See* Johnston-Loehner v. O'Brien, 859 F. Supp. 575, 580 (M.D. Fla. 1994).

[62] *See id.*

[63] *See id.*

[64] *See* Chandler v. James, 958 F. Supp. 1550 (M.D. Ala. 1997).

exercise of religious rights of its student citizens in the public schools,'" the court found that, by its terms, the law allowed only "'non-sectarian, non-proselytizing student-initiated, voluntary prayer.'"[65] The judge held that the law "unreasonably restrict[ed] the free speech and religion rights of Alabama's public school students,"[66] and on October 29, 1997, the judge issued an injunction barring enforcement of the law.[67] The judge also appointed a "monitor" to visit the schools and ensure that the order was followed.[68]

In reaction to these legal developments, students at several schools in the northern area of Alabama known as Sand Mountain walked out of classes or other school events to pray. Such "prayer protests" occurred in Boaz, Albertville, and Glencoe.[69] In addition, Alabama Governor Fob James issued a statement describing the order as an "unwarranted restriction[] on religious freedom" and stating his intention to "resist [the] . . . order by every legal and political means with every ounce of strength [he] possess[ed]."[70]

Chandler's second claim challenged various religious practices, including student-led prayer at high school football games; Bible readings at school-sponsored events and over the public address system; faculty solicited prayers during classes; and distribution of Bibles by non-students in school classrooms.[71] In November 1997, the judge agreed with Chandler and held that the practices were unconstitutional.[72]

The second Alabama dispute began on August 4, 1997, in Troy Alabama, when Jewish parents sued the school district alleging violations of their children's religious freedom. The parents alleged that: (1) one of their children was required to write an essay on "Why Jesus Loves Me;" (2) another child was physically forced to bow his head during a school prayer ceremony; and (3) the children were prohibited from wearing yarmulkes

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[65] *Id.* at 1553 (quoting Ala. Code §§ 16-1-20.3(a) - (b) (1995)). The law was the Alabama legislature's fourth attempt to regulate school prayer. *See id.* at 1553.

[66] *Id.* at 1568.

[67] *See* Chandler v. James, 985 F. Supp. 1062 (M.D. Ala. 1997).

[68] *See id* at 1067-68. As of March 4, 1998, the monitor appointed by the Federal court judge had completed his first visits to the thirteen schools in DeKalb County. *See* The Freedom Forum Online, "Court monitor completes first visits to Alabama schools in prayer case," *free!* (visited Mar. 10, 1998) <http://www.fredomforum.org/religion/1998/3/4alaprayer.asp>.

[69] Kevin Sack, "In South, Prayer Is a Form of Protest; A Ruling Is Opposed in Classrooms, Courtroom and Statehouse," *The New York Times*, Nov. 8, 1997, p. A-9.

[70] Governor Fob James, "Statement of Gov. James Relative to DeMent Prayer Ruling," Nov. 4, 1997, *reprinted in* American Civil Liberties Union Freedom Network, *In the States* (visited Mar. 10, 1998) <http://www.aclu.org/community/alabama/fobstatement.html>, p. 2.

[71] *Chandler*, 985 F. Supp. at 1098-1102 .

[72] *See id.* The ruling granted the plaintiff's Motion for Summary Judgment. *Id.*

and Star of David symbols.[73] The parents alleged that other incidents, such as harassment by other students, had occurred as well.[74] The suit sought injunctive relief prohibiting religious practices in school and ending the harassment.[75] Because many of the issues mirrored those decided in the DeKalb County case, the parties reached a settlement that was approved by the judge on April 23, 1998.[76] In the settlement, the School Board agreed to abide by Judge DeMent's order in the DeKalb County case.[77]

Mississippi

A dispute in Mississippi began in January 1998 when Christopher Edward Childs challenged the Poplarville High School's policy of allowing a minister or school official to lead the audience in prayer at the beginning of home football games. The plaintiff reportedly seeks an amended policy allowing for a moment of silent reflection before each game.

Another dispute began in 1994 and was temporarily resolved when Federal District Judge Neal Biggers ruled that the North Pontotoc Attendance Center's practice of permitting students to offer prayers over the public address system was unconstitutional.[78] After some deliberation, the Pontotoc County school board voted unanimously not to appeal the court's decision. However, on May 6, 1997, school officials - including one school superintendent - led prayers at a mandatory "school pride day" assembly. The current status of this dispute is unknown.

Florida

Students' free speech rights have been at issue in Florida. Nicholas Wright, a senior at the Niceville High School, was suspended for five days for distributing religious tracts at school. Wright distributed his materials to interested friends at school during non-instructional time. The principal and the vice principal told him that if he did not stop he would be suspended. After he refused, claiming he had a constitutional right to distribute his literature peacefully, he was suspended on May 19, 1997. As a result, he failed his

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[73] American Civil Liberties Union Freedom Network, "Jewish Parents Sue Alabama School System For Persecuting Their Children," *News & Events* (visited Feb. 24, 1998) <http://www.aclu.org/news/n081497b.html> (hereafter cited as ACLU, "Jewish Parents Sue"); Gita M. Smith, "Taunts, torment on religion alleged; Family blasts Alabama schools." *The Atlanta Journal and Constitution*, Aug. 13, 1997, p. 3-A.

[74] ACLU, "Jewish Parents Sue."

[75] Ibid.

[76] Jay Reeves, "School Board Settles Religion Suit," *The Associated Press*. Apr. 22, 1998.

[77] Ibid. In addition, the parties agreed to an "undisclosed plan for paying the [plaintiffs'] . . . attorneys." Ibid.

[78] *See* Herdahl v. Pontotoc County Sch. Dist., No. 3:94cv188-B-A (N.D. Miss. June 3, 1996), *reprinted in* <http://www.olemiss.edu/~llibcoll/ndms/june96/96d0083p.html> (visited Oct. 3, 1997).

senior year and was unable to graduate with his class. Wright's lawsuit was settled in January 1998, when the school agreed to revise its student literature distribution policy and to pay Wright's attorney's fees and costs.[79]

A second dispute in Florida began in 1993 when students challenged a Jacksonville school district's policy of allowing each graduating senior class to elect to have two minutes of uncensored speech during graduation ceremonies. One student was chosen to address each class, and the content of the speech was up to the student to decide. During the 1993 graduation ceremonies, 6 senior classes in the district chose to have a secular message or no message at all. The remaining 11 classes in the district chose to have a religious message. The students who challenged the policy sought the removal of religious speech from their graduation ceremonies. The current status of this case is unknown.

West Virginia

In September 1997, before the Nitro High School home football game began, the entire audience stood and bowed their heads for a prayer announced over the intercom system. At least one parent of a student from a visiting school's band and the Executive Director of the West Virginia Civil Liberties Union, complained. Previously, in 1994 a Jewish student had complained after a similar incident. At that time, a clergyman reportedly said the student should go back to his own country, even though the student was a native of Charleston, West Virginia. The current status of these disputes is unknown.

Resolving a separate dispute, one Federal District Court recently held that a West Virginia school board and the school superintendent did not violate the First Amendment by permitting citizen groups to place boxes of Bibles in the school hall for a day with a sign that said, "Feel free to read a copy."

Texas

In October 1997, a U.S. District Judge held that administrators at New Cane High School could not forbid two high school freshmen to wear rosary beads to school because they were considered "gang-related" jewelry. The symbols had a legitimate use that was protected by the First Amendment . The two students both had a sincerely held belief that they ought to wear the beads as part of their Catholic faith, and neither boy had been involved with gang activity.

[79] The Freedom Forum Online, "Florida school board votes to settle First Amendment lawsuit," *free!* (visited Feb. 24, 1998) <http://www.freedomforum.org/religion/news/980115.asp>.

Indiana

A program in a Marion County public school district that permits local clergymen to counsel students during the school day has prompted a Federal lawsuit claiming violation of the separation of church and state. For more than a decade, public schools in Marion County have sponsored a "Listening Post" program in which clergymen associated with the Ministerial Alliance are permitted to counsel students, primarily during lunch hours. The school issues guidelines for the program which state, in part, that members of the Ministerial Alliance must not attempt to "convert students to their particular church congregation." The suit was brought by two students at Decatur Central High School and alleges that ministers stopped uninvited at cafeteria tables and insisted upon praying with the students. The current status of this case is unknown.

Idaho

In 1990, two families and the American Civil Liberties Union (ACLU) filed suit against the Madison School District, arguing that prayer at graduation ceremonies violated the Establishment Clause. Last year, Federal District Court Judge Edward Lodge ruled that district officials had done nothing unconstitutional by allowing students to decide whether to pray at graduation. Since the decision was left to the students, the district did not violate the First Amendment. The ACLU appealed Lodge's decision shortly thereafter, arguing that district officials were ultimately involved because they sponsored the event. The Ninth Circuit Court of Appeals heard arguments on Feb. 6, 1998, and has not yet rendered a decision.

Pennsylvania

During the spring of 1997, a Rocky Grove, Pennsylvania student notified the school board that because she is an atheist, prayers offered at her upcoming graduation ceremony would violate her constitutional rights. After the Pittsburgh office of the American Civil Liberties Union threatened to bring Federal court action on behalf of the student, the school board removed the prayer from the ceremony.[80] A similar issue arose in Peters Township in 1995.[81]

Religious Expression of Teachers in Public Schools

At the Federal level, religious expression of public school teachers is covered by the Constitution and Title VII of the Civil Rights Act of 1964. States may also have

[80] American Civil Liberties Union Freedom Network, "PA Graduation Prayer Controversy Continues," *News* (visited Mar. 25, 1998) <http://www.aclu.org/news/w060397c.html>.

[81] American Civil Liberties Union Freedom Network, "Jane Doe Discontinues Suit Over Peters Township School District's Graduation Prayers," *News & Events* (visited Mar. 25, 1998) <http://www.aclu.org/news/n072695b.html>.

provisions in their constitutions or statutes which govern teacher expression within the parameters of Federal law. Similar to the other topics covered by these hearings, the religious expression rights of teachers are subject to the tension inherent in the First Amendment in which religious expression is guaranteed by the Free Exercise Clause while at the same time restricted by the Establishment Clause.

In addition to constitutional guarantees, Title VII of the Civil Rights Act of 1964 requires an employer reasonably to accommodate an employee's religious observances, practices and beliefs unless the employer can show that an accommodation would cause "undue hardship."[82] Although there is no comprehensive definition of what constitutes an "undue hardship," in one case, the Supreme Court held that an employer need not bear more than a de minimis cost to accommodate an employee.[83]

To some extent, teachers' rights of religious expression may be discerned by examining the law and policies on religious expression of public employees generally. On August 14, 1997, President Clinton issued an executive order entitled, *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace.* The guidelines primarily pertain to employees who are acting in their personal capacity in the workplace. The guidelines direct agencies to permit personal religious expression to the "greatest extent possible" without jeopardizing workplace efficiency or creating the appearance of an official endorsement of religion.[84] The guidelines state that Federal agency employees may express their religious views toward one another as long as proselytizing stops when it is unwelcome and does not amount to religious harassment. Employees may hand out information on religious doctrine and invitations to worship services to colleagues unless the recipient indicates that it is unwelcome. The guidelines caution employees to be sensitive to Establishment Clause issues in workplace areas that are accessible to the public.

While employees may express religious convictions privately among themselves, they are not entitled to make public religious representations that conflict with the employer's mission. In deciding Free Speech cases, the Supreme Court has applied a balancing test, weighing the employee's Free Speech rights and the employer's interest in "promoting the efficiency of the public services it performs through its employees."[85] This balancing test has been applied to freedom of religion cases. In *Lumpkin v. Brown*,[86] a clergyman was removed from the San Francisco Human Rights Commission because of his public statements against homosexuals based on his strong religious beliefs. The mission of the

[82] 42 U.S.C. §2000e (1994).

[83] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

[84] *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* (hereafter cited as *Federal Workplace Guidelines*).

[85] Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

[86] 109 F.3d 1498 (9th Cir. 1997).

Human Rights Commission was "to eliminate prejudice and discrimination because of race, religion, color, ancestry, age, sex, sexual orientation . . . and to officially encourage private persons and groups to promote and provide equal opportunity for and good will toward all people."[87] In this case, the clergyman appeared on television publicly condemning homosexuality as a sin according to the Bible. Applying the Supreme Court's balancing test between the employee's Free Exercise right and the government's interest in workplace efficiency, a Federal court of appeals found that the clergyman could be removed from his position for making public statements that contradicted the commission's mission, even though his views stemmed from strong religious convictions. The court held that the First Amendment does not require any level of government "to put up with policy-level officials who work at cross-purposes with the policies they are responsible for carrying out."[88]

In the case of religious expression of teachers, Establishment Clause issues must be considered along with the interest of efficient operations. As instructors, teachers occupy a unique position. Their rights of religious expression may change depending on the circumstances. Therefore, while teachers may not lead a class in prayer or otherwise proselytize with respect to students, they have greater freedom of expression among colleagues or in the faculty lounge.

The fact that teachers may wish to express religious viewpoints does not create special First Amendment Free Speech rights. 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.[89] In that case, the teachers held prayer meetings on school facilities before students were allowed in the building. When the principal prohibited the meetings, one of the teachers sued, alleging that the ban violated her Free Speech rights. The court reasoned that the school was not required to permit meetings on the premises by private citizens during those hours, and the fact that the plaintiff worked there did not give her that right.[90] The case was decided on free speech, not religious exercise grounds. Furthermore, the Establishment Clause was not a overriding concern in part because students were not aware of the meetings.

Questions of religious accommodation also arise when teachers wear religious dress or religious symbols during work hours. As stated previously, employers must generally make reasonable accommodations without incurring undue hardship. Safety concerns are generally considered to be an undue hardship. 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. The Supreme Court has not ruled on the

[87] *Id.* at 1500 (citing San Francisco Admin. Code §12A.2).

[88] *Id.*

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

[90] *Id.* at 1110.

constitutionality of these statutes. However, other courts have upheld statutes restricting religious dress.

In Oregon, a State statute prohibits teachers from wearing religious dress while teaching in the public schools.[91] A teacher who had become a Sikh was suspended for wearing a white turban and white clothing while teaching.[92] The teacher then challenged the constitutionality of the statute. The Oregon State Supreme Court held that the statute did not violate the Oregon Constitution or the First Amendment of the Federal Constitution because its purpose was to maintain an atmosphere of neutrality in the public schools.[93] The Oregon Supreme Court noted the historical circumstances underlying many of these statutes which generally involved nuns who wore their habits while teaching.[94]

In Pennsylvania, a State statute prohibits public school teachers from wearing any religious dress or insignia while teaching.[95] The statute was challenged by a Muslim teacher who claimed that her religion required her to cover her entire body except for the face and hands.[96] After she was prohibited from teaching in her religious dress, she sued under Title VII of the Civil Rights Act of 1964. The Court of Appeals for the Third Circuit reasoned that the statute furthered a compelling state interest in maintaining the appearance of neutrality in the public schools, and thus held that "forcing an employer to sacrifice a compelling state interest would undeniably constitute an undue hardship."[97] In this case, the teacher did not challenge the constitutionality of the statute but only alleged that the school failed to make reasonable accommodations as mandated by Title VII.

Both the Oregon and Pennsylvania cases concern State statutes that prohibit teachers from wearing religious dress. The cases do not stand for the proposition that religious dress by teachers in public schools would rise to the level of excessive entanglement with religion in violation of the Establishment Clause. However, they both hold that a rule prohibiting religious dress is permissible to avoid the appearance of favoring a particular religion.

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[91] ORS 342.650 provides: "No teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher."

[92] Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298 (Or. 1986).

[93] *Id.* at 313.

[94] *Id.* at 308.

[95] The Pennsylvania Religious Garb statute provides:

"[N]o 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 or denomination. 24 P.S. §11-1112(a).

[96] United States v. Board of Educ. of Sch. Dist. of Phila., 911 F.2d 883 (3d Cir. 1990).

[97] *Id.* at 890.

Chapter Four: Equal Access

Constitutional right to public access to school facilities

Though the Establishment Clause prohibits organized prayer and most other forms of religious activity during school hours, the Free Speech Clause requires public schools to allow students and outside religious groups to meet on school property if the school facilities are open to similar groups.

In 1981, the Supreme Court in *Widmar v. Vincent*[98] applied the public forum analysis of the Free Speech Clause to the religious speech of university students participating in extracurricular activities. As a result religious groups have rights of expression in school facilities before or after instructional hours depending on the character of the facilities under the public forum doctrine of the First Amendment .

- A public forum is property that has been traditionally dedicated to free speech and assembly, such as streets and parks. Any member of the public may speak on any issue within the confines of neutral, generally applicable regulations, such as time, place and manner restrictions.

- A nonpublic forum is property that by neither tradition or designation is a forum for public communication. The government can restrict access as long as the restriction is reasonable and viewpoint neutral.

- A limited public forum is property the government intentionally designates as a public forum. The government can restrict access, as long as the restriction is reasonable and viewpoint neutral.

The public forum analysis balances the government's interest in limiting the use of its property against the speaker's interest in using the property for another purpose. Factors considered under this analysis include the type of property, its intended use, and the disruption likely to be caused by the speaker. Historically, schools are generally held to be either limited public forums or closed, nonpublic forums.

In *Lamb's Chapel v. Center Moriches School District No. 10,*[99] the Supreme Court noted that when a wide variety of organizations utilize a school, it might be considered a public forum. Specifically, the Court, rejecting the decisions of the lower courts, held that a Long Island school district was engaged in viewpoint discrimination when it barred a religious group from using a public school building to show family life films with a religious perspective. The Court found that "[a]ccess to a nonpublic forum can be based

[98] 454 U.S. 263 (1981).

[99] 508 U.S. 384 (1993).

on subject matter or speaker identity, as long as the distinctions are reasonable and viewpoint neutral."

Content neutrality is a broad prohibition on the government to restrict the subject matter of the speech itself. Viewpoint neutrality means that the government should not favor one particular viewpoint over another on a certain subject matter that the forum encompasses. The Supreme Court's opinions before *Lamb's Chapel* considered limitations on religious speech to be content-based, normally permissible in nonpublic fora. *Lamb's Chapel* characterized any limitations on religious expression as viewpoint discrimination, which is prohibited in any type of forum. In *Lamb's Chapel* a wide spectrum of the legal community, including advocates of religious expression and groups that advocate separation of church and state filed amicus briefs in support of permitting access to the "nonpublic" forum. The only group in opposition was Americans United for Separation of Church and State.

Some religious advocates interviewed for this project indicated that they were interested in obtaining statutory protection for religious groups who are not protected by law, namely university students, students younger than elementary school children, and for religious worship. They are concerned about the application of the *Lamb's Chapel* rule to two recent decisions emanating from New York. After the *Lamb's Chapel* decision the New York School District changed its rule, at issue in that case, to permit outside groups to use school facilities for discussing religious material or material containing a religious viewpoint. The amended rule, however, specifically prohibits the use of school facilities for religious services or religious instruction. Recent decisions involve the denial of the use of these facilities for religious services.

In *Bronx Household of Faith v. Community School District No. 10*[100] an evangelical Christian church requested to use a gymnasium/auditorium to conduct church services every Sunday. After the church was denied access, a lawsuit was filed. The United States Court of Appeals for the Second Circuit concluded that the school district had created a limited public forum by restricting access to its facilities to certain speakers and certain subjects. An important consideration to the court was that the school had not previously leased that particular school to an outside group for religious instruction. The Court held that the prohibition against Sunday worship was reasonable because the public might associate the school with the church. The New York State School Boards Association, Inc. filed an amicus brief in support of the New York City Board. During the Commission's Washington, DC hearing, it is expected that Julie Underwood, General Counsel Designate for the American Schools Board, will provide the Commission with the official position of the Board on this matter.

Those who are critical of the *Bronx Household of Faith* decision argue that the sanctioned policy allows bureaucrats in New York to decide when a meeting to discuss religious

[100] 127 F.3d 207 (2d Cir. 1997), *cert. denied*, __ U.S. __ (1998).

matters constitutes "worship." These critics maintain that the government is incompetent to make such determinations and, further that it involves matters with which the government is forbidden by the First Amendment to be involved. Furthermore in *Widmar v. Vincent* the Supreme Court had reasoned that the difference between religious beliefs and worship is a distinction without a difference. Thus, some critics argue that the Court in *Bronx Household of Faith* erroneously made that distinction the basis for its decision. Moreover, as a practical matter, there are those who suggest that outside of New York virtually every other school district allows renting of school facilities for religious worship on weekends because it is a source of revenue.

Another area of concern to Equal Access advocates is the religious expression rights of groups of students attending school at grades below the secondary school level. Since these students are younger, they typically meet in groups that are led by parents. Conflicts arise when schools allow the use of their facilities after instructional time to non-religious groups led by parents, such as the Boy Scouts, but deny similar access to parent-led religious groups. For example, in *Good News/Good Sports Club v. School District of Ladue*[101] a school district policy only allowed athletic groups and the Boy Scouts to meet between 3 p.m. to 6 p.m. Scout meetings were only allowed if they did not include any activity involving religion or religious beliefs. The Good News Club is a group of elementary school students who meet with parental consent. Based on the Supreme Court's analysis in *Lamb's Chapel*, the Eighth Circuit Court of Appeals held that the school policy discriminated on the basis of viewpoint.

Some religious advocates contend that students are not a captive audience. Those who oppose allowing use of school premises argue that there should be a difference between children at the primary and secondary level because primary level school children are much more susceptible to religious persuasion and implied coercion by adults. Thus, they argue that it is more important to keep religion out of the public schools and in the homes of primary school level students.

In October 1996, a lawsuit was filed in the Federal District Court in Buffalo, New York, by University Students for Life against the State University of New York. The lawsuit was the result of the failure of the school to permit the student group to sponsor an event on campus by requiring a security deposit not required of other student groups, and a refusal to permit student activity fees, that were used to fund other religious organizations, to be used by University Students for Life. The case was settled in early March 1998, granting the religious student group the same rights as other student groups.

The Christian Legal Society has a law school student ministry with chapters on about 85 campuses of the 175 law school campuses accredited by the American Bar Association. In a presentation to the United States House of Representatives Subcommittee on the Constitution on March 28, 1998, Steven T. McFarland, Director of the Center for Law

[101] 28 F.3d 1501 (8th Cir. 1994).

and Religious Freedom, described how the clubs encounter many problems in both public and private campuses. According to McFarland, the clubs are told they may not meet on campus and may not be officially recognized as long as they require their voting members and leaders to be Christians. McFarland recommended that Congress adopt legislation with a strict scrutiny standard whenever the government imposes a burden on an individual's religious beliefs that is more than *de minimis*.

The Equal Access Act

The purpose of the Equal Access Act[102] is to permit student groups to meet for student initiated activities not directly related to the school curriculum. The Act provides that public secondary schools receiving Federal financial assistance may not discriminate against student groups on religious, political, philosophical, or other content-based grounds.[103] The Act therefore allows student organized religious prayer in public schools, as long as certain conditions are met. The statute focuses on organized religious expression, not on individual or informal religious activities in which students may constitutionally participate. There is a difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.

When Congress approved the Equal Access Act in 1984, it used the term "limited open forum,"[104] rather than one of the terms of the Supreme Court's free speech doctrine. The use of the term "open" rather than "public," as used in Free Speech cases, suggests that perhaps Congress intended to establish a different standard. Since the Equal Access Act does not use the constitutional public forum doctrine to determine if there is a limited open forum, it is unnecessary under the Act to analyze the factors used in forum classification doctrine, such as policy, practice and the speech's compatibility with school property. The constitutional public forum doctrine requires an affirmative act of designation to establish a limited public forum on public property which is normally nonpublic, such as school. A limited open forum is triggered if a school simply allows one or more "non- curriculum related" student groups to meet.

In 1990 the Supreme Court upheld the constitutionality of the Act in *Board of Education of Westside Community Schools v. Mergens*.[105] For purposes of the Act, state law determines whether an institution is a secondary school.[106] In order to avoid an Establishment Clause violation, the Act provides that when a school creates a limited open forum, no school employee or official can participate in the club's activities, except

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[102] 20 U.S.C. §§ 4071-4074 (1994).

[103] *See* 20 U.S.C. § 4071 (1994).

[104] 20 U.S.C. § 4071(a) (1994).

[105] 496 U.S. 226 (1990).

[106] *See* 20 U.S.C. § 4072(1) (1994).

to facilitate the opening and closing of classroom space for the group's meetings.[107] Excluding a religious club amounts to content discrimination, which is forbidden under the Act.[108] Under the Act, contrary to Free Speech doctrine, a much narrower range of groups can render a school accessible to student religious organizations. The presence of even one student group lacking a corollary formal course in the school curriculum would establish a limited open forum.

The Act only protects student initiated and student-led meetings.

The Act provides access for student religious groups if the schools allow "non-curriculum related" groups to meet. The Act fails, however, to define the term "non-curriculum related clubs." The Supreme Court had stated:

> [A] student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.[109]

State or local authorities might explicitly define what activities are related to a school curriculum. Some contend that the Act does not attempt to limit local school boards' authority defining the boundaries of their curricula[110] because any such attempt by Congress would have upset the country's commitment to leave control of public education to state and local authorities. Similarly, it is argued that the courts should interfere with local autonomy over schools only if constitutional values are threatened.[111]

Upholding the constitutionality of the Equal Access Act may be seen as a trend toward allowing religious expression in an otherwise restrictive forum. The Act involves younger children, while the constitutional equal access doctrine has generally been applied in situations involving older students. The Act was deemed necessary to ensure equal access for students at the secondary school level. Students in even lower grades, however, were considered as lacking the necessary maturity to understand that religious activities were not sponsored by the public schools. Nevertheless, some argue that the Act should be extended to students in lower grades in parent-led religious activity on the ground that parents have the right to determine the religious upbringing and education of their children.[112] Families entrust public schools with the education of their children, but

[107] *See* 20 U.S.C. § 4071(c)(3) (1994).

[108] *See* 20 U.S.C. § 4071(a) (1994).

[109] *Mergens*, 496 U.S. at 239-40.

[110] *See* 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (remarks of Sen. Hatfield).

[111] *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

[112] *See* Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 518 (1925).

condition their trust on the understanding that classrooms will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his/her family. In such situations parental permission is generally required.

Those who oppose extension of the Act say that younger students are impressionable and their attendance at any religious activity would be essentially involuntary. School authorities may exert great authority and coercive power through mandatory attendance requirements, student emulation of teachers as role models, and children's susceptibility to peer pressure.[113] Educators can exercise control over student expression if it involves materials inappropriate for their level of maturity.[114]

Recent articles in national journals discuss how religious clubs at high school and middle school campuses across the nation are drawing thousands of teenagers to regular meetings. For example, the Fellowship of Christian Athletes (FCA) is a Christian youth club that exists in all of the high schools and nearly all of the middle schools in Polk County, Florida. The club is also a national group operating in more than 7,000 schools nationwide. While some parents suggest that FCA clubs raise grades and improve behavior, critics argue that teachers participating with the clubs are not neutral observers but are actively proselytizing. In February 1998, student members from one chapter of the FCA club requested and obtained permission to perform a gymnastics routine to a song with lyrics stating that America needs God as the true basis of freedom. School officials publicly chastised the Christian club and prohibited it from making future presentations of its message during school hours. Members of the club filed suit contesting the school's actions.

In the past a project coordinator for Youth for Christ in Long Island, New York, said that teachers and school officials tore down fliers announcing religious club meetings, and challenged the clubs' right to use school facilities. Youth for Christ works with teenagers who participate in student clubs. It is a 50-year-old organization that in 1995 had 225 chapters in the United States.

Another issue that has arisen under the Equal Access Act, and alluded to in the previous section, involved a situation where a high school club had a requirement that its officers be professed Christians.[115] The Second Circuit said in *Hsu v. Roslyn School District*[116] that the Equal Access Act protects religious expression and allows a rule that those officers who are involved in directing religious services be Christians. In this case two students brought a lawsuit against the Roslyn High School located at Long Island. The

[113] Edwards v. Aguillard, 482 U.S. 578, 584 (1987); *see* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963).

[114] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[115] *See* discussion above regarding the testimony of Steven McFarland before the U.S. House of Representatives.

[116] 85 F.3d 839 (2d Cir. 1996).

school would not allow them to have an official school club which required its officials to be professed Christians. The Club's proposed constitution had an exclusionary leadership policy that restricted the five officer positions to professed Christians. This was counter to the school's policy of prohibiting discrimination because of religion. The Bible Club would have been open to all, with the meetings devoted to prayer, singing and Christian fellowship. Since the position of secretary and activities coordinator were ministerial functions unrelated to the overall purpose and character of the club, the club could not apply its exclusionary leadership policy to these two offices. However, the President, Vice-President, and Music Coordinator of the club, had duties consisting of leading Christian prayer and safeguarding the religious character of the meetings. The court upheld the Christian only leadership provision, ruling that the requirement is essential for the expressive content of the club's meeting, and therefore, protected by the Equal Access Act. The court reasoned that the club's religious discrimination was not invidious, which protects it both from a constitutional challenge under the Equal Protection Clause and the statutory claim under the Equal Access Act. In reaching its decision, the court relied on a 1987 Supreme Court holding that a religious entity could discriminate on the basis of religion for all jobs. Critics say that the exemption for Bible Clubs violates the constitutional separation of church and state. The court held, however, that this exception allowed the club to ensure the religious content of its speech. The exception was necessary to ensure equal access.

CHAPTER FIVE: GOVERNMENT FUNDING AND RELIGIOUS SCHOOLS

Introduction

In recent years, Americans have been increasingly troubled and disappointed by the scholastic performance and conduct of students attending the Nation's public schools, particularly those enrolled in urban school districts.[117] These concerns have been raised by people across all racial, ethnic and economic lines. In addition, recent incidents of shootings by students in public schools--the most recent involving two middle school age students in Arkansas--can be expected to result in increased criticism and examination of the country's public school system. Can public schools accomplish their mission of educating a new generation of students in a safe environment? Will these youngsters be capable of competing in the new technological age of the next millennium? Will they compare favorably with their counterparts elsewhere in the world in terms of basic skills development? Are private, non-religious schools, religious schools, charter schools or home-based schools better able to educate America's youngsters?

Poor student performance and violence in schools are two of the reasons cited by many advocates for alternatives to the country's public education system. Private schools, especially religious schools, according to some, simply do a better job of educating America's children than public schools. Moreover, public schools, they claim, will only improve if they are faced with competition from other schools, i.e., religious schools, which also are better able to address issues regarding values and behavior. However, the question remains to what extent can public funds be used to help accomplish these worthy goals of educational achievement outside the public educational system? More specifically for purposes of the instant project, to what extent can public funds be used to provide services or instruction or to support other education related activities that are provided in or associated with parochial schools, without violating either the Establishment Clause or the Free Exercise Clause of the First Amendment to the U. S. Constitution?

General Legal Principles Regarding Government Funding and Religious Schools

The recent Supreme Court decision in *Agostini* v. *Felton,*[118] along with earlier Supreme Court decisions, provides some answers regarding the extent to which government

[117] Troy Segal, "Saving Our Schools," *Business Week*, Sept. 14, 1992, p. 70 ("America is ...losing faith in public education."). Also a 1988 Gallup poll stated that 48 % of Americans gave public schools a grade of C, 13% a grade of D and 3% a grade of F, while only 23% gave public schools a grade of A or B, as cited in Mark J. Beutler, "Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications," *George Mason Independent L. Rev.*, vol. 2 (Winter 1993) (hereafter cited as Beutler article), p. 7.

[118] 117 S. Ct. 1997 (1997).

funding may be utilized in connection with parochial schools. In *Agostini* the Court held that New York City public school teachers may provide educational services on private or parochial school premises during school hours under certain circumstances without violating the Establishment Clause of the First Amendment. Specifically, publicly funded New York City teachers may now provide Title I services in the city's private and parochial schools rather than continuing the practice of providing Title I services in trailers near the schools. Title I refers to Title I of the Federal Elementary and Secondary Education Act of 1965[119] which provides Federal funds to local school districts for remedial education and job counseling to low income students who have difficulty achieving state student performance standards. The Supreme Court stated that interaction between church and state is inevitable and that some level of involvement of the two has always been tolerated. The Court found that the nature of the church-state involvement did not result in the government becoming excessively involved in the workings of a church institution and the interaction was limited to a particular Federal fund.

Agostini overruled an earlier Supreme Court case, *Aguilar* v. *Felton*[120] which involved the same parties. In that decision, the Court held that New York City's Title I program resulted in excessive church-state entanglement because it required pervasive monitoring of instruction in parochial schools. *Agostini* also overruled in part *Grand Rapids School Dist.* v. *Ball*[121] which held that a similar local program impermissibly advanced religion. Both *Aguilar* and *Ball* were premised on the rationale that public employees who are located on the grounds of parochial schools represent a union of church and state, require extensive monitoring or eventually result in government-sponsored inculcation of religion. However, following *Aguilar* and *Ball*, the Supreme Court retreated from this rationale in a 1993 case *Zobrest* v. *Catalina Foothills School District.*[122] In *Zobrest* the Court upheld the use of a publicly funded sign language interpreter by a parochial school student.

With these most recent cases—*Zobrest* and *Agostini*—which authorize the use of sign language interpreters and Title I teachers in parochial schools, respectively, the Supreme Court has added to the following publicly funded activities that can be connected to religious schools:

1. payment of transportation costs of students to parochial schools;
2. property tax exemptions to churches sponsoring religious schools;
3. public schools lending textbooks to parochial school students;
4. providing vocational tuition grants to the blind; and
5. funding a religious publication from student fees collected at a public, state-run university.

[119] 20 U.S.C. § 1400 *et seq.* (1994).

[120] 473 U.S. 402 (1985).

[121] 473 U.S. 373 (1985).

[122] 509 U.S. 1 (1993).

After the Court's decision in *Agostini*, the DoE implemented guidelines to ensure that the decision was properly implemented. The guidelines can be summarized as follows: ---

1. Only public school employees can serve as Title I instructors;
2. Public schools must assign personnel to private schools without regard to the employee's religious affiliation;
3. All religious symbols must be removed from spaces used for Title I services;
4. Public school teachers must limit their consultations with parochial school personnel to discussions of student education; and
5. A public school field supervisor should make an unannounced visit to each teacher's classroom each month to ensure that the program does not contain any religious aspects.

However, the guidelines have been criticized by some groups as not properly interpreting *Agostini.* Among the concerns raised by one New York-based group are that (1) the guidelines state that religious symbols may be removed, while the group claims that such symbols must be removed; and (2) the guidelines, according to the group, have no enforcement mechanism to insure their proper implementation.

The Commission's investigation may examine school districts' compliance with the guidelines and determine whether an effective enforcement mechanism exists. If there is no effective enforcement mechanism in place, the Commission could explore possible mechanisms which could ensure compliance with *Agostini.*

Vouchers

In light of the *Agostini* decision, which continues a trend by the Court to extend the types of public financial assistance that may be properly associated with parochial schools, the question is whether publicly-funded vouchers can be used for tuition in parochial schools without violating the Constitution? In the 1925 case of *Pierce* v. *Society of Sisters,*[123] the Supreme Court ruled that parents may elect to send their children to a private school rather than a public school. However, the Court has never specifically answered the question whether public funding may be used to assist parents in exercising that right. The issue of the legality of publicly-funded vouchers has arisen in communities throughout the Nation, including the following:

1. The Southeast Delco School Board in Pennsylvania in March 1998 proposed vouchers for its students. The proposal would provide parents of district students vouchers worth from $250 for kindergarten to $1000 for high school to be used at private schools, including religious schools, or at public schools outside the district. However, the Pennsylvania State Constitution prohibits the use of public funds for

[123] 268 U.S. 510 (1925).

private and religious schools. And, in April 1998, the Pennsylvania State Education Association, along with 15 other organizations, filed suit to block the proposal.[124]

2. Also in Pennsylvania, statewide voucher legislation has been pending since 1997;

3. Voucher initiatives have been reported in Washington, DC, California, Colorado, Illinois, Minnesota and Texas. In May 1998, the U.S. House of Representatives narrowly passed a voucher bill for Washington, DC. Under this bill, up to 2,000 low income children would receive tuition vouchers worth from $2400 to $3200 annually which could be used at private schools, including religious schools. In addition, the bill allocates $500 annually to up to 2000 of the school system's remaining 78,000 students for tutoring.[125]

4. Wisconsin, Puerto Rico and Ohio have passed voucher measures. In Cleveland, Ohio, the experimental voucher program provided 3,000 low income students with vouchers to attend private schools.

5. Finally, an experimental voucher program is in its second year in New York City. Initially, 1200 low-income public school students received vouchers to attend private or religious schools at a cost of about $6 million in private donations, largely from foundations and Wall Street corporations. Later this year, the program will be enlarged by 1000 students who will be selected form the city's 14 school districts with the lowest reading scores. The program originated when the mayor accepted a long-standing challenge by the city's Catholic archdiocese which had offered to accept some of the lowest achieving public school students, in part to demonstrate that Catholic schools could provide them with a better education.

Tax Credits and Tax Deductions

Another funding topic which could be addressed during a Commission hearing is the constitutionality of tax credits and tax deductions for tuition paid to parochial schools.[126] Recent controversies involving this issue have arisen in several locations across the country.[127] In Oregon, a voter-led initiative proposing a tax credit for private school tuition failed at the polls. The proposal would have provided for tax credit for either private school tuition or expenses for educating a child at home. However, Minnesota has passed a tax deduction program. This program allows parents a tax deduction of

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[124] *See* "School Choice Foes sue small district in Pennsylvania; Vouchers aimed at Easing Crowding," *The Washington Times*, Apr. 17, 1998, p. A-5.

[125] *The Washington Post*, May 7, 1998, p. VA- 9.

[126] A tax credit is subtracted from the amount of tax owed while a tax deduction is subtracted from taxable income.

[127] *See generally*, Clint Bolick, "School Choice, The Law, and The Constitution: A Primer for Parents and Reformers," *Heritage Foundation Reports*, Sept. 19, 1997.

$650 for children in kindergarten through 6th grade and $1000 for those in grades 7 through 12 for use toward any private school expenses except religion classes, and for certain additional public school programs. In addition, a new Arizona law provides tax credits for contributions to private school scholarship funds and payment of extracurricular activities fees at public schools.[128]

Special School Districts

Another funding issue which arose in New York State, and which could be addressed by the Commission, is the constitutionality of using public funds to establish a special school benefiting one particular religious sect. In August 1997, the New York Governor signed a bill into law allowing a small Orange County village of Hasidic Jews to create a special public school district for disabled children in their community. The courts have ruled that this and similar bills for the village, Kiryas Joel, violate the constitutional separation of church and state.

In sum, there is a growing judicial trend permitting the government to provide financial assistance that is related to religious organizations so long as the organizations receive only an indirect benefit and so long as the primary purpose of the financial aid is secular. Issues concerning the constitutionality of particular types of financial assistance are occurring throughout the country and can be expected to continue for sometime to come.

[128] Randi Barocas, "State Supreme Court Hears Arguments on Tax Credit," The Ethnic NewsWatch, *Jewish News of Greater Phoenix*, Dec. 19, 1997, p. 1.

Schools and Religion Project: New York Hearing

U.S. Commission on Civil Rights

Panel 1:

Overview - Schools and Religion

June 12, 1998
10:00 - 11:30 a.m.

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
Overview
Joseph P. Infranco
Attorney and Partner of Migliore & Infranco

Background

Mr. Infranco is an attorney and partner in the law firm of Migliore & Infranco, P.C., located in Commack, New York. He received a B.S. from Manhattan College in New York in 1974 and a J.D. from Franklin Pierce Law Center, New Hampshire in 1977. He is admitted to practice in the U.S. Supreme Court, the U.S. Court of Appeals, Second Circuit and the Eastern and Southern District Courts of New York. He is a member of the New York State Bar Association, Suffolk County Bar Association, New York State Trial Lawyers Association, American Trial Lawyers Association and the Christian Legal Society.

Mr. Infranco and his firm represent many churches and religious not-for-profit corporations. He has been active in the practice of constitutional litigation in the area of church and state relations. He has authored several articles and has made frequent appearances on radio and television shows concerning First Amendment issues. He recently testified before a Congressional Sub-Committee on a proposed Constitutional Amendment concerning religious practices in public schools and other public places.

Questions

- Are you able to compare the treatment of students' religious rights in New York to such treatment in other parts of the country? Please explain.

- Please describe the equal access litigation and your other advocacy activities involving the denial of school facilities to religious organizations for religious worship. What is your position regarding the application of current law to those groups? Please explain.

- Has there ever been an effort to approve legislation in New York that would allow directly or indirectly the use of school facilities by outside organizations for religious worship? Please explain.

- What is your position concerning religious affiliation membership requirements of student religious clubs?

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
Overview
Vincent P. McCarthy
Senior Northeast Regional Counsel, American Center for Law and Justice

Background

Mr. McCarthy has been the Senior Northeast Regional Counsel of the American Center for Law and Justice since 1997. In this capacity he handles constitutional issues in Federal and state courts involving religious liberties and family values.

Mr. McCarthy graduated from Fordham University School of Law in 1972. He worked until 1975 as a staff counsel specializing in constitutional law at the Legal Services Corporation. During 1975-1976 he was an Assistant Professor of Law at the Western New England School of Law. From 1976 to 1983 he was Associate Dean and Associate Professor of Law at the University of Bridgeport School of Law. He taught constitutional law, remedies, housing, and civil procedure.

Questions

- Please describe the litigation and advocacy activities of your organization involving students' rights of religious expression.

- Are you able to compare the treatment of students' rights of religious expression in New York to such treatment in other parts of the country? Please explain.

- What is the position of your organization regarding the application of current law to students' rights of religious expression? Please explain.

- Has there ever been an effort to approve legislation in New York that would impact directly or indirectly on students' rights of religious expression? Please explain.

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
Overview
Pamela Betheil
New York State School Boards Association

Background

Pamela Betheil is the president of the New York School Boards Association (NSBA) for 1998. Before being elected president, she served seven terms as Association vice president. Ms. Betheil has served on the Association Board of Directors since 1980 as the Director for Area 12, representing school boards in Suffolk County. Ms. Betheil is employed as chairman of the Brookhaven Town Planning Board.

The Association serves as an educational and advocacy organization for school boards across the state. As Association president, Ms Betheil advocates for public education before the New York State Legislature, the Executive Chamber of the Governor's Office and the New York State Board of Regents. She is also a member of the Education Commissioner's Advisory Council of School Board Members.

At the national level, Ms. Bethel represents the Northeast region of the National School Boards Association's Resolutions Committee. She is a member of the NSBA's Federal Relations Network and the State Association's Legislative Network.

Questions

- Please describe the impact of the *Statement of Principles of Religious Expression in Public Schools* that the Department of Education issued in 1995 and now in 1998 at the request of President Clinton?

- Please describe the litigation and other advocacy activities of your organization regarding equal access issues, including any cases in which the organization has intervened in matters involving school boards.

- What is the position of your organization as to whether school boards should allow outside religious groups to use school premises on the weekends for worship? Please explain.

- What is the position of your organization concerning student religious clubs that require that students profess a faith as a requirement for membership? Please explain.

Schools and Religion Project: New York Hearing

U.S. Commission on Civil Rights

Panel 2:

Overview - Schools and Religion

June 12, 1998
11:45 a.m. - 12:45 p.m.

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
Overview – Schools and Religion
Jeffrey H. Ballabon
Board Member, Toward Tradition

Background

Mr. Ballabon is Senior Vice President of Corporate Affairs at Court TV. He serves on the boards of Toward Tradition and the Orthodox Union's Institute for Public Affairs, and he is Vice-Chair of the Young Jewish Leadership PAC. He is also on the New York State Bar Association's Committee on Media Law, and he is Chair of the Federalist Society's Media Subcommittee.

Prior to joining Court TV, Mr. Ballabon was legislative counsel to United States Senator John C. Danforth (R-MO), and counsel to the Senate Committee on Commerce, Science, and Transportation. Before his work in the Senate, Mr. Ballabon was an attorney in private practice. He is a graduate of Yale Law School, Yeshiva University and the Ner Israel Rabbinical College.

Questions

- Please describe the mission of Toward Tradition as it relates to issues involving public schools and religion.

- In an interview with Commission staff, you discussed your concerns regarding certain books included in public school curriculum. Please explain the specific concerns of Toward Tradition about the public schools curriculum.

- Do you believe that the public schools are currently doing a good job of transmitting strong moral values to our nation's youngsters?

- How would you assess the current role of public schools in addressing religious issues? What is the basis of your assessment?

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
Overview - Schools and Religion
Susan L. Douglass, Principal Researcher/Writer, Council on Islamic Education

Background

Susan Douglass has been working with the Council on Islamic Education (CIE) since 1993. In her work with CIE, she consults textbook publishers and school teachers to ensure that social studies and world history materials are fair and accurate in their treatment of religion. She has expertise on Islam, but she consults textbook writers on the treatment of all religions.

Questions

- Do you find that textbooks are properly covering Islam and religion generally? If not, what are the most common deficiencies?

- When textbooks address the topic of religion, are some faiths consistently excluded from consideration?

- What role, if any, should the Federal Government play in ensuring an accurate and fair portrayal of religion in textbooks?

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
Overview - Schools and Religion
Kevin Hasson
President, The Becket Fund

Background

Mr. Hasson has a Masters degree in theology and a law degree, both from Notre Dame. Prior to establishing the Becket Fund, Mr. Hasson worked in the Office of Legal Counsel at the Justice Department. He also worked at Williams & Connelly for seven years on church and state issues. Mr. Hasson founded the Becket Fund to fill a gap between fundamentalist Christian groups that promoted a particular religious viewpoint on one side, and groups on the other side that uniformly advocated against religion in public life.

The Becket Fund is a bi-partisan public interest law firm founded four years ago to protect the free expression of all religious traditions. The Fund is staffed with four full time lawyers in Washington, D.C. Their clients have included Catholics, Protestants, Buddhists, Mormons, Muslims, Native Americans, Jews, and others.

Questions

- Please describe some of the cases in which the Becket Fund has been involved that address public schools and religion issues.

- Do you have any comment on how the Supreme Court has interpreted the Constitution in schools and religion cases?

- Are you familiar with New York Education Law Section 414? If so, what are your views regarding that statute?

Schools and Religion Project: New York Hearing

U.S. Commission on Civil Rights

Panel 3:

Religious Expression and Equal Access

June 12, 1998
1:45 - 3:15 p.m.

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
Religious Expression and Equal Access
Ms. Ann Smith (parent), and Christian and Lindsey Smith (students)

Background

Ann Smith, Parent: Ms. Smith is a single mother of three children. In May 1997, Ms. Smith sought legal advice from the American Center for Law and Justice regarding whether her two youngest children could distribute to their elementary school classmates invitations to a national day of prayer event. Upon learning that the children should be permitted to do so, Ms. Smith allowed her children to bring the invitations to school and distribute them to their classmates.

Lindsey Smith, Student: Lindsey is approximately 12 years old. In May 1997, she was prevented from distributing to her classmates invitations to a local national day of prayer event.

Christian Smith, Student: Christian is approximately 9 years old. In May 1997, he was prevented from distributing to his classmates invitations to a local national day of prayer event.

Questions

- Please describe the invitations, the prayer event, and the way in which Lindsey and Christian became interested and involved in distributing the invitations to their classmates.
- What was the school's reason for keeping Lindsey and Christian from distributing the invitations?
- What was the final outcome of this matter and the impact of it on Lindsey and Christian?

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
Religious Expression and Equal Access
Rebekah Gordon (student) and Denise Gordon (parent)

Student, Rebekah: Rebekah Gordon, a fifth grader, was told she could not sing the song of her choice in a student talent show because it had the word "Jesus" in it. Rebekah was told that the song might offend some people. A demand letter was sent by the American Center for Law & Justice of New York, and the matter was resolved.

Parent, Denise Gordon: Denise Gordon runs a business renting out skating rinks to Christian groups. She is also a Vice President of United Parents Association of New York. She also does victim services work with the Brooklyn Committee on Domestic Violence.

Questions for Student

- Have your friends or teachers treated you differently since this has happened?
- Are you glad that you worked on this matter until they let you sing the song you wanted? If the same thing happened to you in the future, would you handle it in the same way, or would you do something different?

Questions for Parent

- Have there been any positive or negative consequences as a result of this incident, from other students, other parents, or school personnel?
- Have there been any similar incidents that have involved your child or anyone you know?
- If a similar incident arose at school, would you handle it in the same manner again?

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
Religious Expression and Equal Access
Anna Crespo
High School Student

Background

Anna Crespo is a member of the congregation of Centro Biblico church in Freeport, New York. She was born in San Miguel, El Salvador. She came to live to the United States in 1990.

She is a fourth year student at the Freeport High School. Last year she was the President of a Bible club that was officially recognized by the school pursuant to the Equal Access Act.

Questions

- Please describe the goals of the Bible club of high school students that you presided. When was it organized?
- Please explain the difficulties that you had with the school administrators during the period of time you presided the Bible club.
- Were you able to have the Bible club mentioned in your school yearbook? Please explain.

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
Religious Expression and Equal Access
Reverend Steve Fournier, Good News Club

Background

Reverend Fournier has been a pastor since 1990 and has lived in Milford, New York for five years. He and his wife are the organizers and leaders of the Good News Club in Milford. The Good News Club is affiliated with the Child Evangelism Fellowship and uses its guidelines and teaching materials.

The Good News club seeks to teach morals from a Christian perspective. Reverend and Mrs. Fournier began the club in Milford about four years ago. The students range from kindergarten to 6th grade and the club averages 15-20 students at each meeting. They meet every Tuesday at 3:00 for approximately one hour. During the meetings, they pray, sing songs, and play games to help the students memorize scripture and stories from the Bible.

Questions

- What are the goals of the Good News Club and what are some of its activities?
- Please explain the nature of your lawsuit against Milford Central School.
- What other types of organizations use the facilities at Milford Central School?
- During an interview with staff, you mentioned that the Good News Club is careful to avoid the appearance of school sponsorship of its activities. Please elaborate on this point.

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
Equal Access and Freedom of Expression
Reverend Robert Hall

Background

The Reverend Robert Hall has been co-pastor of The Bronx Household of Faith, a Christian Evangelical church and urban mission in New York City. He is a graduate of the University of Minnesota and earned a Master of Divinity degree from Covenant Theological Seminary (Presbyterian), St. Louis, Missouri in 1972. In 1997, he received a Master of Theology degree from Westminster Theological Seminary in Philadelphia.

He is an ordained minister in the Conservative Congregational Christian Conference (CCCC) and also serves as its area representative for the Greater New York/New Jersey area. The CCCC is an Evangelical denomination of the historic Biblical persuasion, and it, in turn, is a member of the National Association of Evangelicals (NAE).

The Bronx Household of Faith is a community based urban church, the majority of whose members live in the immediate neighborhood. Its ministry has taken on many forms, including refugee relief, "at risk" children and youth ministries, responding to emergency situations with food, clothing and finances, and maintaining a close association with Hope Christian Center, a residence for men, where Rev. Hall teaches three days a week.

Questions

- Please describe the arrangements you made on behalf of your congregation to lease school facilities for religious worship during the weekends.

- Are you able to compare the treatment of religious congregations that want to rent school facilities for religious worship in New York to such treatment in other parts of the country?

- What impact has the Federal district court ruling that your church is not a civic, social or cultural organization had on your congregation? Please explain.

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
Religious Expression and Equal Access
Reverend David Silva
Associate Pastor, Centro Biblico

Background

Reverend David Silva is currently an associate pastor of Centro Biblico church in Freeport, New York. He served as the Pastor of Jesus is Lord Ministries in Coram, NY for two years. There he performed the work of an Evangelist in the Eastern area of Long Island, NY through crusades in churches and under a tent. He has preached in the metropolitan area of New York, Long Island, and Puerto Rico. He has been guest speaker at family and marriage conferences.

He is the founder of Youth in Action, a ministry with adolescents. He has been a guest speaker at youth rallies where he says, "hundreds of teenagers have been transformed by the power of God to make commitments such as chastity, antidrugs, antialcohol and to serve the Lord."

Questions

- Please describe the goals of The Truth Club, an organization of high school students that includes members of your church. How was it organized?

- Please explain the difficulties that members of this student religious club brought to your attention in seeking to pursue the goals of the club and your advice to them.

- Do you have any suggestions as to what the New York City School Board should do to avoid these difficulties? Please explain.

Schools and Religion Project: New York Hearing

U.S. Commission on Civil Rights

Panel 4:

School District Representatives

June 12, 1998
3:15 - 4:15 p.m.

SCHOOLS AND RELIGION PROJECT
NEW YORK HEARING
School District Representatives
Dr. Evelyn B. Holman
Superintendent of School, Bay Shore Union Free School District, New York

Background

Since 1994, Dr. Holman has been Superintendent of Schools in Bay Shore, New York (5,000 students). From 1984 to 1994, she was Superintendent of Wicomico County schools in Salisbury, Maryland (13,000 students). She has also been a junior high school civics, social studies, history, and English teacher (1963-1966), a Demonstration Teacher (1967-1968), a high school supervisor and coordinator of instruction (1968-1974), a junior high school and middle school principal (1974-1977), and a director and executive director of schools in Frederick County, Maryland (1977-1984). She earned both a Master of Education degree and Doctor of Philosophy from the University of Maryland.

Questions

- While you were in Maryland, you formed a "values committee" to help form policies and answer questions on the issues of religion and values in school. Could you please tell us some of the more difficult issues this committee helped to resolve? What's the best way to form such a committee and let the parents and public know about it?

- You have now worked in several different school districts during your career. Have you found the kinds of controversies involving religion to be similar in those different districts?

- In your experience, what have you found to be the most effective way to ensure that school teachers and administrators are knowledgeable and current on what the law is with respect to religion in the schools?

- Based on your experience, do you think the state or Federal governments should play a bigger role in helping to train school personnel and/or disseminate relevant information with respect to religion in the schools?

SCHOOLS AND RELIGION PROHECT
NEW YORK HEARING
School District Representatives
Frank W. Miller
Ferrara, Siorenza, Larrison, Barrett, & Reitz, P.C.

Background

Mr. Miller graduated from Albany Law School in 1978 and was admitted to the bar in 1979. He concentrates on education law and represents school districts and educational institutions. He is experienced in defending school districts in many kinds of litigation, including First Amendment cases. He is currently defending Milford Central School in a lawsuit brought by the Good News Club.

The law firm of Ferrara, Siorenza, Larrison, et. al. is staffed with 12 attorneys concentrating in labor and employment law, and education law. The firm currently represents approximately 110 school districts in New York in all types of legal matters, including employment, discrimination, special education, and First Amendment issues.

Questions

- How frequently do religion issues arise during the course of your representation of school districts?
- Please give a brief explanation of New York Education Law Section 414, which governs the use of public school facilities.
- According to your interview with staff, not every group with a religious affiliation is barred from using public school facilities. Under your interpretation of statutory and case law, what uses are prohibited?
- With respect to the Good News Club, please detail the school board's position and the reasons for its position.