

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE FRANK C. DAMRELL, JR., JUDGE

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PLANS, INC.,

Plaintiff,

vs.

SACRAMENTO CITY UNIFIED SCHOOL
DISTRICT, TWIN RIDGES ELEMENTARY
SCHOOL DISTRICT, DOES 1-100,

Defendants.

No. CV S 98-0266 FCD

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REPORTER'S TRANSCRIPT

WEDNESDAY, APRIL 11, 2001

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Reported by: MARGARET McNAMARA, CSR 6729

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1 APPEARANCES

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11 For the Defendant Twin Ridges Elementary School District:

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14 By: Martin Fine, Atty at Law

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SACRAMENTO, CALIFORNIA

WEDNESDAY, APRIL 11, 2001, 1:15 P.M.

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THE CLERK: Calling civil case 98-026 Plans versus Sacramento City Unified School District. It's on for Daubert hearing, your Honor.

MR. KENDALL: Scott Kendall for the plaintiffs, your Honor.

MR. FINE: Good afternoon, your Honor. Martin Fine for the defendants.

MS. CANNON: Michelle Cannon also representing the defendants.

THE COURT: Counsel, I would like to take up some matters before we get to the Daubert hearing and the motions in limine.

This matter, as you know, I think is set for trial on the 25th of June. I want to revisit a couple of matters, but most importantly, the final pretrial order, which I think needs some amending. I don't know if you brought your copy of it with you this afternoon.

Mr. Kendall, do you have it?

MR. KENDALL: Yes. I do.

THE COURT: Why don't you come up to the podium, and I can point out some problems?

I reviewed the disputed factual issues with some care

1 now, and I take responsibility for not reviewing this and
2 analyzing this better the first time around. But with
3 respect to the disputed facts turn to page three of the
4 order.

5 There are a number of disputed facts that are in fact
6 legal issues, and they are not factual issues. I believe
7 all the factual issues that plaintiff has placed in
8 contention are really legal issues, and I would like to
9 incorporate those, counsel, in the points of law provision.

10 I have a draft here -- I'm going to go through this
11 first, and I'm going to give you my draft of proposed
12 amended disputed facts and amended points of law. I would
13 take each of the five issues that are set forth under the
14 disputed facts and incorporate those as essentially -- not
15 all of them, but some of them essentially as legal issues
16 that should be taken up on the points of law.

17 But I do have the one issue that I think -- of the
18 disputed facts set forth by the plaintiff which I believe
19 is at least somewhat incorporated in that, which is the
20 notion of whether Anthroposophy isn't religion.

1 Would counsel concur that is certainly a fundamental
2 factual issue in this case?

3 MR. KENDALL: Yes, absolutely. They are saying it is
4 not a religion, and if it's not a religion for purposes of
5 the First Amendment then our case doesn't have any way to

1 go.

2 THE COURT: Wouldn't the Court have to make a finding
3 with respect to -- and posit this, whether it's a religion
4 or not?

5 MR. FINE: If we could back up for one second. We
6 would see characterized as a mixed issue of law and fact,
7 and therefore it's an issue of law. Because you're
8 applying -- it could be a pure fact. But for example, is
9 there Anthroposophical rituals, but that needs to apply to
10 the Alvarado standards, which are issues of law.

11 THE COURT: I would agree, but don't you think there
12 are some factual determinations here?

13 Maybe we can bifurcate that notion, but I -- frankly,
14 I thought I would have had a real expert here to discuss
15 that issue. And frankly neither side has presented an
16 expert that is going to discuss, in my view with the kind
17 of authority that I anticipated, whether Anthroposophy is a
18 religion. There is no academic scholar that is going to
19 come into this courtroom and say Anthroposophy is a
20 religion.

21 But I do feel from the percipient witnesses and
22 possibly from other expert witnesses -- although I'm not
23 entitled certainly to this, but I think there will be
24 testimony and evidence that will indicate whether or not
25 Anthroposophy is a religion. And I utilized a combination

1 of a definition from the Oxford dictionary and the
2 Webster's New World, and this is by no means definitive.

3 But as an example, as a sub-issue of whether
4 Anthroposophy is a religion I incorporated the following
5 two questions: Whether Anthroposophy is a system of belief
6 and worship of a superhuman controlling power involving a
7 code of ethics and philosophy requiring obedience thereto.
8 That's not necessarily a definitive definition of religion,
9 but it would help me if I could conclude that's what we
10 have here.

11 I'm not suggesting this is necessarily so. Do you
12 understand what I'm saying?

13 I think these are incremental steps that I need to
14 take in order to understand whether we have a violation of
15 the establishment clause. It would help me at least, I
16 think, if I could encapsulate the notion of Anthroposophy
17 in some form. I think the defendants have attempted to do
18 so in their first three issues under religion, but it is
19 number three which I think is most helpful; and that is
20 whether Anthroposophy can be recognized through a variety
21 of signs.

22 So what I'm suggesting is we have a fundamental,
23 albeit mixed issue in fact and law, but I think there are
24 some factual issues that would be -- that if they were
25 resolved would help me reach the ultimate conclusion on

1 whether or not this is a religion by the Establishment
2 Clause.

3 Does that make sense?

4 MR. FINE: We took these factors straight from
5 Alvarado, and if we go beyond the Ninth Circuit statute --

6 THE COURT: That's your belief?

7 Him him: Yes, your Honor. Because we took that
8 straight from Alvarado.

9 THE COURT: I can include that. I mean, I tried to
10 find a question that would help me. If you want to include
11 those references to Alvarado I'll do that as part of the
12 subset of questions.

13 MR. FINE: I was more reporting rather than arguing.
14 We took each one of those from Alvarado, and we were
15 attempting to apply the standards from the Ninth Circuit.

16 THE COURT: I don't know whether these are going to
17 be controlling issues as such, but I would like to have a
18 frame of reference so I can at least get my arms around the
19 notion of religion. And if I have some questions that
20 would relate to that issue it would clearly benefit my own
21 thinking. That's all I'm suggesting here.

22 So without prejudging the matter I would like to have
23 that, whether Anthroposophy is a religion. Do you
24 understand what I'm doing?

25 MR. FINE: Yes, your Honor. May I make one point in

1 terms of grappling with this issue?

2 You are doing what we have done, and we will be
3 making an argument that by definition it's a form of
4 philosophy. So you may want, for your own benefit, to have
5 one definition of philosophy that you can also get your
6 hands around.

7 THE COURT: I'm going to revise the -- my final
8 pretrial order. You are going to have an opportunity to
9 amend it. I did include an issue with respect to the
10 notion of the philosophy that may encompass the definition
11 of Anthroposophy as well.

12 MR. FINE: That might help, your Honor.

13 THE COURT: All right. Now, with respect to the
14 establishment clause endorsement test and the entanglement
15 issues let me just ask one preliminary question.

16 Are we dealing with any schools other than John Morse
17 and Yuba River?

18 I notice you reference -- you make reference to
19 plaintiff Oakridge Elementary -- no. You make reference to
20 Twin Ridges including Yuba. Is there anything between that
21 besides the Yuba River?

22 Why do we have Twin Ridges along with Yuba River?

23 MR. FINE: Twin Ridges is an elementary school
24 district. The only school that plaintiffs have attacked so
25 to speak is Yuba River, but I would be misleading the Court

1 if I didn't say there are approximately three to four other
2 Waldorf method charter schools that the defendant has
3 granted charter status to. But it's never come up in this
4 litigation.

5 THE COURT: Well, Mr. Kendall, we're talking -- I
6 mean if we're dealing with Yuba River --

7 MR. KENDALL: The evidence at the time we filed the
8 lawsuit -- the only knowledge we had of any Waldorf schools
9 initially was the Alternative Charter School, and then it
10 switched to Yuba River subsequent to filing this law suit.
11 And I believe subsequent to the close of discovery there
12 have been a series of attempts of the same school districts
13 to open other Charter Schools.

14 We don't have any evidence with regard to those
15 because discovery has closed. So that's basically the
16 answer to your question.

17 THE COURT: What we're dealing with is Yuba River and
18 John Morse. That's another day, another lawsuit. How I
19 rule in this case may affect those schools, but the bottom
20 line is I would like to focus my attention on the two
21 schools in question.

22 That's what all the evidence has been pointing to.
23 Certainly expert testimony is pointing to that, and I
24 assume the precipient witnesses went to that school.

25 MR. KENDALL: There may be one that will apply to the

1 credibility standard, and that would be more than Yuba
2 River.

3 THE COURT: That would probably be admissible as long
4 as it applies to the school here. So I'm going to
5 reference only John Morse and Yuba River. I understand
6 there may be other schools, but for purposes of this trial
7 we're going to deal with those two schools.

8 In that regard you will see I have modified these
9 questions to agree just for the most part grammatically,
10 but with respect to the -- the principle question, as I see
11 it, on the issue of endorsement I have a question. This
12 would be the question that would apply first to John Morse
13 then to Yuba River charter school, whether the Waldorf
14 curriculum employed by the John Morse Waldorf Methods
15 Magnet School, John Morse, advances and promotes
16 Anthroposophy.

17 And under that:

18 A) What are the curricular and extra-curricular
19 activities at John Morse.

20 B) Whether John Morse curricular and extra-curricular
21 activities conform with teaching guidelines.

22 C) What are the accountability systems in effect for
23 John Morse.

24 D) What are the operational and personnel systems in
25 effect for John Morse.

1 Again, I just want to get my -- again, you are going
2 to have an opportunity to correct this, but is there
3 something here that you immediately object to with respect
4 to my characterization of that particular issue as it
5 applies to John Morse?

6 MR. FINE: Yes, your Honor. It's not a Waldorf
7 curriculum. It's a Waldorf method or Waldorf inspired.

8 THE COURT: Waldorf method. How would you describe
9 the use of the Waldorf method in that school?

10 MR. FINE: As an instructional methodology to
11 introduce the State approved curriculum.

12 THE COURT: What about the Waldorf inspired
13 methodology?

14 MS. CANNON: I think the Waldorf inspired curriculum.

15 MR. FINE: Or methodology.

16 THE COURT: You tell me.

17 Methodology -- Waldorf-inspired methodology employed
18 by the John Morse Waldorf Methods Magnet School.

19 Is that correct?

20 MR. FINE: Yes, your Honor.

21 THE COURT: Advances and promotes Anthroposophy.

22 And then there is a subset of questions that help me
23 understand whether that is in fact the case, which are
24 related factual issues.

25 What about Yuba River Charter, is that also a

1 Waldorf-inspired methodology?

2 MR. FINE: That's correct, your Honor.

3 THE COURT: Then the same subset of questions would
4 be following that particular factual issue.

5 All right then. With respect to entanglement --
6 issues of engtanglement I have the following questions
7 which are -- I thought there was some redundancy in these
8 questions, and maybe there wasn't. But I'm going to give
9 you three questions that I boiled down as to each of the
10 two schools. And they would be the following questions:

11 Whether any religious organization is benefitted by
12 the use of the Waldorf method -- should we say Waldorf
13 inspired methodology?

14 MR. FINE: That would be acceptable.

15 THE COURT: For my sake I want to make sure we are
16 dealing with apples and apples here so I'll say by the use
17 of the Waldorf inspired methodology. The first question
18 then is whether any religious organization is benefitted by
19 the use of Waldorf inspired methodology at John Morse.

20 The next question is whether the SCUSD, due to the
21 operation of John Morse, pays from public funds any benefit
22 or provides aid to any religious organization, and if so,
23 what is the nature of the benefit or aid.

24 MR. FINE: I'm thinking out loud, your Honor.

25 We took this from the San Francisco Unified case, and

1 it sounds like you formulated it much better.

2 THE COURT: I've rewritten it, but for my purposes
3 this made more sense. You'll have an opportunity to review
4 this to see if this makes sense or not.

5 And the final question would be whether any religious
6 organization is benefitted by the Waldorf inspired
7 methodology at -- excuse me. I misspoke. The third
8 question is whether, due to the operation of John Morse,
9 there is a current relationship between SCUSD and any
10 religious organization.

11 And I took that to be something different than the
12 issue of payment of public funds. Although I think the
13 higher question is more crucial to the issue.

14 Any problem with that question?

15 MR. FINE: No, your Honor.

16 THE COURT: All right. You'll have an opportunity to
17 review these. I just want to get -- before I go to the
18 trouble of advancing my order I want to make sure there is
19 nothing that jumps out at you.

20 MR. FINE: May I make one comment?

21 THE COURT: You may.

22 MR. FINE: On page 5, question number 5.

23 THE COURT: Yes.

24 MR. FINE: That's omitted. We believe that's an
25 important part of the test for entanglement. There is a

1 line of case law saying that that would not be
2 entanglement.

3 THE COURT: All right. Let's turn to the points of
4 law. This is a little different. What I would like is all
5 parties to brief the following, and this gets back now, in
6 some measure, to the plaintiff's factual issues which I
7 think are legal issues, although it's not verbatim.

8 But the following would be -- I think in general what
9 I would like to see in briefing then I will address the
10 plaintiff's points that the plaintiff -- excuse me the
11 defendant -- what the defendant wishes to address.

12 Generally, the following should be briefed:

13 Whether Anthroposophy is a religion for Establishment
14 Clause purposes under current United States Supreme Court
15 and Ninth Circuit standards. Number two, whether John
16 Morse School advances Anthroposophy through the inspired
17 Waldorf methodology in violation of the Establishment
18 Clause. Three, whether Yuba River advances Anthroposophy
19 through an inspired Waldorf methodology -- I guess
20 Waldorf-inspired methodology.

21 Number four, whether John Morse school advances
22 Anthroposophy through the Waldorf inspired methodology in
23 violation of Article 16, and the same with Yuba River
24 school. So we're dealing with the establishment clause and
25 the California Constitution with respect to both issues.

1 All right. Now, the only thing I changed with
2 respect to the defendant's legal points is on the issue of
3 whether the plaintiff properly pled entanglement. That's a
4 dispositive motion issue and should not be a part of the
5 points and authorities. So that's going to be deleted, any
6 reference as to whether or not they would be allowed to
7 argue excessive engtangement.

8 We have crossed that bridge, other than everything
9 would be verbatim as you've already got it here. One of
10 the questions I found here, and it hasn't been briefed in
11 the briefing on these issues as I thought it might be, that
12 is the reference to page 13 with respect to impartial
13 experts.

14 The plaintiff referenced a Eugene Schwartz, but no
15 mention has been made of Mr. Schwartz in these briefs.

16 MR. KENDALL: They made a motion in limine were
17 regards to Mr. Schwartz.

18 THE COURT: I don't see him. So you have to amend
19 the pretrial order as far that witness in any event.

20 MR.. KENDALL: He was always listed as a witness.

21 THE COURT: As your witness?

22 MR. KENDALL: Yes. He is listed as a witness, but I
23 can see that he is not acceptable as an expert witness the
24 way that he came in.

25 THE COURT: All right. So he is listed as a

1 percipient witness from your standpoint?

2 MR. KENDALL: Right. If he does testify he will
3 testify as a percipient witness.

4 THE COURT: Okay.

5 MS. CANNON: He has been listed in all the
6 plaintiff's pretrial conference statements as an expert
7 witness, but now they are willing to call him as a
8 percipient witness.

9 THE COURT: All right. That will be deleted from
10 the order.

11 All right. Why don't we then commence with the -- do
12 you have any questions with respect to anything the Court
13 has discussed so far?

14 MR. KENDALL: Just procedurally are we going to have
15 an opportunity to review this material?

16 THE COURT: Yes. I'm going to issue an amended final
17 pretrial order, and you'll have 15 days to object to any of
18 the amendments. And you've heard basically what they are
19 going to be, and if you wish to amend the order you may do
20 so on any portion of it aside from what I've done.
21 Obviously you are not going to add new witnesses or new
22 comments.

23 I'm talking about the issues as they are presented
24 factually. We're going to cover the motions in limine
25 today. So we're really dealing with right now agreed-upon

1 issues, disputed issues and legal issues.

2 MR. KENDALL: The point that I'd like to make is the
3 characterization, at least of the defendants, of these
4 disputed issues really tries to narrowly focus the case as
5 being a pure curriculum case. And it's our contention, and
6 it's always been our position, that with a violation of the
7 establishment clause a case can be brought specifically on
8 a narrow curriculum case.

9 But in this instance it's a little bit broad, for
10 example, paying an Anthroposophical college to pay public
11 school teachers has been an issue involved in the discovery
12 process, and we would contend that that also constitutes an
13 endorsement. We would continue using the name Waldorf. A
14 public school adopting the name Waldorf endorses religion
15 in the same way as if we had a Catholic Charter School.

16 THE COURT: Let me suggest those are clearly legal
17 issues that you've discussed so far. My suggestion to you,
18 counsel, would be to offer those amended points of law. If
19 there are factual issues that get into that you should
20 include those also in your amendment because that's going
21 to control what I'm going to be considering here.

22 MR. KENDALL: I understand.

23 THE COURT: So if you are looking at the training and
24 education of teachers and such, if you think that's an
25 issue I think we need to -- in fact, what I think we need

1 to do is probably have a status conference. I have a
2 briefing schedule on that issue, and what I'm going to
3 suggest is we'll hold a status conference in conjunction
4 with the hearing that I'm going to get into now so that
5 when we take up those particular items if there is any
6 dispute about whether or not those particular factual
7 issues are going to be controlling in this case in addition
8 to what I've suggested.

9 Okay. Do you understand what I'm suggesting now?

10 MR. KENDALL: Do I take it that what we're talking
11 about is this June trial date is not a go?

12 THE COURT: No. It's going to go. We'll be trailing
13 it, but right now it's on calendar. That's why I want to
14 get these matters resolved. So if you have other factual
15 issues or either side has factual issues that you need to
16 incorporate in my order I want to see those within 15 days
17 of the date the order is going to be issued, and then we'll
18 have a hearing and a status conference at the same time we
19 have the hearing.

20 Now, the hearing that -- I want to hear further
21 authority on the issue of standing in light of the Alteman
22 case and any subsequent authority, Ninth Circuit authority
23 or other Circuit authority, with respect to that case and
24 the issue of standing. And what I'm interested in now --
25 I'll order a briefing schedule, and the hearing date will

1 be June 1st and a status conference.

2 What I would like is briefing on the issues raised in
3 Alteman from plaintiff as well as a proffer on the
4 expenditure of public funds for the specific purpose that
5 is laid out in Alteman.

6 And actually there is Ninth Circuit cases that make
7 that requirement. Alteman is very clear on that, and I
8 would like to hear from plaintiff, not only briefing on
9 Alteman and any related cases on standing that were not
10 previously discussed, but in addition I would like an offer
11 of proof on the issues relating to the expense of public --
12 expenditure of public monies for the activities that are
13 objected to in this complaint.

14 And just by reading my own order -- summary judgment
15 order I think that the notion that Plans is challenging the
16 entire curriculum of the school is probably not as much
17 specificity as I need. So I'm looking in your opening
18 brief for an offer of proof that this is a kind of
19 expenditure that we're referring to that would run afoul of
20 the establishment clause. And that brief would be due on
21 or before April 27.

22 Any opposition thereto would be filed on or before
23 May 11. Reply brief will be due May 18. Hearing and
24 status conference will be on June 1st.

25 MS. CANNON: Do you want a status conference

1 statement as well?

2 THE COURT: We're going to make sure we have our
3 ducks in line before the final pretrial order. I will
4 review any other additions that you made, but I'm not going
5 to ask for a joint statement. I just want to review any
6 amendments in addition to what the Court has already
7 proffered.

8 All right?

9 MR. KENDALL: So the initial brief will be by the
10 plaintiff and the reply by the defendants?

11 THE COURT: Yes. I see this as your burden, and I
12 think you should file the opening brief. And it's in
13 response to the Alteman case. So I think it would be more
14 appropriate for you to file the opening brief with the
15 proffer.

16 MR. KENDALL: Okay.

17 THE COURT: All right. Let's move on to the --
18 Any questions regarding anything the Court has said?

19 MR. FINE: No, your Honor.

20 THE COURT: All right. Let's move to the Daubert
21 hearing.

22 First of all, are any witnesses going to testify?

23 MR. KENDALL: No, your Honor.

24 MS. CANNON: None for the defendants.

25 MR. FINE: No, your Honor. We're prepared to submit

1 on the papers and the deposition testimony.

2 THE COURT: All right. Is the woman in the back a
3 witness?

4 MR. FINE: She's a law clerk with our office, your
5 Honor.

6 THE COURT: All right. With respect to -- are you
7 willing to submit this on the briefs, Mr. Kendall?

8 MR. KENDALL: I'd like to make a few comments, your
9 Honor.

10 THE COURT: I'll give you all an opportunity to make
11 comments, but there is no live testimony. So we're going
12 to argue this; is that correct?

13 All right. Why don't you come forward then at this
14 time, Mr. Kendall, and let's take up the first witness,
15 Dan Dugan.

16 MR. KENDALL: That's correct, your Honor.

17 THE COURT: On Dan Dugan the Court has reviewed the
18 motion and points and authorities of the defendants and has
19 also reviewed Mr. Dugan's deposition.

20 Do you want to respond to that? Because that wasn't
21 much of a response. I was expecting more from you, but
22 maybe you can do this orally. Because I think you need to
23 make some argument here or you should have some -- you
24 better have some, put that it way.

25 MR. KENDALL: Your Honor, as a general proposition

1 with regard to the -- we're just taking about the Daubert
2 issues right now?

3 THE COURT: Motions in limine will be later.

4 MR. KENDALL: Your Honor, at least we're apparently
5 going to be modifying the pretrial order a little bit in
6 terms of what the issues are, but one of the issues is
7 whether or not Anthroposophy is a religion, and in order
8 for the Court to determine what Anthroposophy is it has to
9 have some knowledge about that.

10 THE COURT: I don't think that's a correct statement.
11 I don't want some knowledge. I want expertise, some expert
12 testimony. There is a big difference between some
13 knowledge and expert testimony.

14 MR. KENDALL: I understand, your Honor. The issue
15 though initially was in the abstract we talked about having
16 a trial exclusively on the issue of whether or not
17 Anthroposophy is a religion. The standard for this Court
18 to determine that in terms of Daubert initially is a
19 gate-keeping function which the Court has already ruled on
20 initially in the summary judgment motion.

21 The Court found that Mr. Dugan was an expert, and the
22 same objections were made at that time as have been made
23 now. This isn't the type -- this isn't a question about
24 scientific evidence or things of that nature. So the
25 standard -- the Daubert standard although appropriately is

1 is a gate-keeping function.

2 It's a significantly different standard than if
3 somebody was trying to offer scientific testimony under
4 Evidence Code 702, and the issue is, number one, does the
5 witness have some sort of specialized knowledge of more
6 than -- you know, what an average person would have.
7 Number two, is it relevant, and number three, is it helpful
8 to the fact finder.

9 The defendants have taken the position, and I think
10 it's a correct position, that as to the ultimate legal
11 question as to whether or not Anthroposophy is a religion
12 is an issue for the Court to determine and is not really
13 the subject of direct expert testimony. So the question is
14 when we have an abstract question of what is Anthroposophy
15 and whether or not it is a religion, the question is how do
16 we get that evidence before the Court.

17 Mr. Dugan -- and to back up a little bit, this whole
18 question about Anthroposophy as an emerging new age
19 religion is something significantly different than what we
20 -- it's not an organized religion like a Christian church
21 or a Catholic church or the Jewish religion. There is
22 something different that the plaintiff contends that has
23 kind of been coming into the back door of the educational
24 process.

25 I don't know that there is anybody in the country

1 that has studied Anthroposophy other than the
2 Anthroposophicals themselves that would have some sort of
3 college credential that would say, "I'm an expert in
4 Anthroposophy." Mr. Dugan, who is an inventor, has been
5 studying Anthroposophy for about, as he indicated in his
6 declaration for the summary judgment motion as well as in
7 his deposition testimony, he has been studying this -- it's
8 been an area of interest for him for well over ten years.

9 He has a gigantic library that the defendants took
10 two days going through during the discovery process. He is
11 an officer in Plans, and other than Anthroposophicals
12 themselves. I would suggest, as he has already indicated,
13 he probably knows more about what Anthroposophy is, at
14 least in the abstract, than any person.

15 THE COURT: That's where are you falling short in my
16 mind, counsel. I mean, you could have -- suppose you had
17 an automobile mechanic that can take down a car, build it
18 back up, knows where every screw and bolt and mechanism
19 goes, but doesn't know a thing about miles per gallon or
20 emission standards. I'm interested in emission standards
21 and miles per gallon.

22 The fact that Mr. Dugan may be very conversant with
23 the subject matter is not the criterion, and I take issue
24 with what you've just said; that there is nobody out there
25 in the academic world that does have any knowledge of

1 Anthroposophy. I would think there are a number of
2 sociologists and anthropologists in those fields that would
3 deal with every type of that, particularly as it deals with
4 public education or education in general.

5 I'm very disappointed that you didn't bring in
6 someone that can help me with this, and I don't think
7 Mr. Dugan is any more qualified than I would be if I read
8 up on it for a couple of years. It's the concept of
9 Anthroposophy that we're dealing with. It's not
10 necessarily the content so much as what is it in the world
11 of religion or philosophy. How do we categorize it.

12 It seems to me that you need to have somebody with a
13 perspective far greater than a person who loves to read
14 about Anthroposophy because he likes it or doesn't like it.
15 I'm not looking for fans or devotees or people that have an
16 ax to grind either, and I'm not suggesting -- Mr. Dugan I'm
17 sure has pretty strong feelings about it, but I'm looking
18 for somebody that can tell me about it and put this idea of
19 Anthroposophy in a context.

20 And I don't think Mr. Dugan brings anything to the
21 stage. He is like a mechanic that can't talk about miles
22 per gallon.

23 Do you understand what I'm saying?

24 MR. KENDALL: Yes. I do, your Honor. I think the
25 purpose, as I mentioned -- I can see that you don't think

1 that any of these witnesses can ultimately tell you whether
2 or not Anthroposophy is a religion for the purposes of the
3 Establishment Clause.

4 THE COURT: I think that would be true.

5 MR. KENDALL: So what I propose Mr. Dugan for, or I
6 can do it through other percipient witnesses which is more
7 difficult, is to give you the foundational information in
8 order for to you make that decision. I believe I can do it
9 justify simply through percipient witness, and I think that
10 puts a more difficult burden on us. And it places, in
11 terms of time, a more difficult burden on me to present
12 that case.

13 THE COURT: But isn't that better evidence for me?

14 I mean, it just strikes me that what you just said
15 says it in a nutshell. I know it's going to take some time
16 to do this, but I'm not looking for the Reader's Digest
17 version. I'm not sitting in the doctor's office trying to
18 get my hands on Anthroposophy, and I think percipient
19 witnesses might be far more valuable to the Court than
20 someone who takes upon himself the subject matter.

21 MR. KENDALL: I agree with you, and I agree that
22 these witnesses can't ultimately make these decisions on
23 this matter. It's not a matter of you evaluating two
24 experts, one saying it's a religion and the other saying
25 it's a philosophy. I don't think it's that simple, and I

1 don't think it's going to be based on witness credibility.

2 What it's going to be based on is witnesses to
3 present this Court with what the Anthroposophicals say
4 themselves, and maybe what religious figures say about
5 Anthroposophy, like Dr. Morton for example. And then you
6 have to put that information together using their own
7 material, for example, their references to Lucifer and
8 other materials that we will identify if, for example, the
9 Yuba curriculum that I highlighted for you during the
10 summary judgment motion, which on its face is religious.

11 And I think I can present my case almost exclusively
12 in that way. I'm not interested in having Dan Dugan come
13 up and testify that Anthroposophy is a religion. I don't
14 intend for him to do that, but I think what Mr. Dugan can
15 do for this Court is provide you with the foundational
16 information that the Anthroposophicals say themselves what
17 Anthroposophy is if that assists the Court and that is
18 relevant.

19 So again, I'm not -- I agree. Mr. Dugan is not going
20 to testify that it's a religion.

21 THE COURT: Whatever he testifies to he is being
22 called as an expert, as I understand it, to explain to the
23 Court the nature of Anthroposophy, and by education and his
24 academic discipline it isn't there for me. I don't know if
25 I have confidence in that type of testimony just because I

don't think he has the credentials as an expert witness to present those kinds of opinions. That's my bottom line.

I'm not suggesting that there cannot be an expert witness. If you do so, as I said, I would be very surprised if there wasn't several folks in the academic field that could not opine in some detail about the subject of Anthroposophy. I suspect I could be wrong, but I think anthropologists or historians can probably deal with this much more expertly.

But I just don't believe Mr. Dugan has the qualifications to opine on the nature of Anthroposophy as an expert witness if that's what he is being offered to do.

MR. KENDALL: The nature of Anthroposophy, to provide the Court that foundation, like I said, I can get the information in through other witnesses so I'm not overly concerned about this particular witness for this particular purpose. I think it's more convenient for the Court if it allows the evidence to come in that way.

THE COURT: Let me say preliminarily also so you understand, it's not just -- witnesses don't come in because they have read a lot about the subject, and this is one way to get the information. It doesn't work that way. We're dealing with a very difficult subject in some respects in terms of its definitional aspects as well as its educational aspects as well as its religious aspects.

1 And I do think that you need to have people with some
2 academic credentials, at least for my purpose, to talk
3 about the nature of this particular subject matter. So I
4 don't want to mislead you. I want to be clear. Being well
5 read on the subject, I don't think that makes it.

6 Anyway, anything further as to Mr. Dugan? The
7 implication is the only way -- there is nobody out there
8 that can understand the subject except people that buy
9 books about it. I don't think that's true.

10 It's not a very convincing argument. You are saying
11 this is just somebody that's familiar with it, that that's
12 going to be your best bet because no one else knows
13 anything about it. That's not a very compelling argument.

14 MR. KENDALL: Frankly, the only academic expert that
15 I'm aware of other than Anthroposophicals themselves is a
16 witness that is going to testify or has at least been
17 identified to testify for the defendant, and he even has
18 some cursory relationship. His brother is involved with
19 Anthroposophy.

20 So I believe with emerging new age religions that you
21 can be self-taught, and the cases indicate that it's not
22 required to have an academic credential.

23 THE COURT: I'm not saying it can't be self-taught.
24 I just don't believe that Mr. Dugan -- I'll give you an
25 example. Mr. Dugan said he studied philosophy, and he had

1 read Bertram Russel and some Greek philosopher, Socrates.
2 Of course we don't have any writings on Socrates. Well,
3 I've read Irving Stone. Irving Stone is a popular
4 biographer, and he also wrote a popular biography of
5 Michael Angelo. Most of it was fictional, but reading
6 Irving Stone's biographies is hardly a keystone to his
7 credentials.

8 So I have grave doubts about any reliance upon his
9 opinions about anything that has to do with any
10 intellectual endeavor including Anthroposophy. So I'll
11 tell you that reading that one portion of his deposition
12 made it pretty clear to me that he is not the person who is
going to help the Court. So I'm going to grant the motion
as to Mr. Dugan and exclude his testimony as an expert
witness.

Let's take up the next proffered expert. Is that
Mr. Morehead, John Morehead?

MR. KENDALL: Yes, your Honor.

THE COURT: Let me just say at the outset that some
of the same problems Mr. Dugan has Mr. Morehead has. I
don't see how a person who does haven't any academic
credentials, no college degree, again is very interested in
the subject matter, but how is he any different -- tell me
this. How is he any different in terms of Mr. Dugan in
terms of bringing anything to the table as an expert

1 witness in Anthroposophy utilizing my same comments.

2 MR. KENDALL: Well, he is a licensed minister.

3 THE COURT: What does that mean?

4 It doesn't require any education. As I understand
5 it, it's just a license like a driver's license; isn't it.

6 MR. KENDALL: I don't know precisely what that means
7 for him.

8 THE COURT: His testimony says it doesn't require any
9 educational qualifications. I'm not opposed to admitting
10 somebody licensed to pursue their religious beliefs, but
11 how does that help me?

12 MR. KENDALL: I see where you are going, and if you
13 are going to make the same points with regard -- I mean, he
14 writes articles. He speaks on these issues. I think it's
15 important for the Court to understand the traditional --

16 THE COURT: I'm not sure Mr. Morehead is in a
17 position to put this in context. He does haven't the
18 education to do that. He is a very sincere individual
19 presumably and such, but he doesn't the qualifications that
20 I'm looking for in an expert to help me understand what
21 Anthroposophy is.

22 Again, I think -- what I said about Mr. Dugan I think
23 applies equally to Mr. Morehead unless you can point out
24 how he may differ from Mr. Morehead other than the fact
25 that he is a licensed minister.

1 MR. KENDALL: My contention would be with regard to
2 both of these gentlemen, as I've already stated -- and I
3 don't want to waste the Court's time, is that emerging new
4 age religions are kind of something relatively new on the
5 scene in terms of their impact and their involvement with
6 public education. Anthroposophy in particular is an entity
7 that's been moving aggressively in the public sector, and
8 as far as I know this is the first case that has raised
9 this issue. And I haven't been able to find a lot of
10 different experts out there about it.

11 I think it's helpful for the Court to know that
12 somebody that studies cults and studies new age religions,
13 how he compares Anthroposophy to other known religions.

14 THE COURT: Counsel, I agree with that, somebody that
15 understands and studied cults and does a lot of things,
16 academic pursuits, which would help me understand this, I'm
17 not disagreeing with you. I want a rigorous, intellectual
18 approach on this with academic training and background. I
19 don't see Mr. Morehead having any of that.

20 It's not that I don't want help here. Don't get me
21 wrong. It's just that Mr. Morehead basically doesn't help
22 me.

23 MR. KENDALL: It goes to the weight of the evidence
24 as opposed to its initial admissibility.

25 THE COURT: All right. I'm going to grant the

1 defendant's motion with respect to John Morehead. He is
2 not qualified as an expert witness. Based upon the factors
3 that are set forth in the motion and also reviewing his
4 deposition he does not appear to have the academic
5 background or expertise that would help the Court
6 understand the provisions of 702 of the Federal Evidence
7 Code.

8 All right. Let's move to Reverend Morton. Now,
9 counsel, let me just say this with respect to Reverend
10 Morton. Clearly I think he is qualified to opine on
11 traditional religious -- Christian religious organizations
12 and possibly others, depending upon -- I don't have all
13 the -- I'm not entirely certain that enough of that has
14 been developed in his deposition testimony.

15 And I'm inclined to allow him to opine on that
16 subject matter of the religious organizations, how they
17 appear, what they do, things of that nature, and that might
18 be helpful to the Court. Now, when we get into the issue
19 of Anthroposophy, however, he has again just a smattering
20 of information about it. I don't know what he is going to
21 testify -- what you want to him testify to about
22 Anthroposophy.

23 If he knew more about it maybe he could compare
24 traditional Christian religions with Anthroposophy, but I
25 just don't see any information that I reviewed in his

1 testimony in deposition that would indicate that he has
2 that kind of knowledge. He has red pamphlets, and he has
3 talked to some people.

4 MR. KENDALL: I think that he can provide the Court
5 with helpful information. He has a Ph.d. in divinity in
6 terms of what that means.

7 THE COURT: Yes. I'm in agreement with that.

8 MR. KENDALL: And I think that will be helpful for
9 the Court, and I think that depending on the other
0 foundational evidence that's before the Court he can place
1 that in context for you. And the other issue that I think
2 is important, and I think the Brown case speaks to this,
3 the Ninth Circuit case, is that when we are discussing this
4 core issue of religious neutrality one of the important
5 issues involved with that is the divisiveness in terms of a
6 public debate if in fact the Government is endorsing one
7 religion over another.

8 And to that extent I think that the perspective of
9 traditional religions about Anthroposophy and other
0 emerging new age religions is also helpful for the Court in
1 determining, for example, the Christians view of
2 Anthroposophy as being religious. I think that's at least,
3 if not dispositive, that's relevant to the Court, and
4 Dr. Morton was directly involved in this controversey in
5 his community.

1 He was a leader in his community and participated in
2 the debate about it, and I think it would be helpful for
3 the Court to hear that testimony.

4 THE COURT: I'm not entirely sure that's going to be
5 proper, but I want to hear a response from the defendant as
6 to this particular issue. And I indicated my intended
7 ruling here on Reverend Morton.

8 Counsel, who is going to be addressing the Court?

9 MR. KENDALL: Your Honor, I might be able to help the
10 Court out. Debra Snell is going to be a preceptient
11 witness, and given your ruling on Dan Dugan I think that
12 it's the same result. I'll concede that, and Kathleen
13 Sutphen, primarily the information she is going to provide
14 to the Court is going to be precipient in nature.

15 And there is another doctor. Her name escapes me for
16 the moment, but it's in their motion. And I decided I'm
17 not going to call her.

18 THE COURT: She is a precipient witness?

19 MR. KENDALL: Correct.

20 THE COURT: What about Dr. Scott.

21 MR. KENDALL: Dr. Scott is not going to testify.

22 THE COURT: All right. So we're dealing with
23 Reverend Morton then?

24 MR. KENDALL: That's correct.

25 THE COURT: All right. Thank you, counsel.

1 MR. FINE: Your Honor, as we said in our paperwork,
2 we would agree that Dr. Morton would be qualified to
3 testify to the Protestant religion, the Baptist faith, but
4 that really doesn't have anything to do with this case. He
5 is particularly unqualified in the area of anything to do
6 with public education. He has no training or knowledge or
7 experience in public or private education.

8 There is also frankly no fit to the facts in this
9 case, and his opinion testimony -- he knows nothing about
10 John Morse School and almost nothing Yuba River school.
11 Bias is there because he was, as counsel indicated,
12 actively involved in forming a group to oppose Yuba River
13 Charter School. So I agree with your Honor's take on it,
14 that he's qualified to speak about the traditional
15 Protestant religion, but I don't see how that would be
16 helpful to this case.

17 THE COURT: But would it be helpful to the Court at
18 least to hear one expert in religion, at least in the
19 perspective of a Protestant, and I can take that
20 definition, albeit limited to the extent that it does
21 define maybe a Protestant Christian religion or
22 denomination of that Christian religion, and then as the
23 precipient witnesses testify I can use that as something --
24 at least I have a bench mark of some type.

25 I'm not going to suggest I give it the weight it

deserves, but I think it might be helpful to have somebody testify in that regard.

MR. FINE: Your Honor, we said in our paperwork that we did think he was qualified. With his academic background he is was qualified to testify as to the Protestant affairs. We don't believe he is qualified to testify as to Anthroposophy itself and ask that it be limited and that he not testify to public school curriculum.

He takes the next step. He says here, "My background in Anthroposophy is as a religion." And because of public school, the Waldorf inspired curriculum, he has already made those leaps in his mind, but we can establish that on cross examination.

THE COURT: All right. Mr. Kendall, I'm inclined to limit Reverend Morton's testimony as to the -- his expertise as to religion, his definition as encompassed by the Christian doctrines, Protestant doctrines as well as individual Southern Baptist doctrines.

Am I correct?

MR. KENDALL: Yes.

THE COURT: I mean, I think he has got enough education and expertise to testify as to his understanding of religion and its definitional terms within that context. I do not believe that he has sufficient expertise, however,

to testify with respect to public school curricular as it may be evidenced or influenced in these two schools.

There is not simply enough, in my view, of an indication that he has that kind of expertise. So I'm going to limit his testimony as I've just outlined.

Now, let's take up the motions in limine if we could. The first two -- I mean, these has are normally not subject to the motions in limine. Clearly the parties are going to be excluded as witnesses. The witnesses will be excluded except party representatives. I will allow one party representative as to each.

Motion in limine number one is going to be granted. I take it you didn't have any real opposition to that; did you, counsel?

MR. KENDALL: That's correct, your Honor.

THE COURT: And then number two, I'm presuming that you are going to have -- you mentioned that you have board members. The Court as a rule only allows one representative of the defendant. That person could be a witness, the president of your organization or whoever you wish to designate, but I'm not going to allow the Board to be present unless they are not going to be witnesses.

So each side will be allowed a representative to be present who may be a witness, but all other witnesses will be excluded.

1 MR. KENDALL: Your Honor, I don't have any problem
2 with that.

3 THE COURT: All right. So Twin Ridges and Sacramento
4 City would have a representative who could be witnesses.
5 The Plans may have representatives who could be witnesses
6 present.

7 MS. CANNON: When do you want the parties to
8 designate their representative?

9 THE COURT: You can do that at the time of trial.

10 All right. Motion in limine number three?

11 MS. CANNON: Are you skipping number two?

12 THE COURT: Two I thought was the representatives.

13 MS. CANNON: Number one was.

14 THE COURT: Excuse me. You are right. Number two is
15 unlisted expert witnesses. I apologize. I would grant
16 that motion.

17 Is there any -- we have already dealt with
18 Mr. Schwartz; haven't we?

19 MR. KENDALL: That's correct.

20 THE COURT: I'll grant motion number two. You have
21 no objection to that?

22 MR. KENDALL: Well, with the exception that we might
23 call him as a precipient witness.

24 THE COURT: Why don't you all three come forward to
25 the podium?

1 MR. KENDALL: As we discussed, we might want to
2 consider him as a percipient witness. I think he might
3 have some valuable information to give the Court in a
4 percipient matter not to opine any opinions.

5 MS. CANNON: Your Honor, there is a later in limine
6 motion which asks to exclude personal witnesses with
7 knowledge.

8 THE COURT: That's somebody Schwartz that you are
9 referring to?

10 MS. CANNON: Right.

11 THE COURT: You know, unless there is actually
12 witnesses outside Mr. Schwartz I'm going to grant that
13 motion. The opposition, as I recall, wasn't --

14 MR. KENDALL: We have no opposition to him being
15 excluded as an expert witness.

16 THE COURT: Well, the Court is going to grant that
17 motion.

18 Number three, requested exhibits not produced. Are
19 these the -- they were not copied or something? What are
20 we dealing with here with respect to the exhibits that were
21 not produced?

22 MR. KENDALL: Well, your Honor, this is the most
23 troubling motion in limine to me. We have had -- we have
24 had extensive discovery prior to getting to this point over
25 a period of years including, for example, producing

evidence for inspection and/or copying. Way back at the beginning we produced documents, and we've been producing documents during deposition.

And at the pretrial conference we agreed that documents that had been previously exchanged in discovery we don't have to provide during this evidence exchange pursuant to the Court's order. Now, there are three types of evidence that the defendants are complaining about. The first involved documents which we do not have under our control.

These are copyrighted materials that the defendants identified in their response to interrogatories such as books and materials that they have on their bookshelves at the subject schools in the Sacramento City Unified School District, and basically what they were trying to do is require us to produce documents that they have control of and that are copyrighted. The purpose of the evidence exchange is so there is not going to be any surprise as to what the evidence is.

They already have this evidence. They've always had it under their control, and it's our intention to subpoena that and have them bring that evidence that they have under control to trial. We don't have control of those materials.

THE COURT: Do you have those materials or copies of

them?

MR. KENDALL: No.

THE COURT: Has counsel identified the materials that he wants subpoenaed?

He's listed those as exhibits, has he not?

MS. CANNON: Well, your Honor, exhibits -- I mean, documents are listed as exhibits, but there has been no subpoenas or anything else like that if that's your question. A lot of these documents that are listed or exhibits that are listed, I suppose, are books that have not been produced. I have no way of knowing which is which.

All I have is plaintiff's proposed exhibit list.

MR. KENDALL: Well, perhaps even more importantly as soon as this issue was raised by the defendants, and it was actually well before the ultimate required exchange, we actually exchanged before we were required to under your order, the final order pretrial order. And I immediately provided counsel this information when these concerns were raised.

I've only talked about one of the categories. There is three categories of documents that I didn't produce. I immediately offered to produce them, and the defendants don't really want them because they have already inspected them. They just similarly want to use this as a sword in

order to keep evidence away from the Court, and it's really not appropriate.

The second category of documents are student work. That is not the type of thing that can be copied. They are big colorful documents that were produced during the -- for inspection to the defendants during the initial document exchange, and then they were brought a second time during the deposition of the experts and made available for the defendants to make copies if they chose to do that. And they made copies of all sorts of different things.

So they were produced twice, and then we tendered to produce them a third time. They complained that it wasn't included in the document exchange. It's not something that copies can be made of. These are big giant exhibits.

THE COURT: You have exhibits that can't be copied, work of students, charts, maps or diagrams of some type?

MR. KENDALL: Right.

THE COURT: And I think you have copies of things that are in the possession of that defendant that you've identified?

MR. KENDALL: Right. They have that on their shelves.

THE COURT: What is the third category?

MR. KENDALL: The third category is video tapes. Now, these video tapes were produced on two occasions. The

first time is when the defendants went to Mr. Dugan's home where they went through his library and documents for a period of like two days. The second time they were produced was during Mr. Dugan's deposition, and there is a whole big discussion about that in the deposition.

And we complied. We provided them specifically -- we gave them a list of all of the different videotapes, and we identified some of them that were created by the defendants and the video tapes that are copyrighted materials that are created by Anthroposophicals.

THE COURT: Now, are these in the possession of the defendants?

MR. KENDALL: I don't know if they are in the possession of the defendants or not.

THE COURT: Where are they?

MR. KENDALL: We have them.

THE COURT: Have you seen them, counsel?

MS. CANNON: No. We have not.

MR. KENDALL: We have made those available two times to the defendants to copy.

THE COURT: Normally you would have to copy those and turn them over. That's the way the system works.

MR. KENDALL: They accepted our offer of those copies. I can point to you where the whole discussion took place, and I don't think we have the obligation to purchase

these. We said, "You can have any tapes that you want," and they said, "Okay. We want this tape and this tape and this tape."

In fact, we provided copies of those tapes that were created by these defendants.

THE COURT: You created the video tapes?

MR. KENDALL: Two of the video tapes were created by the defendants. The rest of the video tapes are copyrighted materials that are produced by Anthroposophicals themselves. Again, as I mentioned, I immediately tendered these to be copied by the defendants.

THE COURT: Which of the exhibits are videotapes?

MS. CANNON: I believe the --

THE COURT: Is it 30 or 31 or 40 or 44?

MS. CANNON: I believe they are in a later series, 98 through A1 and 2.

THE COURT: Those are all videos, and which of these videos did the defendant produce?

MR. KENDALL: Has the defendant produced?

THE COURT: These are all copyrighted videos?

MS. CANNON: Your Honor, the defendant has not made nor seen any of these videotapes.

THE COURT: I thought he said he made some of those.

MS. CANNON: That's incorrect.

THE COURT: Counsel, I don't understand why you can't

make a copy of these. I understand they are copyrighted. Think you can certainly get permission under these circumstances to copy them.

MR. KENDALL: I immediately responded with a letter that I can provide to the Court tendering to do whatever we needed to do to fix this problem with regard to all of these exhibits if they wanted to see the school children's work again and do whatever they wanted. I offered all of this immediately.

THE COURT: Well, we have time before trial, and I don't want to waste my time on this. I want you to make the videotapes available, physically available to the defendants.

MR. KENDALL: Not a problem.

MS. CANNON: Physically available, send us copies, or just come and view them in his office?

THE COURT: You can send the originals and let them make copies, or you make the copies and send it to them. If you are going to do that you have to give them access to do that.

MR. KENDALL: Not a problem, your Honor.

THE COURT: Now, with respect to the student work, who has possession of the students' work?

MS. CANNON: Not the defendants, your Honor. I don't know what student work he is talking about.

MR. KENDALL: They are all at defendant's school.

THE COURT: Wait a minute. How are they identified in the exhibit list?

MR. KENDALL: As student work.

THE COURT: What number? The exhibits identified are 30 and 31?

MS. CANNON: Forty-three is listed as student work from Oakridge Elementary, and 44 is listed as student work from Twin Ridges Elementary. And 45 is listed as Oakridge School student work reflecting Anthroposophy.

THE COURT: How is student work from those schools relevant? Are those the schools we're dealing with here?

MR. KENDALL: Yes.

MS. CANNON: No.

THE COURT: We're dealing with John Morse or River Charter School?

MR. KENDALL: Or their immediate predecessor.

THE COURT: There is no date on this. I'm going to look very carefully. I'm not going to allow some student who did work three years before the fact. I don't know if that's going to be relevant to me.

MR. KENDALL: It would certainly be relevant to excessive entanglement issues.

THE COURT: We're entangling two schools here that aren't even involved in this case?

MR. KENDALL: Your Honor, this is the activities of the defendants Twin Ridges and Sacramento City Unified School District after there was substantial complaints about their activities. After we filed the lawsuit they changed the location of the school. They kept the same teachers. Everything is still the same.

THE COURT: I'm not going to get into any admissibility issues at this point. I want you to make those exhibits physically available to the defendants, and I want a date on that as well. In fact, it would be helpful, counsel, on all of this that deals directly with the schools, to put dates on these exhibits.

I want to know, when we are talking about. I see some have dates, and some don't have dates.

All right. What is the second item -- the third item? Those are documents in the possession of the defendant?

Counsel, have those been identified sufficiently for you? What's the issue here?

MS. CANNON: Your Honor, they are titles of books and pamphlets of various sorts, which at the beginning of discovery when an interrogatory was sent about any materials that had been purchased by either school, a list of documents including books and such were mentioned there. It does not mean that any school, nor certainly our law

office, have copies of any of those things. Those are things that were at one time purchased by the school district.

THE COURT: Can't you tell counsel that you don't have them?

MS. CANNON: We have narrowed it down to 16 documents that we don't have. They didn't exchange them with us so that's why we're asking them to be excluded.

THE COURT: What's your basis for the motion?

MS. CANNON: The plaintiff has listed these as their exhibits, and they were not produced in the exhibit exchange. And we said there are exhibits that they have that we want pursuant to the exhibit exchange.

THE COURT: So he obviously didn't exchange them because he didn't have them; is that correct?

MR. KENDALL: Yeah. These were documents --

THE COURT: You didn't subpoena them for a deposition?

MR. KENDALL: No.

THE COURT: Why not? What about a production notice?

MR. KENDALL: They were not produced, but they were identified.

THE COURT: That's not good enough. You have to produce them. I can't look at a list and say --

MS. CANNON: Your Honor, defendants have never been

served with a request for production of documents in this lawsuit.

THE COURT: Counsel, you've got to get a production notice out or a subpoena.

MR. KENDALL: I'm going to subpoena them. If they don't have them, they don't have them.

THE COURT: But you are confined to the final pretrial order. That's the point of this whole exercise. You just can't subpoena documents.

MR. KENDALL: Your Honor, they can't identify documents.

THE COURT: Let me finish my statement so you understand. Look at the final pretrial order, and that will tell you what you can produce and admit into evidence or attempt to admit to offer into evidence in this case. And it's confined to those exhibits that have been exchanged.

MR. KENDALL: Your Honor, they have these exhibits in their response to our interrogatories. They can't identify things as being relevant and then say that they don't have them any more.

THE COURT: I'm talking about the order. Just remember we're dealing with the final pretrial order. That's what are you stuck with. That's the way the system in the Federal procedure works as far as the local rules

go.

Now, if you didn't get a production request out that's your problem. You could have gotten these documents then. They had them, and they were bound to produce them.

That's your obligation, but you can't just say, "We identified them, and now we want them." It doesn't work that way. If you can find me some way to get around this I'd be happy to let you, but I think are you stuck with this order.

MR. KENDALL: But they are listed in the order.

THE COURT: That's not the issue. You don't have them. They were never produced, and they were never exchanged.

It's not just the fact that you listed them, and therefore they are admissible or therefore subject to the order. You can list whatever you want in there. That's what this purpose is for is to sort out these kind of issues.

MR. KENDALL: Right. And the purpose is to avoid the surprise. How can the defendants identify these as being relevant documents and have them disappear and get away with that?

THE COURT: You don't even know what these documents are?

MR. KENDALL: We reviewed them. We looked at the

Anthroposophical book store. We looked at them. We have an idea what's in them.

THE COURT: Why didn't you send a production notice out? Why didn't you discover the documents?

If you looked at them and saw that they were important you could have done that.

MR. KENDALL: We looked at them. We found out they were important, and we intended to subpoena them for trial. We listed them as because the defendants are the ones that identified them as being relevant documents.

MS. CANNON: I wouldn't say we identified them as being relevant. We identified them as being purchased by the schools at some point in time.

MR. KENDALL: We can purchase the documents tomorrow and exchange them if that's what the Court wants us to do, but I think it's very important for the Court to be able to know --

THE COURT: Counsel, there is ways of doing -- the discovery process is not difficult, and it's not that formalistic. And once you've identified them and felt that they were important for your case, then you've got an obligation to serve a request for production on opposing counsel. That's your obligation.

You didn't do that. You have a list. You've seen them. You want them to be admitted into trial. It seems

to me it's going to be on you to obtain those documents on your own.

MR. KENDALL: I don't have any problem with doing that if that's what the Court wants me to do.

THE COURT: Well, I'm going to require you to do that, and I understand what counsel's objection is. But I think that's probably elevating form over substance. So you obtain the documents provided they are exactly the same documents that were identified in the production -- was that during deposition that they were produced?

MR. KENDALL: No. It was interrogatories.

THE COURT: Then the physical documents you never saw?

MR. KENDALL: Right. We didn't see the ones that were under their control. They were very specific in identifying which ones they were.

THE COURT: All right. Then you are going to have the burden of obtaining those documents, and then I want you to make sure that the defendants have an opportunity to see those documents before trial and at least verify that these are the documents that they identified in their interrogatories.

MR. KENDALL: Yes, your Honor.

THE COURT: All right. Motion number four, that motion is denied subject to the provision the Court just

proposed.

MS. CANNON: Is there a deadline for plaintiffs to comply with that?

THE COURT: Yes, within 15 days of the date of this hearing.

Number four motion in limine regarding evidence of Anthroposophy not relevant to the determination of religion or the teachings or activities of either school. This is in reference to exhibit 17, 25, 26, 73 through 76, 78 and 79. I'll hear from defendants on this.

Why isn't that -- why isn't the issue of Anthroposophy, albeit as I understand it not specifically related to what's going on in the school, nevertheless of some consequence or relevance in this case?

There is a lot of things that we have talked about so far that don't necessarily directly implicate the methodology of the schools but nevertheless might be relevant in understanding what that methodology is?

MS. CANNON: Right. But there is also a lot of things about Anthroposophy that plaintiffs have focused on which wouldn't even qualify as that. For instance, some of the exhibits and documents and testimony have focused on rituals of Anthroposophy, and I think the Court would be hard pressed to find how that satisfies either the Court's information about what occurs at either school or about

Anthroposophy as a religion.

THE COURT: It seems to me that you raise this during trial, or you raise this -- more specifically, you just simply say that -- you talk about Anthroposophy generally, and you gave me some examples. But it may well not be admissible, but I'm not sure I can issue a blanket order on this motion. I don't think it's sufficiently specific to allow me do do so.

I mean, I don't know specifically what we are dealing with here. Do I -- have you given me any kind of indication of -- what, this is some dozen documents that we are talking about?

I don't know -- I don't know what we're talking about. You may be perfectly correct in what you are saying.

MS. CANNON: I understand what you are saying. We listed the documents from the plaintiff's exhibit list which the Court does not have in front of you at this time. So if you want to reserve ruling for the time of trial and then make your ruling at that time that's fine.

THE COURT: I'm going to reserve this for the time of trial.

Motion number five, evidence regarding Rudolph Steiner.

MS. CANNON: This is the same sort of thing if you want to reserve this for trial.

THE COURT: It's reserved.

Number six?

MR. KENDALL: That's probably the same situation for six.

MS. CANNON: No. I would definitely not agree that it's the same situation for number six. We attached deposition testimony to help the Court see that many of the listed witnesses do not have any personal knowledge of either of those schools in this lawsuit. We certainly dealt with Mr. Dugan and Mr. Morton as it applies to this issue, and Dr. Scott is not testifying. But we have only dealt with them as experts, not as witnesses lacking personal knowledge.

THE COURT: Well, the problem, I suppose, is I have no idea -- I know, for example, Mr. Dugan testified to -- I don't know what he is going to be testifying to here. It may be exactly on the same lines he was asked about in his deposition in which event your motion is probably well taken, and ordinarily I wouldn't grant a motion like this before trial.

It may not -- the evidence may be totally lacking here, or the relevance may be totalling lacking. But there has been some contact by these folks with the school; hasn't there?

MS. CANNON: No. That's our contention.

MR. KENDALL: Mr. Dugan took some pictures.

MS. CANNON: Mr. Dugan has not been to either of the schools involved in this lawsuit.

THE COURT: Well, I'll reserve ruling here. I'll need a prefer as to the witnesses Dugan, Morehead, Morton, Snell and Sutphen before they testify.

All right?

MR. KENDALL: Yes, your Honor.

THE COURT: Now, with respect to the other witnesses, what personal knowledge do the other witnesses have with respect to the two schools, Roemer, McKay and so forth?

I don't have any way of ruling on this. Do these folks --

MR. KENDALL: They have children that went to those schools.

THE COURT: Do they have personal knowledge of what went on at those schools?

MR. KENDALL: Yes. They do, your Honor.

MS. CANNON: I don't believe they do based upon the witnesses that they disclosed and that we were able to depose. They weren't disclosed so they weren't deposed. I was hoping for an offer of proof from the plaintiff so that this can be disposed of.

THE COURT: These are witnesses on the witness list. I would require an offer of proof as to all these witnesses

with respect to their personal knowledge.

MR. KENDALL: Certainly.

THE COURT: All right. So I'll reserve ruling as to motion number six.

Number seven, Mr. Kendall, is it your intention of asking, I presume, teachers about their personal beliefs?

MR. KENDALL: Yes, your Honor.

THE COURT: If this was a school that had say Roman Catholic -- all the teachers were Roman Catholic, or they were all Mormons or Catholic or whatever, do you think you could ask that question?

MR. KENDALL: If the -- I think there is very narrow circumstances where I would be able to ask such questions. One of those would be -- and I think perhaps whether it's appropriate to ask the question or not would be contingent on what the Court determined on the first issue of whether or not Anthroposophy is religion.

THE COURT: No. The premise here is they are promoting it. You have to make that showing first before you ever get to this issue. Whether Anthroposophy is a religion or not would probably be pretty determinative. Let's assume it is a religion.

Then you've got to show that the specific witness or teacher that's a witness in this case is or promoting Anthroposophy, and once you reach that threshold then you

can seek a motion to inquire under 610. But are you not going to get there just because Anthroposophy is a religion.

Do you understand what I'm saying?

MR. KENDALL: I do understand what are you saying, but 610 seems to be about credibility and that you can't use a person's personal religious beliefs to attack their credibility. One of the issues in this case is whether or not anthroposophy is being advanced by the defendants in their personal convictions as teachers in terms of advancing Anthroposophy. I think it is a relevant issue.

THE COURT: Well, I think you are talking about their credibility to a degree. The case law is very strict. You've got a tough hill to climb to get into this. I'm going to forewarn you.

I'm not going to grant this motion. I will reserve my ruling, but I want you to know that you've got a steep hill to climb on this one.

MR. KENDALL: I appreciate that, your Honor.

THE COURT: All right. With respect to number eight, past acts and practices of either school district should not be admitted.

Mr. Fine?

MR. FINE: Yes, your Honor.

THE COURT: Do you want to address the Court on this

issue?

MR. FINE: I have wandered to the podium, your Honor. Eight, nine and ten are critical to the parameters of the trial and the length of the trial. Since it's for prospective injunctive relief and not for damages the Ninth Circuit case law is clear that we can't go back into time and punish the schools for something that was done.

You've touched on it once or twice, but there were predecessors. Oakwood, which is not a Waldorf Alternative Charter School is long gone, and what's dispositive in our belief is that they were long gone before the filing of the complaint.

We are now dealing with John Morse school and Yuba River Charter School, and those came into being before the complaint was filed. There was never a request for a temporary restraining order. There was never a request for a preliminary injunction.

Educators continuously on a weekly, annual and monthly basis upgrade their programs. John Morse is subject to what's called a program quality review, and it's constantly being changed, updated and made better. We're going to introduce that into the record.

Yuba River has an accountability matrix that's going to be adopted by the State as the model, and it's continually being updated. So what we have from most all

of their witnesses are people who go way back in time before the complaint was filed who don't deal with Yuba River or John Morse school, and they are seeking an injunction to prospectively shut it down.

So we think that's critical. Let me give you an example. Let's take a hypothetical school, Mark Twain School. Let's say that in 1994 and 1995 at Mark Twain school they said the Lord's prayer prior to the start of the school day.

Let's say they stopped it. Let's say there is no more Mark Twain school. They dissolved it, and a complaint is filed in 1998. And they say because in 1994 you said the Lord's prayer we're entitled to an injunction, and that's not the case law.

We are perfectly willing to go back to the time of the filing of the complaint as long as we deal with John Morse School and Yuba River School, but we just believe it's not the law in the Ninth Circuit that you can go back in time under the In Re: Young doctrine to get a prospective injunction.

THE COURT: How do you get around the Section 1983 action?

It's got to be a present controversy. How does this come to be relevant?

MR. KENDALL: First of all, the defendants in this

case are the school districts. It's not the particular school. It's the defendants. It's the school districts, and it's their conduct.

They can't simply avoid confronting this issue by simply changing the name of the school or changing the location.

THE COURT: I don't think that's what counsel is saying. We're talking about different practices and different methodologies.

MR. KENDALL: It would be our contention --

THE COURT: I can only enjoin what's going to happen, what's threatened to happen or what's going on right now. So let's stay on that path. Okay?

So what happened in 1995 and '96 and '97, unless it's going on today, is not relevant to my consideration. You are asking for injunctive relief in a Section 1983. What went on back then right now is history unless you can tell me what's going on right now.

MR. KENDALL: Well, your Honor, I have no way to do that since this case has been -- through the defendants' actions been delayed for over a year because we had an interim appeal, and discovery has been closed for about two years. So I don't know how it would be possible for us to put on that type of evidence.

THE COURT: It may not be, but I've got my rules in

this case, my rules circumscribed by what I have to do and what I can do and what I can't do. And what I can't do is rule on actions that took place three years ago. I can't impose any injunctive relief under those circumstances.

MR. KENDALL: It is our contention, and I mentioned earlier when we were talking about what the issues were in the case in terms of the disputed facts, that there is -- it's going to be possible to salvage these because of the excessive entanglement issue. So their conduct in the past with these particular teachers and what they did, which are still teaching in these schools districts, is relevant. And the Court should hear that evidence.

It's a bench trial. If we don't ultimately persuade you to allow these schools to continue without it being excessive entanglement then I imagine we have a problem.

THE COURT: All right. You're going to have these teachers testify?

MR. KENDALL: Yes, your Honor.

THE COURT: Aren't you going to be able to question them as to what they are doing?

MR. KENDALL: I want to be able to discuss what they have done in the past.

THE COURT: What difference does it make in terms of what they did in the past in terms of the relief you are seeking?

You've got to examine them on what they are doing now, and did it run afoul of the Establishment Clause. I want to enjoin them, but if it doesn't I'm not. Now, whether they did it in the past, that horse is out of the barn and three counties away.

I can't do that. Think about that. So, I mean, you are going to have the witnesses here. Are you going to be able to ask what they are doing and what kinds of conduct they are engaged in and whatever exhibits you need to establish what they are doing now?

I mean, all of that is going to be relevant, but what happened in the past -- I mean, I've got a case in controversy that has to be disposed of based upon the circumstances now, not what's going to be threatened to happen in the future. That's my rule. This is not an historical critique. This is an action seeking injunctive relief.

MR. KENDALL: But part of the issue goes to the excessive entanglement, and the conduct is relevant to that question because it may not be possible. What they attempt to do is try to separate Waldorf methods from Anthroposophy, and the question is can they do that. And if the answer is no, and the reason you know that it's not is because of their past conduct.

And it would require excessive entanglement for the

Court to monitor them to make sure they are not engaging in that same past conduct, which is important and very relevant in this case.

THE COURT: If what they did in the past is going on today you are right. If it's not going on today there is nothing I can do about it. I can't deal with those things that took place two or three years ago. It just simply isn't before the Court.

If it's going on now and there is excessive entanglement you can impeach witnesses that may say -- you know, may say this is not going on. And then you can establish by circumstantial evidence this is exactly what's going on.

You are the trial lawyer. You can do all those things, but you can't introduce evidence of past conduct until you've made it relevant to present conduct. Okay?

MR. KENDALL: Yes, your Honor.

THE COURT: It has to be relevant to present conduct. It may well be relevant. I don't know what's going to happen in this case.

MR. KENDALL: That's the whole issue. Until we take the witness at trial I should be allowed to try to establish the foundation if possible.

THE COURT: You can do that, but I'm not going to allow any past conduct to be introduced as evidence in this

case unless it's in fact evidence of present conduct.

Do you understand?

MR. KENDALL: Yes.

THE COURT: To that extent I'll grant the motion. To the extent that such conduct is relevant to present conduct I'll allow you to make that foundation, and we'll take it up at the -- during the course of the witnesses' testimony.

MR. KENDALL: I still have a real difficulty in understanding precisely what the Court means by, "present conduct". Does that mean in the last month, in the last six months?

Where is the line?

THE COURT: The line is what's going on now. This is an injunctive action. If you can lay a foundation that the past conduct has directly affected what's going on in that school today, and by, "today", I mean the day we are in trial. I'm sure there is going to be some activity within days or months before this trial took place that might very well explain what's going on today circumstantially in that school, but it has to affect what's going on in that school today. This is an injunctive proceeding.

MR. KENDALL: I understand that.

THE COURT: And I'm not going to enjoin anything that took place in the past. That doesn't mean what took place in the past is not relevant today. That may very well be

relevant.

I'm not going to prejudge that, but I'm not going to allow you to produce evidence of past conduct that isn't relevant to the conduct that is going on today in the schools. All right?

Do you understand that ruling?

MR. KENDALL: It sounds like an impossibility the way that you are posing it.

THE COURT: I don't think so.

MR. KENDALL: When discovery has been closed for two years. I mean, I can ask questions, "Did you do that yesterday, or do you intend to do it in the future?" And you are saying I'm limited to that?

THE COURT: Counsel, you are the one that brought this lawsuit. You are seeking injunctive relief. I recognize there has been a habeas here, and we're going to trial. You are a lawyer, and you understand that I can only enjoin what's going on now. I can't enjoin what took place in the past.

If the evidence in the past is directly relevant to what's going on today then it may well be admissible, but if it's not -- if it's not it's not going to come in this courtroom. I'm not going to hear that evidence. You've got to deal with what's going on here now. We're all stuck with that issue.

MR. KENDALL: I understand, but the point is, as I mentioned earlier, our case has never been a narrow curriculum attack. It hasn't been that narrow. So for example, if -- one of the arguments that we made, and the Court even noted it and discussed it in its ruling on the summary judgment motion, is the proposition that relying on a system that is religious in nature could in itself be a violation of the Establishment Clause.

So for example, that kind of evidence isn't directly related necessarily to specific conduct. It's related to the curriculum in general or the reliance on the system, and that would be relevant. And it's particularly relevant to the question of excessive entanglement.

So I just want to make sure that I'm not being limited from laying that foundation.

THE COURT: If the schools are relying upon any system of belief that inferences upon the establishment clause that's perfectly relevant. All I'm saying is that I want -- I can enjoin and will enjoin that conduct that is going on in that school today, not two years ago.

All right?

MR. KENDALL: Yes, your Honor.

THE COURT: All right. Now, you may, during the course of trial -- and the point I want to make is I think I need to make a ruling here that past conduct -- I don't

want to reserve this ruling. Because I think I'm required to make a ruling based upon my understanding of the law. But I think it's important to understand that my ruling in not allowing plaintiff to present past conduct does not preclude plaintiff from presenting conduct that is relevant to establish present conduct.

But the point is it has to be relevant to what's going on in the school today, and that can be by impeachment or by any other method that you feel is appropriate. But I'm going to be focusing on what's going on today, not just in the past. So I'm going to exclude that evidence today. I'm going to grant that motion with that understanding.

Does everyone understand my ruling?

MR. KENDALL: Yes, your Honor.

MR. FINE: Yes, your Honor.

THE COURT: All right. Let's get on to number nine then.

MR. FINE: It's a similar issue, your Honor. There is a mindset that private and public and Waldorf, it's all the same thing, your Honor. We are responsible for John Morse School. We are responsible for Yuba River School.

Going back to 110, your Honor, even though it's not our case to prove, if you give us time we will put on the programs at those schools. We will put on teachers from

kindergarten. We have got teachers from the primary grades. We have got teachers from the middle grades all the way up to the superintendent level.

You will get what's going on at those schools in this school year, but that's what we're responsible for. We're not responsible for Sacramento Waldorf School or Community Waldorf School. It's an entirely separate arena, and that evidence should not come into this trial.

THE COURT: Well, as an example, here you are talking about exhibit number 3. I don't know what these exhibits are. It says, "Learning that grows with the learner, an introduction to the Waldorf education." Now, you say that --

MR. FINE: Has no relevance. That's a private Waldorf school.

THE COURT: You are saying that's a private school?

MR. FINE: I believe so. We have a problem with the --

THE COURT: I mean, I don't have the benefit of these exhibits. Let me just make this statement, and I'm going to make this ruling. Given the exhibits, that's different here, but I'm going to make this ruling that I'm not going to allow any exhibits or evidence of activities that relate to Waldorf private schools unless it is -- can be established that those documents and that evidence,

whatever it may be, is being utilized in the public schools that are subject to this lawsuit.

It's a somewhat similar ruling, but I don't even know -- you may have exhibits that I'm not encompassing within my ruling here. But it seems to me if they are not being utilized in these schools even though they may be Waldorf materials they are not going to be relevant. They may be, but you are going to have to make a showing that they are.

So that's my ruling. So I'm going to grant that motion subject to the -- what I'll do is I'll grant that motion subject to the conditions I've just laid down. In other words, it will be on the plaintiff to establish an offer of proof that these exhibits or any testimony about the private schools are relevant to the present school in question.

MR. KENDALL: It could be relevant to some of the other cases as well.

THE COURT: Well, you are going to have to make an offer on that.

MR. KENDALL: Sure.

THE COURT: But I'm going to make a ruling now that I'm not going to allow the type of evidence that was described by counsel that involves private Waldorf schools in this case unless you make an offer of proof that in fact you can demonstrate it as relevant to the activities being

carried on at the two schools in question.

MR. KENDALL: Your Honor, it's possible that it could be relevant to some of the other disputed issues in this case.

THE COURT: Such as?

MR. KENDALL: Whether Anthroposophy is a religion, for example, and to the question of excessive entanglement, what they might call religious in the private Waldorf school. And they may do exactly the same thing in a public school that may not be related.

THE COURT: We have the issue relating to the religion, and then we have the issue of endorsement and entanglement, those issues and the sub-issues within those issues. But my concern here is that all the parties understand that while these documents may be relevant to whether or not Anthroposophy is a religion, I don't know what we're talking about.

I just have numbers here and a very brief description, but I'm referring now to the motion in limine here which I think -- the thrust of the way I'm taking it is that I'm not going to allow evidence of documents that are utilized in private Waldorf educational programs to be introduced in this case if they do not have any relevance to the schools in this case.

Now, I'm referring to the endorsement and

entanglement issues specifically. You may have something that may be helpful, but that's not what this motion addresses.

MR. FINE: That's correct, your Honor.

THE COURT: I'm just dealing with this particular issue as it relates to the public school.

MR. KENDALL: Just so I understand what are you saying is that I can't use evidence of what happened in private Waldorf schools to infer what happened in the public Waldorf schools, and I agree with that. But all I'm saying is given the multiple disputed issues these exhibits which the defendants didn't place in front of you have potential multiple relevance.

And in particular I think it may be relevant to the issue of whether or not Anthroposophy is a religion, and whether or not it involves excessive entanglement to separate the two.

THE COURT: Well, you can make an offer of proof.

MR. KENDALL: That's fine, your Honor.

THE COURT: But you heard my ruling.

All right. On the issue of the teaching activities in other Waldorf schools my ruling will be similar to those previous rulings. I will exclude that evidence. However, you can make an offer of proof to show that there is some connection between what's going on in the private schools

and the public schools.

MR. KENDALL: Very well, your Honor.

THE COURT: All right. Anything else? Are there any issues that we haven't covered?

With the new pretrial order coming out you are going to be busy.

MR. FINE: I think we covered everything. We appreciate the Court scheduling and rescheduling this motion.

THE COURT: We are going to have the status conference -- that doesn't leave us much time before we get to trial, but I want to make sure these issues are closely defined before trial. So take a look at the pretrial order, and if you have some thoughts on how we can refine those issues better --

MS. CANNON: Your Honor, if I may just ask you one question. How many days are currently scheduled for the trial in this case?

THE COURT: I believe eight days, eight court days.

MR. FINE: Your Honor, we might need to address that in our pretrial. We suggested eight days for defendants. I believe from talking to counsel he needs approximately the same.

THE COURT: So you are looking at four weeks?

MR. KENDALL: Given the Court's ruling on the use of

expert witnesses I think that it is going to take me longer to put on my case, and we have always set -- I think it ended up being a typo when the Court initially in its order said eight days. And then we did the settlement conference, and we thought we were going to do a bifurcated trial. So I don't think either party attempted to amend that, and then that fell apart.

THE COURT: The Ninth Circuit conference is in the middle of this trial.

MR. FINE: Your Honor, while you are looking at the calendar, Ms. Cannon is expecting her first child. She would be going on maternity leave on August 1st. We have consulted with Mr. Kendall, and he doesn't have any time constraints in terms of rushing this through.

THE COURT: I've got a jury starting on the ninth of July, and I have the Ninth Circuit conference starting on the 16th.

MR. FINE: I believe we're both agreeable to pushing it into the fall.

THE COURT: All right. Why don't you stay here with the clerk and settle on the date. We can do this in three weeks.

MR. KENDALL: I think we originally said in our --

THE COURT: You wanted four weeks originally. I mean, you were talking eight days, and now you are talking

what -- a month for your case?

This is a Court trial. Eight days is two weeks.

MR. FINE: Eight court days when we line the witnesses up.

THE COURT: I understand, but do you really think you are going to need eight days?

Don't forget you are going to be calling some of the defendants' witnesses; aren't you?

MR. KENDALL: That is true.

THE COURT: Maybe we can cross-pollinate a little bit. I would like it if we could do that, but if you are talking about a six-week trial you are going to be way into 2001 - 2002.

MR. FINE: I understand.

MR. KENDALL: I think we have been saying a total of three court weeks is what we have anticipated, and I think that's probably accurate.

THE COURT: I would think we can get this thing out of the way certainly in 16 days, but it's not my case. Why don't you meet with the clerk now and get a firm trial date, and we'll include that in the order. And in the meantime we'll stay with the current schedule and get this thing resolved on the amended pretrial order, and we'll have a hearing and a status conference on the 1st.

Anything further?

MS. CANNON: No, your Honor.

MR. KENDALL: No, your Honor.

THE COURT: Thank you.

(Whereupon the proceedings were adjourned.)

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REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, MARGARET McNAMARA, certify that I was the official Court Reporter, and that I reported verbatim in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 1 through 75, inclusive, constitute a complete, true, and correct record of said proceedings:

COURT: U.S. District Court
Eastern District of California

JUDGE: Honorable FRANK C. DAMRELL, JR., Judge

CAUSE: Plans, Inc. vs. Sac Unified School District
Case No. CV S 98-0266 FCD

DATE: April 11, 2001

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on the 24th day of April, 2001.

MARGARET McNAMARA
CSR No. 6729