



NYCLU

NEW YORK CIVIL LIBERTIES UNION

125 Broad Street
New York, NY 10004
212.607.3300
212.607.3318
www.nyclu.org

NYCLU testimony on NYC Council Resolution 1155 (2011)

Testimony of Donna Lieberman

regarding

New York City Council Resolution 1155 in support of state legislation that would give religious organizations “maximum access to school property”

February 2, 2012

My name is Donna Lieberman and I am the Executive Director of the New York Civil Liberties Union (“NYCLU”). I would like to thank the Committee on Education for inviting the NYCLU to provide testimony today on Resolution 1155 in support of state legislation that would give religious organizations “maximum access to school property.”

The NYCLU, the state affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state, and nearly 50,000 members. The NYCLU’s mission is to defend and promote the fundamental principles, rights and constitutional values embodied in the Bill of Rights of the U.S. Constitution and the Constitution of the State of New York. This includes the right to religious freedom.

The issue before the City Council today – Resolution 1155 – speaks to the issue of church and state; specifically, to the role of government as it relates to the activity of religious organizations in public facilities.

It is an issue that generates strong feeling among some in our City. But as the issue has been joined in the legislative arena, it seems not to have generated much in the way of thoughtful, measured reflection and analysis.

And that is unfortunate, because the resolution before the Council – and the state legislation to which the resolution is addressed, A8800A/S.6087A– implicates fundamental issues of constitutional liberty.

A little context:

In June of 2011 the Second Circuit Court of Appeals ruled that the New York City Department of Education (then, the Board of Education) had acted reasonably – and consistent with constitutional principles – in adopting a policy that prohibits the use of public schools for “religious workshop services, or otherwise using a school as a house of worship.” Bronx Household of Faith v. Bd. of Education¹

A bill pending in the state legislature would, in effect, overrule the Second Circuit Court of Appeals – permitting the use of schools for religious worship services.

The resolution now before the Council (Res. 1155) endorses the state bill.

It is my view, and it is the position of the NYCLU, that the City Council must reject this resolution – as a matter of constitutional law, as a matter of religious freedom, and as a matter of sound public policy.

You did not mishear me: The Council must defeat Resolution 1155 in the interests of religious freedom.

The First Amendment to the U.S. Constitution articulates two principles related to religion. The first directs government to “make no law respecting an establishment of religion”; the second bars government from prohibiting the “free exercise” of one’s religious beliefs.

It is important to recognize that the first of these principles is in the service of the second: the prohibition upon government’s establishment of religion is protective of the right to practice one’s religion. Properly understood, the Establishment Clause rests upon the understanding, well-grounded in the history of sectarian strife, that religious freedom and the diversity of spiritual belief are rendered more secure if

¹ 650 F.3d 30 (2nd Cir. 2011).

government is prohibited from privileging one religion over others or even from favoring religious adherents, over non-religious persons.

This, I hope, is clear. Keeping government out of the business of endorsing or promoting religion promotes the great diversity of religious belief and practices that are a distinctive feature of the American tradition of religious tolerance.

It was this concern about the appearance of government endorsement of religion that led the New York City Department of Education to adopt a policy prohibiting the use of public schools for religious worship services.

And according to the Second Circuit Court of Appeals, the City's education officials had a sound basis for concluding that “. . . the regular, long-term conversion of schools into state subsidized churches on Sundays would violate the Establishment Clause by reason of public perception of endorsement.”²

Now, I have heard proponents of the state legislation suggest that the concerns I raise today constitute much ado about very little; that the bill would allow otherwise empty schools to be used by local churches whose congregants are residents of the communities in which the schools are located.

I have heard it suggested that those who oppose this legislation are anti-religion.

As to the second point: The ACLU and its affiliates are champions of religious freedom – in the courts, and before legislative and policy-making bodies.

The NYCLU has, and will, defend and uphold the constitutional right of every individual to practice his or her religion. Thus, for example, a rabbi from a small congregation that could not afford to buy land and build a synagogue wanted to hold services in the rabbi's home and was told by local officials that he could not do so without violating the local zoning law. The NYCLU defended the rabbi's right to conduct services in his home.

As to the suggestion that by opposing the state legislation – and the City Council resolution – the NYCLU is making a constitutional matter out of a mole hill, let us consider the record before the court in Bronx Household.

² *Id.* at 42.

The Establishment Clause: separation of church and state

The Supreme Court has held that the Establishment Clause prohibits laws whose purpose is to promote religion; and those whose principal or primary effect is one that advances religion.³

The record in the matter of Bronx Household demonstrates that a policy allowing religious worship services in public schools fails the test established by the Supreme Court.

The performance of worship services is the defining event of an organized religion. As explained by Robert Hall, a pastor with the Bronx Household of Faith, the Sunday worship service is the “indispensable integration point for our church.” And the clearly stated purpose of this church is to treat as “God’s house” the schools where the church worship services took place.⁴

Pastor Jack Roberts, a named party in the Bronx Household case, stated the goal quite clearly: “. . . May there be a church . . . in every school in New York City and grow to a large size for the glory of God if that’s what he wants.”⁵

As the Court of Appeals observed in its ruling,

When worship services are performed in a place, the nature of the site changes. The site is no longer simply a room in a school being used temporarily for some activity. [Bronx Household of Faith] has made the school the place for the performance of its rites, and might well

³ *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). In order to avoid the promotion or advancement of religion, government conduct (1) “must have a secular . . . purpose,” (2) must have a “principal or primary effect . . . that neither advances nor inhibits religion,” and (3) “must not foster ‘an excessive government entanglement with religion.’”

⁴ Record on Appeal at A544, *Bronx Household of Faith v. Board of Educ. of City of New York*, 400 F.Supp.2d 581 (S.D.N.Y. 2005) (No. 01 CIV. 8598 (LAP)), *vacated and remanded by* 492 F.3d 89 (2d Cir. 2007) (No. 06-0725-CV) [hereafter “Record on Appeal”]. This court document is on file with the Clerk of the Court at the U.S. District Court for the Southern District. It is also on file with the NYCLU.

⁵ This comment and other quotations from the court record cited in this statement (excepted as otherwise cited) appear in deposition transcripts and other court documents compiled in the litigation of *Bronx Household v. New York City Board of Education*, 226 F. Supp. 2d 401 (S.D.N.Y. 2002), *aff’d* 331 F.3d 334, 346 (2d Cir. 2003). These court documents are on file with the NYCLU.

appear to have *established* itself there. The place has, at least for a time, become the church.⁶

Other facts further reinforce the appearance in the mind of the community that the church and public education are one and that there is a strong evidence of an Establishment Clause violation.

Church domination of the school setting

The court observed that during worship services “the schools are dominated by church use.”⁷ Congregants “use the largest room, or multiple rooms, sometimes for the entire day.”⁸ In some instances the church is the only outside organization using space in a school. “Accordingly,” the court concluded, “on Sundays some schools effectively become churches.”⁹

Churches often have a long-term presence in schools. As of April 2005, thirteen congregations had been conducting regular worship services in the same school for more than a year.¹⁰ In the case of P.S. 15, the Second Circuit noted that Bronx Household of Faith had held its worship services at the school (and nowhere else) every Sunday for nine years.¹¹

What’s more the presence of churches in schools is widespread. As of October 2011 approximately 160 congregations in New York City had been granted permits for worship services the 2010-2011 school year.¹²

Promotion of religion

Bronx Household of Faith views its presence in schools as an opportunity to recruit congregants. Members of these churches distribute flyers and post signs; they proselytize outside school buildings.¹³ Congregations also advertise worship

⁶ *Bronx Household*, 650 F.3d at 41 (emphasis in original).

⁷ *Id.* at 42.

⁸ *Id.*

⁹ *Id.* .

¹⁰ Record on Appeal at A34, ¶ 58.

¹¹ *Bronx Household*, 650 F.3d at 42.

¹² *Bronx Household of Faith, et al. v. Board of Education of the City of New York, et al.*, Petition for Writ of Certiorari, Case No. 11-386 (2011), Brief in Opposition, fn.5.

¹³ *Bronx Household*, 650 F.3d at 42.

services at public schools using media advertisements, the Internet, and informal conversations with the public.¹⁴

An official with the church observed, in a court proceeding, that “church is God’s method of evangelism, and that’s why meeting in the schools is so important.”¹⁵ There has been at least one reported incident, which led to complaints, in which a congregation distributed religious materials to children who attended schools in which religious services took place.¹⁶

As a result, “both church congregants and members of the public identify the churches with schools.”¹⁷ The confusion created regarding institutions of church and state is most troubling as regards the impact on young people. Concerns regarding the state’s endorsement of religion become most acute when young, impressionable students are involved because they might easily mistake the consequence of a neutral policy for endorsement.¹⁸

Endorsement of one religion over another

New York City schools are not equally available to all faiths. For example, in 2004-2005 more than 800 of the City’s 1197 school buildings were reserved on Saturdays for school-sponsored activities – meaning these schools were unavailable for congregations that worship on that day.¹⁹

More than 450 school buildings were reserved for school-sponsored activities on Fridays after school or in the evening – making these schools unavailable for a religious congregation that worships at those times.²⁰ However fewer than 300 school buildings were reserved for school-sponsored activities on Sundays.²¹

¹⁴ Record on Appeal at A329; A776; A832; A697-698; A706-708; A713-714; A731-732; A737-739; and A745-749.

¹⁵ Record on Appeal at A557.

¹⁶ *Id.*; Record on Appeal at A701, ¶12; A330.

¹⁷ *Id.*

¹⁸ *Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring).

¹⁹ Record on Appeal at A18; A238.

²⁰ *Id.*, A18.

²¹ *Id.*

What this means is that schools are far less likely to be available for Jews and Muslims on the days prescribed for their religious services.

School officials also become involved in promoting religion by housing religious services that exclude certain individuals from participating. Bronx Household of Faith, for example, excludes persons who are not baptized, those who have been excommunicated, as well as those who advocate the Islamic religion.²² This church also rejects New York State law recognizing same-sex marriages because it fails to recognize “the authority of God, creator and sovereign of the universe, as the authority above the state.”²³

Government subsidies to religious organizations

Bronx Household of Faith paid neither rent nor utility fees for the use of schools to conduct religious worship services. This led the Second Circuit to conclude that the “City . . . foots a major portion of the costs of the operation of a church.”²⁴

This fact also informed the determination of the Department of Education that to allow such activity in public schools would involve the government in subsidizing religion – and in so doing, would entangle the government with religion in a manner that violated the Establishment Clause of the Constitution.

The Bronx Household case describes a highly organized and well-planned effort to establish and grow evangelical churches – what is referred to by church officials as “church planting.”

The Southern Baptist Convention has identified New York as a “Strategic Focus City” for the location of new churches.²⁵

²² *Bronx Household* at 43; Record on Appeal at 483-489.

²³ Bronx Household of Faith, News & Updates, *Bronx Household of Faith Versus New York City Board of Education* (July 2011), available at <http://www.bhof.org/press.html>.

²⁴ *Bronx Household*, 650 F.3d at 41.

²⁵ Jeff K. Walters, *Embracing the City: A Brief Survey of the North American Mission Board’s Engagement of America’s Urban Centers*, Southern Baptist Theological Seminary (2008), available at <http://northamericanmissions.org/files/UrbanEngagement.Walters.revised.pdf>.

This effort is spearheaded by New Hope New York, which serves more than 213 churches in the metropolitan area. Many of these churches seek to grow their congregations by establishing churches in New York City schools.²⁶

I (and the NYCLU) would be the last to object to, or seek to constrain, aggressive advocacy on behalf of strongly held beliefs. Indeed, the courts have upheld the right of religious advocacy. They have properly recognized, as a general matter, that religious organizations have a right to engage in expression in public facilities that is equal to the right enjoyed by secular organizations.

But this equal right of access is not absolute. It is not absolute for secular organizations and it is not absolute for religious organizations. In all instances, this right must yield to compelling countervailing interests where such interests are narrowly pursued by the government.

One such compelling interest is the need to refrain from an Establishment Clause violation. Accordingly, in this case, the right of “equal access” asserted by Bronx Household and others must yield to the compelling demands of the Establishment Clause.

When the state becomes involved in the endorsement of an organization’s religious mission, the First Amendment requires a line of separation between the government and that organization.

To some the use of schools by Bronx Household of Worship is not problematic – an exaggerated controversy.

I would respectfully submit that those who take this view underestimate how power (exercised with bias or prejudice) may influence the manner in which public officials may choose to allocate space for religious services.

. . . To offer space in a school, for example, to some but not others; to some *more* than others; perhaps to those who happen (for any number of reasons) to have greater influence with a local politician.

²⁶ James Dotson, *New Hope New York: Praying for the Light of Christ to Shine on the Big Apple*, Journal of the Southern Baptist Convention (Oct. 2003), available at <http://www.sbclife.org/Articles/2003/10/Sla4.asp>.

. . . Not to those without access; and perhaps *never* to those whose religious belief is contrary to more widely shared, or dominant, religious views.

In prohibiting the use of schools for religious worship services, the New York City Department of Education adopted the correct policy – it was the only option available in this circumstance that comports with principles of sound governance and a constitutional democracy.

The New York Legislature and the City Council are likewise bound by these principles. In a 1995 Supreme Court ruling, Justice Sandra Day O’Connor spoke to the duty and obligation of state officials in matters of church and state:

[The Establishment Clause] imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message. That is, the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.

. . . Where the government’s operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result . . . the Establishment Clause is violated.

This is so . . . because the State’s own actions . . . actually convey a message of endorsement.²⁷

The former Justice O’Connor speaks here to you – and I believe the members of the City Council are bound to follow her wise counsel by rejecting Resolution 1155.

²⁷ *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 777 (1995).