

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

1	TAMMY J. KITZMILLER, et al.,	:	
2		:	
3	Plaintiffs	:	
4	vs.	:	Case Number
5		:	4:04-CV-02688
6	DOVER AREA SCHOOL DISTRICT;	:	
7	DOVER AREA SCHOOL DISTRICT	:	
8	BOARD OF DIRECTORS,	:	
9	Defendants	:	

MORNING SESSION

TRANSCRIPT OF PROCEEDINGS
OF BENCH TRIAL

Before: HONORABLE JOHN E. JONES, III

Date : October 21, 2005

Place : Courtroom Number 2, 9th Floor
Federal Building
228 Walnut Street
Harrisburg, Pennsylvania

COUNSEL PRESENT:

ERIC J. ROTHSCHILD, ESQ.
WITOLD J. WALCZAK, ESQ.
STEPHEN G. HARVEY, ESQ.
THOMAS B. SCHMIDT, III, ESQ.
ALFRED WILCOX, ESQ.

For - Plaintiffs

PATRICK T. GILLEN, ESQ.
ROBERT J. MUISE, ESQ.
JULIE SHOTZBARGER, ESQ.

For - Defendants

Lori A. Shuey, RPR, CRR
U.S. Official Court Reporter

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I N D E X

WITNESSES

<u>For - Defendants:</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Dr. Richard Nilsen	13	67		

1 THE COURT: Good morning to all. We're in
2 the middle of Dr. Nilsen's testimony, and we can
3 resume that.

4 MR. MUISE: Your Honor, if we may, at this
5 time we are prepared to move for Dr. Behe's exhibits.

6 THE COURT: All right. Let's do that.

7 MR. MUISE: If we could maybe address that
8 now.

9 THE COURT: That's fine, sure, before we go
10 too long. The typed version that I have, does that
11 represent stipulated exhibits or not? They were not.
12 Okay. Let's make sure that we have these. Then on
13 defendants' ledger on direct, we have the CV that is
14 D249. And I'll just go through the whole list and
15 then we'll go back.

16 MR. MUISE: Counsel and I have discussed
17 this. We'll just verify your list, but there are no
18 objections to the Dr. Behe --

19 MR. ROTHSCHILD: Assuming our lists are the
20 same as yours.

21 MR. MUISE: Right. We'll just check the
22 list, and then we can just move them all without
23 objection.

24 THE COURT: That's fine. Let's just do it
25 that way then. D249 is the CV. D203 is the article,

1 the Behe article.

2 MR. MUISE: Your Honor, there's 203 and then
3 there's --

4 THE COURT: There's A, B, C, E, G, H, and J
5 under 203 is what I have. Is that correct?

6 MR. ROTHSCHILD: A, B, C, G, H --

7 THE COURT: I have an E.

8 MR. MUISE: There's an E, yes, Your Honor.

9 THE COURT: I have a G and I have an H and I
10 have a J. What have I missed under 203?

11 MR. MUISE: There's a 203-I, as well, Your
12 Honor.

13 THE COURT: All right. So we'll include I,
14 as well. Any other subparts of 203?

15 MR. MUISE: That should be all of them, Your
16 Honor.

17 THE COURT: Okay. Then D220, which is *Of*
18 *Pandas and People*, that, I guess, is already in under
19 another number, perhaps.

20 MR. MUISE: We would still move that.

21 THE COURT: All right, you move that. 237
22 is the Saier article. 238 is the article by Saier and
23 others. 266 is the Thornhill and Ussery article. 267
24 is the Knoll interview. 269 is the Wuethrich article.
25 270 is the Kondrashov article. 271 is the Pennisi

1 article. 271 is the Doolittle article. 274 is the --

2 MR. MUISE: Excuse me, Your Honor, that's
3 272.

4 THE COURT: 272, that's correct, is the
5 Doolittle article. Thank you. 274 is the DeRosier
6 article. Those are the defendants exhibits I have.
7 Tell me if you have others.

8 MR. MUISE: There was a 265, as well, Your
9 Honor, Down with the Big Bang.

10 MR. ROTHSCHILD: Stipulated.

11 THE COURT: Rapidly stipulated. All right,
12 265, as well. Any other defendants' exhibits?

13 MR. MUISE: That's all of them, Your Honor.

14 THE COURT: All right. Any objection?

15 MR. ROTHSCHILD: No, Your Honor.

16 THE COURT: All of those named exhibits are
17 admitted. And, Liz, you have the addition of 265 and
18 203-I. Is that right?

19 COURTROOM DEPUTY: Yes.

20 THE COURT: On cross, I have P140, which is
21 The Wedge Strategy; P256, the Zhou article. P279 is
22 the van Gent article. P280 is the Clatworthy article.
23 P281 is the Messier article. P283 is the Kapitonov
24 article. P602 is the Behe report. P621 is the
25 Dembski report or a portion thereof. P718 is the

1 Reply to My Critics article. P721 is the Behe-Snoke
2 article. P722 is the Young/Edis book, Chapter 8.
3 P723 is a Behe article. P724 is the Minnesota Daily
4 article. P726 is the Tulips and Dandelions article.
5 P742 is the Lehigh University statement. P743 is the
6 Behe immune system articles. P747 is the Agrawal
7 article. P748 is the Bartl article. P751 is the
8 Paley book. P754 is the Muster Seeds article. P755
9 is the Vaandrager article. P756 is the Curtis/Sloan
10 article. And P775 is the excerpt from the draft of
11 the Design of Life. Any others, Mr. Rothschild?

12 MR. ROTHSCHILD: We had marked the Buell
13 testimony as 573, but we'll move that in as
14 designations later. So we're not moving that in now.
15 And then I think all the other ones that we used were
16 ones that had been separately marked as -- had already
17 been admitted.

18 THE COURT: All right. So all the exhibits
19 that I named, you're then moving for their admission
20 at this point?

21 MR. ROTHSCHILD: No, Your Honor. We're not
22 moving 621, which is the Dembski report; 602, which is
23 the Behe report; 754, which is the Atchison Muster
24 Seeds article; and 724, which is the Kirsinger article
25 in the Minnesota Daily. Everything else we are moving

1 in.

2 THE COURT: So we're eliminating 602, 621,
3 724 and 754. Is that correct?

4 MR. ROTHSCHILD: That's correct.

5 MR. MUISE: And we have just one objection,
6 Your Honor, with P742, the Lehigh statement on the
7 basis of hearsay.

8 MR. ROTHSCHILD: It's like the AAAS and NAS
9 statements, which are statements of -- this is a
10 virtually identical document, just on a smaller scale,
11 of a statement of a smaller scientific community's
12 position.

13 It's not entered for the -- it's entered for
14 the fact that it is their statement, not for the
15 correctness of whether intelligent design is or is not
16 science, similar to the AAAS and NAS. I'm fairly
17 confident Professor Behe acknowledged that it was what
18 it was, not an authenticity issue.

19 MR. MUISE: Your Honor, first of all, it's
20 not the same as the AAAS and the NAS. It's some of
21 the biology members in the biology department, and
22 it's clearly hearsay. He testified --

23 (Musical cell phone ring.)

24 MR. MUISE: He testified as he did. It was,
25 you know, obviously for purposes of cross-examination,

1 but the document itself doesn't come in as a hearsay
2 statement.

3 THE COURT: You had a musical background. I
4 don't know if that was a significant point.

5 I think that, Mr. Muise, under the
6 circumstances, since we had testimony, your objection
7 at the front end might have vitality, but inasmuch as
8 he did testify about the statement and he did admit
9 during his testimony that the statement appears on the
10 Web site and that it was a statement by his
11 colleagues, I'm inclined to admit it.

12 It is a bench trial. I don't necessarily
13 take it for the truth, that is, the truth as it
14 relates to his theory and his work, but for the
15 existence of the statement on the Web site. I think
16 at this point it's a pretty cumbersome distinction to
17 make, to say that it doesn't exist on the Web site for
18 the purpose of the record.

19 MR. MUISE: That's not the point, Your
20 Honor. It's an out-of-court statement. I'm making my
21 hearsay objection, Your Honor.

22 THE COURT: Well, the point is that it's a
23 bench trial.

24 MR. MUISE: Yes, I understand.

25 THE COURT: I understand that it's an

1 out-of-court statement, but he did testify. And I say
2 again, had it been objected to at the front end -- and
3 I'm not faulting you for this -- but, you know, he
4 testified in all candor that it does exist and that it
5 is on the Web site. I take it for what it is, and
6 I'll assign it whatever weight I think is appropriate
7 in my determination.

8 MR. MUISE: For a point of clarification
9 about how things have been proceeding here, I mean, I
10 didn't object on the front end because it wasn't
11 offered as an exhibit. I just want to make sure that
12 we're -- you're not wanting us to be objecting on the
13 front end when they haven't moved for it to be
14 admitted.

15 THE COURT: I understand.

16 MR. MUISE: That hasn't been the procedure,
17 I think, that we've been --

18 THE COURT: Well, I think if you see a
19 statement -- it's hard to develop a hard-and-fast
20 rule, if you will. But I think if you see a statement
21 like that that comes up and you want to make a
22 preventative objection at the front end -- and that
23 may preclude even a reference to it. If you make the
24 objection at the front end and I let him refer to it,
25 then obviously that front-end objection is likely

1 going to fail.

2 I can't go back and know at this point how I
3 would have ruled on a front-end objection. I would
4 have heard argument from counsel. And, again, no
5 fault assigned at this point, but inasmuch as his
6 testimony then established the accuracy of the Web
7 posting, I'm not inclined to not admit it.

8 MR. MUISE: Your Honor, just the one last
9 issue is with regard to the demonstrative exhibits.
10 We've had --

11 MR. ROTHSCHILD: We think we can take a
12 simple issue and make it more complicated.

13 MR. MUISE: I'll let Mr. Rothschild do that.

14 MR. ROTHSCHILD: There was some discussion a
15 couple of days ago about what we were going to do with
16 demonstratives, and I think the parties have
17 absolutely agreed and the Court has accepted that we
18 are going to provide the demonstratives and assign a
19 number to them.

20 My view is that the demonstratives, as a
21 general matter, are not necessarily evidence. A lot
22 of times they're just cues to the witness's testimony.
23 They're just, you know, words that they're going to
24 read into the record, and it's really the testimony
25 that's the evidence.

1 But we do think within the demonstratives
2 there are some types of evidence. And one example
3 that Mr. Walczak has raised is, for example, we have
4 diagrams in Dr. Padian's testimony, in Professor
5 Behe's testimony, for example, from the Voet book,
6 that those would be evidence. And the slides of
7 fossils, those would be evidence.

8 What I would suggest is we don't treat them
9 all as admissible evidence and that the parties
10 separately move in those portions, not this morning,
11 hopefully, but later on move in what they think should
12 be properly treated as evidence.

13 MR. MUISE: Your Honor, that was, I guess,
14 the point I was trying to make yesterday, the
15 difference between a demonstrative exhibit and -- or
16 the day before, the difference between a demonstrative
17 exhibit and an exhibit for evidence.

18 I mean, I think the Court should have all
19 the demonstratives. And how you want to address and
20 deal with the individual exhibits -- again, you made
21 the comment it's a bench trial, but I do think there's
22 a difference between a demonstrative exhibit and an
23 exhibit that goes in as substantive evidence, as
24 Mr. Rothschild just explained. So however the Court
25 wants to deal with that.

1 THE COURT: Well, let me see if I can help.
2 Whether they're admissible exhibits or they're
3 demonstrative exhibits, as I re-review the testimony
4 as I need to, I will tell you that in certain cases to
5 not have the slide, be it demonstrative or be it
6 admissible evidence, may place me at a disadvantage.
7 I'm sure you understand that.

8 MR. MUISE: That's the point of doing that.

9 MR. ROTHSCHILD: We're in agreement that you
10 should have them.

11 THE COURT: Right. And you all have your
12 eyes on a record which potentially could be for the
13 purpose of an appeal, so you're going to have to
14 decide what you want to do as far as the admissibility
15 of the exhibits.

16 So if I understand you correctly, you're
17 going to give them to me so that I have them. The
18 distinction is simply going to be what you're going to
19 want to be made part of the record in this case.
20 Really, I'll abide by your stipulation in that regard
21 inasmuch as you're going to give me the -- I hesitate
22 to call them exhibits -- slides, whatever they are,
23 whatever we want to call them, anyway.

24 So if you could reach a stipulation as to
25 the admissibility of those that you want to have made

1 part of the record, that's fine, and I can take that
2 at a later point in the trial. That's certainly not
3 urgent now, but we need to do it before we close the
4 record. It wasn't that hard.

5 MR. MUISE: That's agreeable to us, Your
6 Honor.

7 MR. ROTHSCHILD: Thank you, Your Honor.

8 THE COURT: Anything else before we resume
9 Dr. Nilsen's testimony?

10 MR. MUISE: That's it, Your Honor.

11 THE COURT: All right. Dr. Nilsen, you can
12 retake the stand, and we will resume with your
13 testimony.

14 DR. RICHARD NILSEN, having been previously
15 duly sworn or affirmed, resumed the witness stand and
16 testified as follows:

17 DIRECT EXAMINATION (cont'd.)

18 BY MR. GILLEN:

19 Q. Good morning, Dr. Nilsen.

20 A. Good morning.

21 Q. Good to see you this morning. I'd say it's
22 a pleasure, but I don't want the Judge to call me a
23 liar again.

24 THE COURT: It is Friday, Mr. Gillen.

25 MR. GILLEN: I know.

1 BY MR. GILLEN:

2 Q. Rich, when we left off, we were leaving this
3 October 18th meeting and discussing the tape, and
4 Mr. Rothschild asked me to make one point clear for
5 the record, and I want to do that now.

6 With respect to the tape and the portion
7 that you asked to be transcribed, it does not cover
8 the public comment section. Correct?

9 A. That is correct.

10 Q. You asked the person to begin the task at
11 the portion of discussion relating to the agenda item
12 that dealt with the curriculum. Correct?

13 A. That is correct.

14 Q. Okay. Let me ask you just generally as we
15 leave that meeting and the discussion among the board
16 members, was there a back-and-forth between board
17 members about this proposed curriculum change?

18 A. There was general discussion among board
19 members about the change, yes.

20 Q. Can you remember any of the specific
21 statements that specific board members made?

22 A. No, I cannot.

23 Q. Can you -- describe for us your perception
24 of the tone of the exchanges between the members.

25 A. I think there was frustration on a number of

1 members. In fact, at that meeting two of the members
2 resigned.

3 Q. How about the way they approached the issue,
4 can you tell us whether there were questions being
5 asked, an exchange of information between board
6 members about the curriculum item?

7 A. I think there were individuals talking among
8 themselves on what it meant.

9 Q. And as the voting proceeded, was there
10 questioning that related to the nature of the motion
11 before the board at that time?

12 A. Yes.

13 Q. Was it difficult to follow in a sense?

14 A. Yes.

15 Q. Who was making the chain of motions?

16 A. Predominantly Mr. Wenrich.

17 Q. And, again, from your standpoint as the
18 superintendent at the meeting, did you have an
19 understanding as to his purpose in making those
20 various motions?

21 A. Yes.

22 Q. Tell us what that was.

23 A. My understanding in listening to
24 Mr. Wenrich, he -- his motion specifically was the
25 fact that he wanted to have additional input from

1 various committees on the proposed biology change.

2 Q. We've described a statement that was made as
3 the meeting broke up. After the meeting, did you
4 direct Mr. Baksa to do anything as a result of the
5 board's decision?

6 A. Yes.

7 Q. Tell us about that.

8 A. The faculty, specifically the science
9 department, had voiced concerns on the implementation.
10 And I recommended to Mr. Baksa that he end up
11 developing statements that would address their
12 concerns, with the objective being advancing what the
13 board had addressed in the change, as well as
14 supporting the teachers, finding exactly what they
15 would do in class to protect them.

16 Q. Well, with that in mind, I'd ask you to look
17 at Defendants' Exhibit 65. Do you recognize that
18 document, Rich?

19 A. Yes.

20 Q. What is it?

21 A. It's a memo from Mr. Baksa to the board of
22 directors.

23 Q. Did you receive this document?

24 A. Yes.

25 Q. And when you received it, what was your

1 understanding as to its purpose?

2 A. My understanding was that Mr. Baksa was
3 developing draft copies dealing with the
4 implementation of the biology curriculum.

5 Q. I'd ask you to turn to the portion of
6 Exhibit 65 with the Bates Number 15 in the lower
7 right-hand corner. And if you would, just looking at
8 that statement, give us your understanding about this
9 last paragraph here, which reads, The school leaves
10 the discussion of origins of life to individual
11 students and their families.

12 Did you have an understanding concerning why
13 that language was included in this document?

14 A. Yes.

15 Q. Tell us about that.

16 A. The teachers never taught the origins of
17 life. And the board specifically, on the curriculum
18 approved on the 18th, had the note that said the
19 origins of life will not be taught, and that statement
20 reiterated both practice and adopted policy.

21 Q. With that in mind, did you have an
22 understanding about the way in which the statement was
23 designed to address the concerns expressed by the
24 teachers in the lead-up to the curriculum change?

25 A. Yes. As referred to, the teachers had a

1 concern that intelligent design would be taught, and
2 intelligent design, in their minds, referred to the
3 origins of life. So we reinforced the fact that we
4 were not teaching the origins of life or intelligent
5 design.

6 Q. If you direct your attention again to that
7 last paragraph, in the last sentence of that paragraph
8 on the portion of Exhibit 65 with Bates Stamp Number
9 15, you'll see the last sentence reads, As a
10 standards-driven district, class instruction focuses
11 on the standards and preparing students to be
12 successful on standards-based assessments.

13 Did you have an understanding concerning why
14 that language was included in this statement?

15 A. I think for two reasons. One, we were
16 reinforcing that what the teachers were doing was
17 following the state curriculum, specifically teaching
18 the standards. We were focusing on the standards and
19 the fact that all the assessments would be based
20 solely on the individual state standards. The
21 teachers were continuing to do what they were doing
22 before, which is teaching the state standards,
23 teaching evolution.

24 Q. Did the curriculum change that was put in
25 place by the board on October 18th, 2004, elicit a

1 response on the part of the science faculty?

2 A. Yes.

3 Q. Tell us about that, Rich.

4 A. They specifically requested direction on
5 what they should teach.

6 Q. Let me ask you to look at Defendants'
7 Exhibit 81. Do you recognize that document?

8 A. Yes.

9 Q. Did you receive this?

10 A. Yes.

11 Q. And did you have any discussion with
12 Mr. Baksa about this document?

13 A. Yes.

14 Q. What was the nature of that?

15 A. Mr. Baksa communicated to me that he had
16 received this memo and that he had followed through
17 with their request and had taken their name off of the
18 planned courses.

19 Q. I'd like you to look at the concerns
20 expressed by the teachers in this memo. And look
21 first at the first sentence, first two sentences,
22 Rich, and read those for the record.

23 A. We request that our names be removed from
24 the top of the biology curriculum. At the top of the
25 curriculum it states, Written by Jennifer Miller,

1 Robert Linker, and William Rickard.

2 Q. Please continue.

3 A. Since we did not write the portion of the
4 curriculum under evolution that the board approved on
5 October 18th, we do not want the document to falsely
6 state that it was, indeed, written by us.

7 Q. When you read that language, Rich, did that
8 seem to have connection to the objections the teachers
9 had been voicing or was this something new?

10 A. It was consistent.

11 Q. Okay. Continue, please, with the last
12 portion of that paragraph.

13 A. If there is any litigation, we do not want
14 to be named as the authors of the curriculum in
15 question.

16 Q. Again, did that assertion on the part of the
17 teachers seem linked to concerns they had expressed in
18 the lead-up to the curriculum change?

19 A. Yes.

20 Q. What was your reaction to this document?

21 A. Somewhat confused based upon the fact that
22 they had written the majority, if not 99 percent, of
23 the document, and the only difference was what the
24 board had directed to be placed in the document. And
25 since that was board directed, they would not be in

1 litigation based upon an action of the board.

2 Q. And I'd like you to just explain that again
3 briefly, your understanding as to litigation and the
4 potential liability of board versus the teachers.
5 What are you getting at?

6 A. Specifically, teachers, as well as
7 administrators, are covered in state code, the fact
8 that if a board has an action and the teachers and/or
9 administrators are following the board directives,
10 they're covered based upon the fact that they're
11 following board directives.

12 Q. Did you direct Mr. Baksa to take any steps
13 as a result of this memo?

14 A. I didn't have to. He told me that he had
15 withdrew the names, and I supported him in that
16 action.

17 Q. Was there any particular reason?

18 A. No, not really, not an issue of significant
19 importance for me.

20 Q. Did you see the request that the teachers'
21 names be withdrawn from the curriculum as significant?

22 A. No.

23 Q. And why is that?

24 A. Based upon the fact that in the scope of
25 things, it really didn't matter one way or another.

1 I, as assistant superintendent, had originated the
2 concept of having teachers' names on the planned
3 courses as a point of authorship and pride, and if
4 they chose to withdraw their name, that was fine.

5 Q. Now, there's been some testimony in this
6 case about the board's perception of reporting on
7 their actual curriculum change. I want to ask you a
8 few questions about that by way of background.

9 Were you aware of press coverage of the
10 curriculum change after the October 18th meeting?

11 A. Yes.

12 Q. And did you learn or have an understanding
13 concerning board concerns relating to that coverage?

14 A. Yes.

15 Q. And what was the nature of your
16 understanding, Rich?

17 A. The board was concerned that the newspapers
18 were reporting that the action of the board had the
19 teachers teaching creationism, had the teachers
20 teaching intelligent design, had the teachers teaching
21 religion, and had the textbook *Of Pandas* as a -- or
22 the book *Of Pandas* as a required text.

23 Q. With that in mind, Rich, I'd just like to
24 ask you, do you remember the specific reports that
25 were producing board concern during this period?

1 A. Not specific reports, no.

2 Q. I'd ask you to direct your attention to
3 Defendants' Exhibit 84. Do you recall this article
4 coming to your attention?

5 A. Specifically, no.

6 Q. Okay. If you look at -- what I'm looking
7 for is, can you recall the specific items of reporting
8 that were producing board objections?

9 A. Yes.

10 Q. Are those the ones you've just described?

11 A. Yes.

12 Q. With that in mind, I'd ask you to look at
13 Defendants' Exhibit 83. Before we discuss that
14 document, I'd like to ask you, did you personally, as
15 superintendent, take it upon yourself to do anything
16 about press coverage?

17 A. No.

18 Q. Why is that?

19 A. I didn't have the time of day to contact
20 every incorrect newspaper article. It would have
21 taken 12 hours a day contacting every media, every
22 outlet that was inaccurately stating -- or stating
23 inaccurate comments. And graduate school
24 administrators are given an adage, you never take on
25 individuals that buy ink by the barrel, and I knew it

1 would be a losing proposition, anyway.

2 Q. Well, let me ask you, did there come a time
3 when a board member thought that some steps should be
4 taken to try and address perceived inaccuracies in the
5 reporting?

6 A. Yes.

7 Q. And if you look at 83, is that related to
8 what I've just described?

9 A. Yes.

10 Q. Do you recognize this document?

11 A. Yes.

12 Q. What is it?

13 A. Mr. Alan Bonsell, board member at the time,
14 communicated to me that he continually, in the
15 community, had people coming up asking him why he had
16 supported teaching religion in school and why he had
17 supported creationism being taught.

18 Q. Did Mr. Bonsell ask you to do anything?

19 A. Yes. He directed me to develop a press
20 release to communicate what the board had accurately
21 done.

22 Q. If you look at Exhibit 83, there are some
23 handwritten notations there, Rich. Are those your
24 notes?

25 A. Yes, they are.

1 Q. And why did you write those notes?

2 A. Prior to developing the press release, I
3 wanted to make sure that we had developed specifically
4 what was going to be noted in class, and that note is
5 addressed to Mr. Baksa requesting an update on what
6 his status was on developing the paragraphs.

7 Q. And for the record, Rich, if you'd just read
8 that, please.

9 A. Mike, please see me, press review status of
10 sentence, Rich.

11 Q. And did you speak with Mike about the
12 statement?

13 A. Yes.

14 Q. I'd ask you, were there any other concerns
15 that supported Mr. Bonsell's desire to have a press
16 release or some sort of statement on the part of the
17 board?

18 A. I think they were trying to make sure that
19 everybody understood exactly what was going on and
20 make sure the teachers understood what the board had
21 implied, as well.

22 Q. If you would, Rich, direct your attention to
23 Defendants' Exhibit 70. Do you recognize this
24 document?

25 A. Yes, I do.

1 Q. Do you recall seeing it?

2 A. Yes.

3 Q. Was this in the mix, so to speak, when
4 Mr. Bonsell asked you to prepare some sort of press
5 release?

6 A. Yes.

7 Q. And why is that?

8 A. I think, again, Mr. Bonsell wanted to make
9 sure that everybody, including parents of
10 ninth-graders, understood exactly what was going to be
11 happening.

12 Q. I'd ask you to look it over and just make
13 plain the portion of this document which supported
14 Mr. Bonsell's desire to have a press release.

15 MR. ROTHSCHILD: Objection, Your Honor.
16 He's characterizing Mr. Bonsell's state of mind in a
17 way that isn't supported by the evidence.

18 THE COURT: The question as stated probably
19 gets into what Mr. Bonsell's state of mind was. Why
20 don't you rephrase the question. I'll sustain the
21 objection.

22 MR. GILLEN: Certainly.

23 BY MR. GILLEN:

24 Q. Did you, as superintendent, see this
25 document and the concerns expressed therein as

1 converging with Mr. Bonsell's concern about the
2 information the public had and its perception of the
3 board's policy?

4 MR. ROTHSCHILD: Objection, Your Honor.
5 First of all, it lacks foundation. I'm not sure
6 Dr. Nilsen has -- the foundation has been laid that he
7 saw this. And, second, he's again speculating on
8 Mr. Bonsell's mental state.

9 MR. GILLEN: The first is, he has testified
10 that he saw the document. The second is, I'm asking
11 for his understanding, his belief as superintendent as
12 to whether this document, which he received, converged
13 with Mr. Bonsell's concern that there was inaccurate
14 information being disseminated to the public.

15 MR. ROTHSCHILD: It's getting very
16 speculative. I probably should have raised this
17 objection a couple of questions earlier as we got into
18 Mr. Bonsell's mental state, but --

19 THE COURT: I don't think it calls for
20 Mr. Bonsell's mental state. And my recollection is he
21 said he did see it, so I'll overrule the objection.
22 He can answer the question.

23 THE WITNESS: Yes.

24 BY MR. GILLEN:

25 Q. And tell me how.

1 A. If you look in the e-mail, a parent is
2 questioning if she can take her daughter out of the
3 class when they're being taught this theory of
4 intelligent design, and it refers, again, to a parent
5 having the perception that we're teaching intelligent
6 design.

7 Q. Did you ultimately prepare a press release
8 as requested by Mr. Bonsell?

9 A. Yes, I did.

10 Q. With that in mind, Rich, I'd like you to
11 look at Defendants' Exhibit 101. Do you recognize
12 that document, Rich?

13 A. Yes, I do.

14 Q. Tell us what it is.

15 A. It's one of the drafts -- apparently looks
16 like one of the first drafts of the biology curriculum
17 press release.

18 Q. And then if you would, look at 102. Do you
19 recognize that document?

20 A. Yes.

21 Q. What is it?

22 A. Again, it appears to be one of the drafts on
23 the biology curriculum press release.

24 Q. And then I'd ask you, Rich, to look at
25 Defendants' Exhibit 103. Do you recognize that

1 document?

2 A. Yes. It's the final first posting, or
3 posting of the biology curriculum press release.

4 Q. Did you show this document to anyone before
5 it was -- well, let me ask you, did you post it?

6 A. Yes.

7 Q. Did you show it to anyone before it was
8 posted?

9 A. Yes.

10 Q. Who?

11 A. Two individuals, specifically Mr. Baksa, the
12 assistant superintendent for curriculum, and
13 Dr. Butterfield, the language arts supervisor.

14 Q. Was the press release reposted at any time?

15 A. Yes.

16 Q. Tell us why.

17 A. It was reposted a number of days after it
18 was originally posted because we came across the fact
19 that there was a typo and a grammar error.

20 Q. Was there any change to the substance of the
21 reposted press release?

22 A. No.

23 Q. Was it identical in substance to the initial
24 posting?

25 A. Yes.

1 Q. Does Exhibit 103 contain the statement that
2 was meant to be read to students in January of 2005?

3 A. Yes.

4 Q. Do you know the details as to how the
5 language of that statement had been worked out, that
6 is, the statement that would be read to students?

7 A. Specific details, no.

8 Q. Do you know the process which was employed
9 to produce the statement that was read to students?

10 A. Yes.

11 Q. Tell us about that.

12 A. Mr. Baksa talked to the majority -- or at
13 least my recollection the senior biology teacher on
14 getting input, as well as, I believe, also talked to
15 board members.

16 Q. Rich, I'd ask you to direct your attention
17 to the portion of Exhibit 103 with the Bates Stamp
18 Number 50 in the lower right-hand corner.

19 A. Bates Stamp Number 50?

20 Q. Correct.

21 A. Yes.

22 Q. And I want to focus your attention on the
23 second-to-last paragraph, the full paragraph there, so
24 we can get your understanding as to your purpose in
25 drafting this. If you would, I'd ask you to read the

1 first sentence.

2 A. The foregoing statements were developed to
3 provide a balanced view and not to teach or present
4 religious beliefs.

5 Q. What was your purpose in including that
6 sentence in this press release?

7 A. The purpose for the press release overall
8 was not to develop any instructional piece, was to
9 communicate specific statements that were in the press
10 that were inaccurate. And this specific statement
11 addresses the fact that a lot of media outlets had
12 reported that we were teaching religious beliefs and
13 we were teaching religion.

14 Q. In that sentence, you referenced a balanced
15 view. Was your choice of that language linked to
16 information you had received from the board in the
17 lead-up to the curriculum change?

18 A. Yes. All the way back to January of 2004,
19 there were discussions about providing other theories
20 and providing a balanced view.

21 Q. I'd ask you to look at the second sentence
22 and read that.

23 A. The superintendent, Dr. Richard Nilsen, has
24 directed that no teacher will teach intelligent
25 design, creationism, or present his or her or the

1 board's religious beliefs.

2 Q. What was your purpose in including that
3 language in the press release?

4 A. First of all, reinforcing what I had said,
5 and also stating for the press and the community that
6 there would be no teacher teaching intelligent design,
7 there would be no teacher teaching creationism, and
8 there would be no teacher presenting his or her or
9 anybody's religious beliefs.

10 Q. Let me ask you again, at the time you
11 drafted this statement, you understood that this press
12 release, you understood that the statement which is
13 included would be read to students. In this sentence,
14 you've said that no teacher will teach intelligent
15 design. What was the basis for that language choice
16 in light of the fact that the statement was going to
17 be read?

18 A. Well, the statement made students aware. It
19 did not teach intelligent design, as I had priorly
20 defined teaching.

21 Q. If you would, I'd ask you to read the rest
22 of that paragraph.

23 A. The Dover Area School District supports and
24 does not discriminate against students and parents who
25 have competing beliefs, especially in the area of

1 origins of life debate. The school board has not --
2 has noted that there are opinions other than Darwin's
3 on the origin of life. School districts are forums
4 for inquiry and critical discussion. The above
5 statement and the district's revised biology
6 curriculum together provide an opportunity for open
7 critical discussions, the real heart of the scientific
8 practice.

9 Q. Okay. And forgive me, I got ahead of myself
10 here. I want you to look at that second sentence
11 again, and I note that you used the terms "intelligent
12 design" and "creationism" in the alternative. Why did
13 you do that?

14 A. I'm sorry, could you ask that question
15 again?

16 Q. Sure. In the second sentence of that
17 paragraph, Rich, if you look at it, it reads, The
18 superintendent, Dr. Richard Nilsen, has directed that
19 no teacher will teach intelligent design, creationism,
20 or present his or her or the board's religious
21 beliefs.

22 In this sentence, you have used "intelligent
23 design" and "creationism" in the alternative. Why did
24 you do that?

25 MR. ROTHSCHILD: Objection, Your Honor.

1 Leading the witness.

2 MR. GILLEN: I'm asking why. It's not a yes
3 or no answer.

4 THE COURT: I'll overrule the objection. He
5 can answer the question.

6 THE WITNESS: I did not see intelligent
7 design as creationism. I saw them totally separate.

8 BY MR. GILLEN:

9 Q. And why is that?

10 A. Creationism specifically references Genesis
11 or, at least my definition, the origins of life
12 debate, and intelligent design does not reference a
13 biblical context at all.

14 Q. Did you see intelligent design as religion
15 at the time you drafted this press release?

16 A. No, I did not see it. In fact, the
17 teachers' acceptance of the *Of Pandas and People* book
18 in the August meeting as a reference reinforced that
19 concept.

20 Q. Well, forgive me again, but now I'm going to
21 ask you to discuss the remainder of that paragraph
22 that you've read. And I want you to give the Court a
23 sense for what was your purpose here as you finished
24 this paragraph.

25 A. The paragraph, again, was directed to

1 address the inaccurate comments in the community. It
2 was not done as a curricular outline or a directive of
3 what is taught in individual classrooms, just
4 specifically relating to the inaccurate media
5 comments.

6 Q. If you look at the last sentence on that
7 page, with Bates Stamp Number 50, Rich, did you author
8 that?

9 A. Yes.

10 Q. And what was your purpose in including that
11 language in this press release?

12 A. Any graduate student in administration
13 appreciates the debate on religion and the *Lemon* test,
14 the second and third prong, and I wanted to reinforce
15 the fact that we were not involved in inhibiting or
16 promoting religion as it related to past court cases.

17 Q. Now, Rich, I'd ask you to turn back to Page
18 103, which has the Bates Stamp Number 49, and direct
19 your attention to the first -- well, actually, the
20 last full paragraph immediately above the indented
21 portion, which is the statement, and read that first
22 sentence.

23 A. The Pennsylvania academic standards?

24 Q. No, I'm sorry, the paragraph above that.

25 A. Students will be made --

1 Q. The paragraph above that, Rich, In
2 coordination.

3 A. In coordination with the science department
4 teachers, the district solicitor, and the school
5 board, Mr. Michael Baksa, the assistant superintendent
6 in charge of curriculum, developed the following
7 procedural statement that will be read to all students
8 as the new biology curriculum is implemented beginning
9 in January of 2005.

10 Q. Did you write that language?

11 A. Yes.

12 Q. And what was your purpose in doing so?

13 A. My purpose in doing so was to end up
14 communicating the fact that Mr. Baksa incorporated
15 individuals, teachers, our solicitor, and the school
16 board in developing the implementation.

17 Q. Did the press release elicit a response on
18 the part of the science faculty?

19 A. Yes.

20 Q. With that in mind, I'd ask you to look at
21 Defendants' Exhibit 106. Do you recognize that
22 document, Rich?

23 A. Yes.

24 Q. Tell us what it is.

25 A. It's a letter from the high school science

1 faculty and the local area union president to me.

2 Q. And what is the -- what is your
3 understanding as to the purpose of that memo?

4 A. A letter basically stating that they had an
5 argument or a concern with, I believe, two words in
6 the press release.

7 Q. And what were those two words?

8 A. "In coordination with."

9 Q. Did you have a reaction to this statement,
10 Rich?

11 A. Yes.

12 Q. And what was that?

13 A. I didn't understand what their concern was.

14 Q. Did you -- what do you mean? Please be more
15 specific.

16 A. They had a concern with the comment "in
17 coordination with," and my usage of that term
18 reflected the fact that Mr. Baksa did sit down with
19 science teachers and get input from them on the
20 statement.

21 Q. Did you do anything in response to this
22 document?

23 A. Yes.

24 Q. What did you do?

25 A. I told Mr. Baksa that I wanted to fully

1 understand what their concerns were and requested for
2 him to schedule a meeting on an in-service day,
3 November 24th, that included all the science teachers
4 so I would understand exactly what their concern was.

5 Q. Okay. Now, before we move to that meeting,
6 I'd like you to look at Defendants' Exhibit 172. Do
7 you recognize that document, Rich?

8 A. Yes.

9 Q. What is it?

10 A. It's a memo I sent to Mrs. Spahr after the
11 board meeting requesting time for us to get together
12 and talk about the implementation of the board action.

13 Q. Okay. And let me ask you this. You sent
14 this memo. Was there a meeting close in time to
15 October 19th, 2004, with respect to the curriculum?

16 A. I'm sorry, could you ask that question
17 again?

18 Q. Well, you've indicated that this document,
19 Defendants' Exhibit 172, is dated October 19th, the
20 day after the board meeting. Was there --

21 MR. ROTHSCHILD: I'm sorry, if we could just
22 clarify for the record, this has actually many
23 communications, and I just want clarity, are we just
24 talking -- is Exhibit 172 intended to be the entire
25 group?

1 THE COURT: You're referring to Bates 341.
2 Is that right?

3 MR. GILLEN: You're correct, Your Honor.
4 And I thank Mr. Rothschild for that point of
5 clarification.

6 THE COURT: Is that the issue,
7 Mr. Rothschild?

8 MR. ROTHSCHILD: Yes. What makes it a
9 little more confusing is there's a cover page that
10 says "Communications" that's Bates stamped 338, and
11 then it skips a few pages and then goes on -- the
12 first page is 341.

13 MR. GILLEN: Well, let me clarify the record
14 on that point, Your Honor. At this time I'm directing
15 Dr. Nilsen's attention to the portion of Defendants'
16 Exhibit 172 with the Bates Stamp Number 341 in the
17 lower right-hand corner.

18 THE COURT: All right.

19 BY MR. GILLEN:

20 Q. With that in mind, Rich, let me ask you
21 again, do you recognize this document?

22 A. 341, yes.

23 Q. Okay. What is it?

24 A. It's a memo from me to Bert Spahr, Robert
25 Eshbach, Jennifer Miller, and Leslie Prall.

1 Q. And what was your purpose in sending that
2 memo?

3 A. My purpose was to meet with the science
4 teachers to discuss the implementation of the board
5 action on the bio curriculum.

6 Q. Did you meet with them personally?

7 A. No.

8 Q. Did you direct Mr. Baksa to meet with them?

9 A. Yes.

10 Q. Did you have an understanding concerning
11 whether Mr. Baksa met with them?

12 A. I'm sorry?

13 Q. Did you have an understanding concerning
14 whether Mr. Baksa met with them?

15 A. Yes, I have an understanding he did.

16 Q. Okay. Looking back at 106, tell us again
17 what you did in response to that document.

18 A. I convened a meeting on November the 24th at
19 1 o'clock in the administrative office.

20 Q. Did that meeting take place?

21 A. Yes, it did.

22 Q. Do you remember anything from that meeting?

23 A. Yes.

24 Q. Tell us what you remember.

25 A. The meeting began with the science

1 department showed up, as well as the local union
2 president and the two past presidents. And it began
3 with the past president, Mr. Miller --

4 Q. Let me ask you, you say the science
5 department showed up. Do you remember which science
6 teachers were present?

7 A. I remember Bert Spahr, Jennifer Miller.
8 Those are the only two I remember.

9 Q. Was Rob Eshbach there?

10 A. Yes.

11 Q. Was Bob Linker there?

12 A. I don't remember Mr. Linker.

13 Q. You've mentioned some union representatives.
14 Do you remember who was there?

15 A. Yes, Mr. Miller and Mr. Neal and
16 Mrs. Bowser.

17 Q. What happened?

18 A. We began the meeting by asking if they would
19 convey to me what their concern was concerning the
20 prior, aforementioned letter. Mr. Miller answered
21 that the faculty had a concern with the press release
22 that was sent out, that it said "in coordination
23 with."

24 And he ended up communicating that the
25 teachers had input based upon the fact that they were

1 directed to do so because they did not want to be
2 insubordinate and then the fact that they had not
3 agreed with what the board had done. And he also
4 requested an additional press release from me
5 verifying that they had not agreed on what was being
6 done.

7 Q. Did you say anything to the teachers in
8 response to their concerns?

9 A. Yes.

10 Q. Tell us what you said.

11 A. Once again reiterating, I told them the
12 press release was done predominantly for a way to
13 convey that the teachers had been cooperative
14 throughout the whole process, and in no way did the
15 press release say that they agreed or, for that
16 matter, the administration agreed with what was done.
17 It was just that they were included in on the process.

18 Q. Did you offer them anything else by way of a
19 show of support?

20 A. Yes. Predominantly through the meeting,
21 they continually voiced that they had been cooperative
22 throughout the whole process, that they had met with
23 board members, they had met with administrators. They
24 had agreed, through the process, to include gaps and
25 problems in the curriculum. They had agreed to

1 include the *Of Pandas* as a reference.

2 And I communicated to them that I would
3 support that comment and thought they had been very
4 agreeable, I guess. And I communicated to them that I
5 would be willing to go on a local radio talk show and
6 communicate to them -- communicate to the community
7 that the teachers had been very positive in this whole
8 experience. And I requested them to give me what they
9 wanted me to say in the radio show.

10 Q. With that in mind, Rich, I'd ask you to turn
11 back to Defendants' Exhibit 172 and direct your
12 attention to the pages of Exhibit 172 which have the
13 Bates Numbers 359 and 360 in the lower right-hand
14 corner.

15 And if I could direct your attention first
16 to the portion of Exhibit 172 with the Bates Number
17 359 and ask you, Rich, do you recognize that document?

18 A. Yes.

19 Q. What is it?

20 A. It's a memo to me from the science
21 department, a carbon copy to Mrs. Bowser, for the
22 suggestions for the Gary Sutton Show.

23 Q. Did you receive that document?

24 A. Yes, I did.

25 Q. I'd ask you to turn to the portion of 172

1 with Bates Number 360 in the lower right-hand corner
2 and ask you if you recognize that document.

3 A. Yes, I do.

4 Q. And what is that?

5 A. That's my transcript of what I said on the
6 Gary Sutton Show.

7 Q. Was there -- and did you express the
8 sentiments you had stated in this meeting on the Gary
9 Sutton Show?

10 A. Yes.

11 Q. Was there anything else regarding the
12 curriculum change or its implementation discussed at
13 this meeting?

14 A. Yes.

15 Q. Tell us about that.

16 A. First of all, the teachers continually asked
17 what are we supposed to do on various aspects. And I
18 told them as superintendent, I understood their
19 concern and would sign off on any procedural or
20 anything that they had a concern with, that all they
21 needed to do was send me a list of all the concerns
22 that they ended up having, and I would sign off to
23 give them administrative approval.

24 Q. You've mentioned concerns expressed by
25 parents. Was there any discussion of an opt-out at

1 this meeting?

2 A. Yes.

3 Q. Tell us about that.

4 A. At the time period Mr. Baksa began
5 discussing with the science teachers the
6 implementation. And I believe there were two or three
7 items he discussed with them, the implementation of
8 the *Pandas* book, if a student asked to take a book
9 out, how long would he or she have the book, as well
10 as a discussion of a procedure on parents, if they so
11 chose to opt out of the unit.

12 Q. You've mentioned a statement to students in
13 the press release. Was there any discussion about the
14 reading of the statement?

15 A. Yes. Jen Miller repeatedly, at least, I
16 believe, two times, asked me specifically what happens
17 at the end of the statement if a student follows up
18 and asks a question concerning what was read.

19 And I answered to her, you would answer the
20 same way you would answer anything else that was not
21 specifically in the curriculum or as it relates to a
22 standards-driven curriculum, that that is a good
23 question, we appreciate your interest, please research
24 that on your own behalf or talk to your parents about
25 it.

1 Q. Just if you would, Rich, what was your
2 impression about the tone of the meeting?

3 A. Honestly, it was strained.

4 Q. And did you have an understanding concerning
5 why?

6 A. I think the teachers were concerned about
7 two things. One, they were concerned that they did
8 not see the press release prior to it being sent out.
9 Secondly, they were concerned about their own
10 liability, legal concerns.

11 Q. As you lead this meeting, what was the
12 general nature of your response to the teachers'
13 concerns? Did you offer them assurances?

14 A. Yes.

15 Q. What kind?

16 A. Once again, as stipulated in my prior
17 comments, I told them if they had any specific issues,
18 to communicate to me, and I would end up telling them
19 what they were to do as it related to any actions.

20 We also agreed that any future
21 communications we would share, in my behalf with the
22 science teachers and the association on their behalf.
23 Anything that they disseminated, they would share with
24 me.

25 Q. Did the press release elicit another

1 response on the part of the science faculty? Did they
2 respond to this meeting?

3 Well, let me ask you, Rich, a more specific
4 question. Perhaps I'll help you out here. Was there
5 more than one press release relating to the curriculum
6 change?

7 A. Yes. After the meeting, at the next board
8 meeting a newspaper reporter came to me and asked me
9 what I thought of the teachers' press release, because
10 apparently they had disseminated a press release the
11 next day.

12 Q. With that in mind, Rich, I'd ask you to look
13 at Defendants' Exhibit 105. Had the teachers shared
14 this document with you prior to its dissemination?

15 A. No.

16 Q. How did you learn about it?

17 A. At the board meeting a newspaper reporter
18 asked me what my reaction was to the teachers' press
19 release. I had to say I didn't know what they were
20 talking about.

21 Q. Did this document later come to your
22 attention?

23 A. Yes.

24 Q. How is that?

25 A. I contacted the union president asking her

1 what they were talking about as it related to the
2 press release.

3 Q. What was your reaction to this document?

4 A. Initially frustrated based on the fact that
5 I thought we had left the meeting with the
6 understanding that we would communicate prior
7 communications with each other.

8 Q. And did they respond to that concern on your
9 part?

10 A. Originally they had communicated that they
11 would convey to me prior to any dissemination, much
12 like I had subsequently promised them.

13 Q. But did they do that?

14 A. No.

15 Q. At the meeting that you've described in
16 November of 2004 was there discussion of how *Of Pandas*
17 could be used or placed in the classroom?

18 A. Yes.

19 Q. And tell us about that.

20 A. I think Mr. Baksa continued the conversation
21 of where the book would be placed in the respective
22 classroom.

23 Q. And you spoke with Jen Miller about that?

24 A. Yes. When I had met with her on or about
25 before the October 18th board meeting, we had an

1 extended conversation.

2 Q. With that in mind, I'd ask you to look at
3 Defendants' Exhibit 127, Rich, and also direct your
4 attention to Defendants' Exhibit 137. Look at 137
5 first. Do you recognize that document?

6 A. Yes.

7 Q. What is it?

8 A. It's a memo from the high school librarian,
9 Cora Kunkle, to Mr. Baksa, subject, reference books,
10 carbon copied to me.

11 Q. And if you would read that communication.

12 A. As per your directive on December 22nd,
13 2004, 58 copies of the book *Of Pandas and People* have
14 been processed and are ready for student use. Twenty
15 copies have been placed in the reference section of
16 the library as per your request.

17 Q. Did you direct that the book *Of Pandas* be
18 placed in the library?

19 A. Yes.

20 Q. Why did you do that?

21 A. Mr. Baksa and I were in the library on or
22 about December 22nd, 2004, for a student council
23 function. And after the function, we were talking to
24 the librarian about a number of items. And then she
25 had communicated to us that she had a reference

1 section on the topics of creationism and evolution.
2 And at that time period I was pleased to hear that and
3 still struggling with where to put the textbooks and
4 then directed the textbooks to be placed there,
5 because I thought as a reference book, I now knew
6 there was a reference section in the library on that
7 subject.

8 Q. Were you advised to place the book in the
9 library by anyone --

10 A. No.

11 Q. -- before you made this decision?

12 A. No.

13 Q. Let me ask you a few more questions about
14 the opt-out you've described. Did you believe the
15 opt-out applied in the case of this curriculum change?

16 A. The opt-out applies to any curriculum in
17 Dover.

18 Q. Did you believe the opt-out applied because
19 intelligent design was religion?

20 A. No.

21 Q. Are there other areas in which the opt-out
22 policy has been applied?

23 A. Yes. We have a custom of where any parent
24 can opt out of any curriculum. The No Child Left
25 Behind, the NCLB requirement, stipulates that a parent

1 can opt out for any religious purposes.

2 They also have the requirement in NCLB that
3 the parents have an option of having their students'
4 names eliminated from the recruiter's list. We also
5 send an opt-out letter anytime we have a dissection of
6 animals. We provided an opt-out letter at the
7 intermediate school when we sent home booklets that
8 containing Planned Parenthood, as well as we provide
9 opt-out letters when we have units on sexuality.

10 Q. We've talked about the reading of the
11 statement, Rich. With that in mind, I'd like you to
12 look at Defendants' Exhibit 138 and 139. Looking
13 first at Defendants' Exhibit 138, do you recognize
14 that document?

15 A. Yes.

16 Q. What is it?

17 A. It's a draft of Mr. Baksa's notes concerning
18 a meeting he had with the science department.

19 Q. There are written notes. Did you have an
20 understanding concerning why they were written?

21 A. Those written -- I directed Mr. Baksa to
22 memorialize all communications dealing with the
23 science department.

24 Q. And why did you do that?

25 A. Based on our prior conversations on the

1 24th, we thought we would provide clear directions and
2 clear communications so everybody understood what to
3 do.

4 Q. I note that on 138 there are handwritten
5 changes. Are those changes in your hand?

6 A. Yes, they are.

7 Q. And what was your purpose in making those?

8 A. There are a number of purposes. First of
9 all, I wanted it structured in an outline format.
10 Second of all, I ended up eliminating some pronouns
11 for specificity. And I also, on the third one, wanted
12 to make sure that there was a clear understanding that
13 anything associated with intelligent design was not
14 being taught, and I specified nothing discussed during
15 a student absence will be assessed, which reflects the
16 teaching strategy.

17 Q. What do you mean by "reflects the teaching
18 strategy"?

19 A. As mentioned prior, we define teaching very
20 specifically as a component with assessment. And in
21 this case, the fact that it was only mentioned, it
22 would not be assessed.

23 Q. Was there a specific reason that that issue
24 came to your attention?

25 A. Again, reinforcing the fact that the

1 teachers were not teaching intelligent design.

2 Q. How about with respect to the opt-out, did
3 you make notes relating to the opt-out?

4 A. On the document to the opt-out?

5 Q. Yes, on Exhibit 138. Look at Exhibit 138,
6 Rich, and tell me if you made notes relating to the
7 opt-out on that document.

8 A. As it relates specifically to the opt-out,
9 there are notes that I end up talking about as per
10 prior procedures.

11 Q. Rich, I'd ask you to look at Defendants'
12 Exhibits 133 and 134 and 135. Looking first at 133,
13 do you recognize that document?

14 A. Yes.

15 Q. Did you receive this document?

16 A. Yes.

17 Q. What is it?

18 A. It's Mr. Baksa's letter he developed for the
19 parents concerning the opt-out.

20 Q. If you'd look at Exhibit 134, do you
21 recognize that document?

22 A. Yes.

23 Q. What is it?

24 A. It's Mr. Baksa's letter he developed dealing
25 with the form attached with the opt-out.

1 Q. And what is the purpose of that form?

2 A. The purpose of the form is to communicate to
3 the school district from the parent that they are
4 choosing their student not to be in the class during
5 the reading of the statement.

6 Q. And I'd ask if you look at Defendants'
7 Exhibit 135. Do you recognize that document?

8 A. Yes.

9 Q. What is it?

10 A. I believe that's the final form.

11 Q. With respect to this opt-out procedure,
12 Rich, did you have a plan for how these documents
13 would be distributed?

14 A. Yes.

15 Q. What was that plan?

16 A. Mr. Baksa coordinated with the high school
17 administration and I also believe the science
18 department that on the Friday prior to the unit or the
19 four statements of the unit on evolution, that the
20 parents would receive these letters with the opt-out.

21 Q. Did the teachers distribute the forms?

22 A. No, they did not.

23 Q. How did that come to your attention?

24 A. I got a call Saturday from a board member
25 asking why the opt-out letters had not gone out to the

1 parents as I had said they would.

2 Q. Did anyone ever explain to you why the
3 opt-out forms were not distributed by the teachers?

4 A. Yes.

5 Q. Who was that?

6 A. Two individuals. After receiving that phone
7 call, I contacted the high school principal and asked
8 him why they had not been disseminated, and he wasn't
9 aware that it was not. So we further contacted other
10 individuals in the science department to find out what
11 had happened. And later on the next day, Sunday,
12 Mrs. Bowser returned my call and communicated to me
13 what had happened.

14 Q. Did you gain an understanding from that
15 communication concerning why the teachers did not
16 distribute the opt-out forms?

17 A. Yes.

18 Q. Tell us about that.

19 A. The teachers had decided that they did not
20 want any part of the dissemination of the opt-out
21 letters and therefore had an individual Friday going
22 around collecting all of the letters that were to be
23 sent out that day with the purpose of giving them all
24 back Monday morning.

25 Q. What was your reaction to that information,

1 Rich?

2 A. Twofold. One, I was somewhat frustrated
3 based upon the fact that information that I had
4 disseminated that the opt-out would be sent on Friday
5 was not followed through and that I was not even aware
6 that it was not being followed through and, secondly,
7 somewhat of a confusion based upon the fact that
8 administratively, we had supported the teachers and
9 their request not to be involved in the curriculum and
10 yet they were not sending home information that
11 allowed the students the same option.

12 Q. Well, explain a little more, Rich. You said
13 you supported the teachers with respect to their
14 desires concerning the statement. What do you mean by
15 that?

16 A. During this time period, the teachers had
17 communicated to the high school principal and
18 therefore the administration that they did not want to
19 read the four-paragraph statement, that they thought
20 that there was an ethics issues associated with it.

21 Q. Did you see a rather ironic connection
22 between that request and their conduct here?

23 A. Yes.

24 Q. What was that?

25 A. Again, the issue of they did not want

1 involvement, but they wouldn't disseminate information
2 that allowed the students the same option.

3 Q. I'd ask you to go to Defendants' Exhibit
4 142. Do you recognize that document, Rich?

5 A. Yes.

6 Q. What is it?

7 A. It's the statement that was read in class.

8 Q. At the time this statement was prepared did
9 you have a plan with respect to the reading of the
10 statement?

11 A. Yes.

12 Q. What was it?

13 A. The plan was the teachers would communicate
14 to us when the unit on evolution was to begin, and
15 then Mr. Baksa and I would come in and then read the
16 statement after we had given the students who had, by
17 parents and by their own request, had opted out.

18 Q. Did the teachers read the statement?

19 A. No, they did not.

20 Q. Was the statement read?

21 A. Yes.

22 Q. Who read it?

23 A. Mr. Baksa and/or myself.

24 Q. Rich, why did the administration come into
25 the science classroom to read this four-paragraph

1 statement?

2 A. The same reason we wrote the statement.
3 Through this whole process, it was never our intent to
4 develop a statement, it was never our intent to read
5 the statement. In both instances, it was done solely
6 for the protection and request of the professional
7 staff.

8 Q. Did you have something in mind when you
9 initially saw that the curriculum change had been
10 approved?

11 A. Sure. My understanding of what would have
12 happened is the fact that the teachers would still
13 teach evolution. Through this whole conversation and
14 process, no one had ever said we would modify or
15 ignore the state standards on evolution.

16 The teachers at one time, prior to the
17 updating, had taught it 19 days. Through the current
18 process, they had taught it for two days. And I'm
19 aware now that they have a new draft that has it five
20 days. The teachers would continue to teach evolution
21 as it related to the standards and as it related to
22 what they thought was professionally accurate and
23 appropriate.

24 I was also under the understanding that they
25 had mentioned -- and the reinforcement of the fact is

1 the Dr. Peterman memo -- that they had mentioned
2 creationism as an alternative theory. It was my
3 understanding that the board procedure would have
4 ended up having a five- or ten-second additional
5 comment that they end up saying, creationism is
6 another theory, as past practice, as well as there is
7 another theory called intelligent design. They would
8 then reference a book in the library and then move on.

9 Q. Why didn't that happen?

10 A. The teachers requested that it not happen
11 and requested that there end up being a four-paragraph
12 statement reflective of what the board did and they
13 requested not to do the statement.

14 Q. So, again, I ask you, some weight has been
15 placed on the fact that the administration has read
16 this statement. Why did the administration read the
17 statement to the students?

18 A. Solely based on the fact that the teachers
19 ended up requesting it. Mr. Baksa and myself long for
20 the day when we don't have to do that.

21 Q. Was there a -- let me ask you next, what
22 happened in terms of steps related to this curriculum
23 change? Before I do that, Rich, forgive me, was
24 Defendants' Exhibit 142 the statement you read in the
25 class?

1 A. Yes.

2 Q. Now, let me ask you next, was there another
3 effort to reach out to the public with information
4 about this curriculum change?

5 A. Yes.

6 Q. What was that?

7 A. Mr. Bonsell came to me and said that the
8 press release that we had posted on the Web was not
9 good enough because they didn't communicate the
10 information to all the constituents, that even though
11 we periodically accessed our Web page, that not
12 everybody in the community accessed the Web page, so
13 he wanted to make sure that everybody was getting the
14 information.

15 Q. Did you participate in the drafting of that
16 document?

17 A. No, I did not.

18 Q. Did there come a time -- we've mentioned *Of*
19 *Pandas* being in the library. Did there come a time
20 when Dover Area School District received another
21 donation of books?

22 A. Yes.

23 Q. And did those books touch on the subject
24 matter of this dispute, evolutionary theory and other
25 theories, the controversy surrounding evolutionary

1 theory?

2 A. Yes.

3 Q. When did that happen?

4 A. Sometime in the spring of '05.

5 Q. How did the books come to your attention?

6 A. I read about it in the newspaper. There was
7 a front-page article asking, I guess the organization
8 that donated it, asking what the administration was
9 going to do with the books.

10 Q. At this time did you have the books?

11 A. I don't know.

12 Q. What do you mean by that?

13 A. I didn't -- no one ever communicated to me
14 when the articles came out -- in fact, I think the
15 newspapers ran two or three days asking what the
16 district was going to do with the textbooks, and we
17 never knew where the textbooks were.

18 The first time we found out about the
19 textbooks was subsequent, a few days afterwards. The
20 union president, in a meeting I had, asked us what she
21 should do with the books that are in the high school
22 library. And my answer was, okay, now I know where
23 the books are.

24 Q. What did you tell Ms. Bowser in response to
25 that information?

1 A. I directed her to send the books over to
2 Mr. Baksa.

3 Q. And why did you do that?

4 A. Two reasons. One, we were curious on what
5 the books were, and, secondly, we wanted to review
6 exactly what was sent.

7 Q. When the books were received, did you ask
8 who sent them?

9 A. No.

10 Q. Did you care?

11 A. No.

12 Q. Why is that?

13 A. Anytime you end up getting information,
14 things that you can end up using that's appropriate, I
15 think it's more important to look at what was sent,
16 not who sent it.

17 Q. Were the books reviewed?

18 A. Yes.

19 Q. Were they placed in the library?

20 A. Yes.

21 Q. Did you direct the librarian to place those
22 books in any specific location?

23 A. No.

24 Q. Who determined where the books were placed
25 in the collection?

1 A. Librarian.

2 Q. Did the receipt of the books have any impact
3 on the implementation of the curriculum change?

4 A. Yes.

5 Q. What was that?

6 A. After understanding that there was more than
7 just one textbook for reference in this conversation,
8 I directed Mr. Baksa to reword the statement that
9 there would be other books besides the *Panda* book in
10 the library for students to review.

11 Q. With that in mind, Rich, I'd ask you to
12 direct your attention to Defendants' Exhibit 193. Do
13 you recognize that document?

14 A. Yes.

15 Q. What is it?

16 A. It's the statement that was read to the
17 students in 2005.

18 Q. Would you read the portion of the document
19 that reflects the change you've described?

20 A. I'm sorry, I couldn't hear you.

21 Q. Would you read the portion of the document
22 that reflects the change you've described.

23 A. Intelligent design is -- it's the third
24 paragraph. Intelligent design is an explanation of
25 the origin of life that differs from Darwin's view.

1 The reference book *Of Pandas and People* is in the
2 library, along with other resources for students who
3 might be interested in gaining an understanding of
4 what intelligent design actually involves.

5 Q. And what was your purpose in including that
6 additional language?

7 A. To convey that there were other resources
8 for students.

9 Q. Did you have an understanding concerning
10 whether that addition was consistent with the board's
11 purpose, as you understood it, in adopting the
12 curriculum change on October 18th, 2004?

13 A. Yes. The board referenced other theories,
14 not just intelligent design.

15 MR. GILLEN: Your Honor, may I approach the
16 witness?

17 THE COURT: You may.

18 BY MR. GILLEN:

19 Q. Rich, I've placed before you three books.
20 I'd ask that you read their author and title for the
21 record.

22 A. *Tower of Babel* by Robert T. Pennock; *Finding*
23 *Darwin's God*, Kenneth Miller; *Intelligent Design*
24 *Creationism and Its Critics*, edited by Robert Pennock.

25 Q. Do you know whether these books are in the

1 Dover Area School District library?

2 A. They are.

3 Q. Do you believe that the placement of these
4 books in the Dover Area School District library was
5 consistent with the intent of the board when it
6 enacted the curriculum change on October 18th, 2004?

7 MR. ROTHSCHILD: Objection, Your Honor.
8 Calls for speculation.

9 MR. GILLEN: No, I'm asking for his
10 understanding.

11 MR. ROTHSCHILD: An understanding based
12 purely on speculation.

13 MR. GILLEN: It's based on his role as
14 administrator, the personal knowledge he received from
15 communications with them. It's not hearsay.

16 THE COURT: Well, no, I don't think the
17 objection is hearsay, is it?

18 MR. ROTHSCHILD: It's speculation and
19 doesn't -- I'm not sure that there's any basis other
20 than his guess.

21 THE COURT: To know whether it was
22 consistent with the board policy, he would have to
23 have consulted the board. Now, he could state what
24 his impression was, what his interpretation was. But
25 the way the question was phrased might assume that he

1 knew from a contact with the board or having consulted
2 the board, so why don't you rephrase. I'll sustain
3 the objection.

4 MR. GILLEN: Okay. I believe I can ask him
5 for his understanding, Your Honor, as to whether what
6 he did was consistent with district policy?

7 THE COURT: That would be my opinion.

8 MR. GILLEN: Okay. Thank you, Your Honor.

9 BY MR. GILLEN:

10 Q. Dr. Nilsen, do you have a view concerning
11 whether your placement of these books in the Dover
12 Area School District library is consistent with the
13 board's policy approved by the board on October 18th,
14 2004?

15 A. Yes.

16 Q. Has anyone from the board ever asked you to
17 remove those books from the library?

18 A. No.

19 MR. GILLEN: No further questions, Your
20 Honor.

21 THE COURT: All right. This will be an
22 appropriate time then to take a break. We'll take a
23 20-minute break and we'll resume then with
24 cross-examination by the plaintiffs' counsel. We'll
25 be in recess.

1 (Recess taken.)

2 THE COURT: We'll commence with
3 cross-examination by Mr. Rothschild.

4 MR. ROTHSCHILD: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. ROTHSCHILD:

7 Q. Good morning, Dr. Nilsen.

8 A. Good morning.

9 Q. Dr. Nilsen, you had your deposition taken
10 four times in this case?

11 A. Yes, I did.

12 Q. You were the lucky winner of the most
13 depositions taken?

14 A. What's the prize?

15 Q. And there were actually some reasons for
16 that. The first deposition was taken in January of
17 2005 so that the plaintiffs would have an opportunity
18 to take evidence to decide whether to seek a temporary
19 restraining order. You understand that?

20 A. That's correct.

21 Q. And then after a more complete production of
22 documents, the plaintiffs took your deposition again
23 in April, 2005?

24 A. That's correct.

25 Q. And then you found -- in cleaning out your

1 office, you found some additional documents you
2 thought might be responsive to plaintiffs' document
3 request, and you promptly turned them over to your
4 counsel. And they provided them to us, and I took
5 your deposition again in August of 2005?

6 A. That is correct.

7 Q. And then Mr. Baksa found some additional
8 documents which he turned over to defendants' counsel
9 and were turned over to us, and plaintiffs determined
10 that they needed to take your deposition relating to
11 those documents. Correct?

12 A. That is correct.

13 Q. I'm going to be asking you some questions,
14 and we may need to refer to the depositions, so I'm
15 going to give you all four copies of your transcripts.

16 Enjoying litigation so much, you've also
17 attended a number of days of this trial?

18 A. That is correct.

19 Q. And I'm just going to go through the names
20 of some of the witnesses and ask you whether you were
21 at their testimony. Jennifer Miller?

22 A. Yes.

23 Q. Bertha Spahr?

24 A. Yes.

25 Q. Casey Brown?

1 A. Yes.

2 Q. Jeff Brown?

3 A. Yes.

4 Q. Christy Rehm?

5 A. Yes.

6 Q. Bryan Rehm?

7 A. Yes.

8 Q. Barrie Callahan?

9 A. Yes.

10 Q. And Fred Callahan?

11 A. Yes.

12 Q. In your capacity as superintendent, you
13 regularly attend all the school board meetings.

14 Correct?

15 A. Yes.

16 Q. And you also attend executive sessions when
17 you're invited by the board?

18 A. Yes.

19 Q. And you testified yesterday that one of your
20 responsibilities is to set the agenda for board
21 meetings?

22 A. Yes.

23 Q. Does the board president have any
24 responsibility for the agenda?

25 A. Yes.

1 Q. And is it basically a collaborative effort
2 between you and the board president to set the agenda
3 each month or each meeting?

4 A. Yes.

5 Q. And you're also the primary contact for the
6 district with the school district's solicitor?

7 A. Yes.

8 Q. And the school district solicitor, for some
9 time, other than in this litigation, has been the law
10 firm Stock and Russell -- Stock and Leader? I
11 apologize.

12 A. Stock and Leader.

13 Q. And the lead attorney for that
14 representation has been Steven Russell?

15 A. I'll phrase it this way, during the time
16 period he was one of two.

17 Q. Who was the other one?

18 A. Phil Spare.

19 Q. And Mr. Russell's wife actually served as
20 the board secretary prior to her passing. Correct?

21 A. Yes.

22 Q. And she was the board secretary during the
23 June, 2004 meetings that are the subject of so much
24 discussion in this trial?

25 A. I don't remember specifically that. It

1 would make sense, but I can't speak to that.

2 Q. You don't take front-line responsibility for
3 developing curriculum and selection of textbooks?

4 A. That's correct.

5 Q. Mr. Baksa does that?

6 A. Yes.

7 Q. And you don't have any background in science
8 education. Correct?

9 A. That's correct.

10 Q. And neither does Mr. Baksa?

11 A. That's correct.

12 Q. Fair to say that the people who have the
13 most expertise on science education in your school
14 district are, in fact, the science teachers?

15 A. That's correct.

16 Q. You're not aware that any member of the
17 school board at -- members of the school board during
18 the year 2004 have any background in science other
19 than, you know, that we all took high school science
20 or maybe some college science classes?

21 A. That's correct.

22 Q. And similarly, you're not aware of them
23 having any background in science education?

24 A. That's correct.

25 Q. The board does have hiring and firing power

1 for school district administrators?

2 A. Yes.

3 Q. You described a group of board members that
4 emphasized or ran on a platform of fiscal
5 responsibility. Can you tell us which board members
6 that applies to?

7 A. During that election?

8 Q. Why don't we look at the composition of the
9 board on October 18th, 2004, and tell me which of the
10 members of the board ran on that platform.

11 A. Mr. Bonsell, Angie Yingling, Casey Brown,
12 and I don't remember who the fourth member was that
13 ran.

14 Q. What about Mr. Buckingham, did he emphasize,
15 when he ran, a platform of fiscal responsibility?

16 A. Mr. Buckingham was appointed to fill a
17 vacancy. When he was reelected, I don't remember what
18 his platform was.

19 Q. You testified that the -- well, let me
20 withdraw that for a moment. Did you -- from his time
21 on the board, did you understand Mr. Buckingham to be
22 an advocate of fiscal responsibility in the same vein
23 that you described Mr. Bonsell or Ms. Yingling?

24 A. Yes. Mr. Brown, during one of his first
25 years on the board, was looking at fiscal concerns.

1 And he had tried to set up a county-wide taxpayer
2 association. And, in fact, this taxpayer association
3 met a number of times at North Salem, and one of only
4 two members that attended was Mr. Buckingham.

5 Q. You testified that the curriculum advisory
6 committee, their input on curriculum was not required
7 by policy. Is that right?

8 A. That's correct.

9 Q. And by that you mean a written policy?

10 A. Yes.

11 Q. And counsel showed you one exhibit which was
12 a version of a policy that said it was amended on
13 August 2nd, 2004. But just to be clear, I think you
14 also said that you looked at prior versions of policy,
15 and that was your understanding for the time period
16 prior to that?

17 That was a convoluted question. Is it your
18 understanding that it was never written policy that
19 the curriculum advisory committee give input on
20 curriculum?

21 A. That is not my understanding.

22 Q. Your understanding there was no policy?

23 A. Let me answer your question this way because
24 I think this is -- well, ask your question again.

25 Q. I'm asking, you said that you checked to see

1 whether curriculum advisory committee input was
2 required for curriculum by written policy. Right?
3 You said you did that after you saw that complaint?

4 A. Yes. At 2004, when the curriculum was
5 approved, we verified what was current policy at that
6 time period, yes.

7 Q. And then a document that counsel showed
8 you -- and I'm happy to find that again, if you'd
9 like -- actually said that it was a version that was
10 amended as of August 2nd, 2004. And what I'm trying
11 to clarify is, did you also check policy in effect
12 prior to August 2nd, 2004?

13 A. Yes.

14 Q. And it was based on that research you
15 understood that even prior to August 2nd, 2004, there
16 was no written policy requiring curriculum advisory
17 committee input on curriculum?

18 A. That is incorrect.

19 Q. Tell us your understanding.

20 A. Our understanding was when we reviewed --
21 when Mr. Schaffer, the assistant principal, reviewed
22 and subsequently communicated to us that there were a
23 number of prior policies during the update procedure
24 that did not have the requirement on them, but there
25 were policies I believe in the '80s, if not early

1 '90s, that did require it.

2 Q. In the 2004 year, it was not required?

3 A. That's correct.

4 Q. Okay. Thank you. I'm sorry I was unclear
5 there. But the board did have a practice of getting
6 curriculum advisory committee input on curriculum?

7 A. Yes.

8 Q. And it's a pretty good practice, isn't it,
9 involving the community?

10 A. Sure.

11 Q. It's an example of consensus-building?

12 A. Yes.

13 Q. And, for example, we looked at Defendants'
14 Exhibit 3. Let me show you a copy of that again.

15 MR. ROTHSCHILD: May I approach, Your Honor?

16 THE COURT: You may.

17 MR. ROTHSCHILD: It's up on the screen, Your
18 Honor.

19 BY MR. ROTHSCHILD:

20 Q. Defendants' Exhibit 3 is an example of where
21 this practice of involving the curriculum advisory
22 committee, the citizens committee, was done?

23 A. Yes.

24 Q. And it looks like it's fair to say that
25 administration communicated quite a bit of information

1 to the community members. Is that fair?

2 A. Yes.

3 Q. And, again, you said that you agreed this is
4 conducive to consensus-building?

5 A. Yes.

6 Q. And you said that was a priority for
7 Mr. Bonsell when he was president during 2004?

8 A. Yes.

9 Q. You also testified that it was policy to
10 destroy tapes of board meetings after the minutes were
11 prepared. You really meant to say "practice."
12 Correct?

13 A. Yes. My apologies if I said "policy."
14 That's incorrect. It was "practice."

15 Q. There's no written policy?

16 A. No, there is not.

17 Q. Speaking of practices, when you became the
18 district's superintendent, you started a practice of
19 holding a retreat for board members and
20 administrators. Correct?

21 A. Yes.

22 Q. And one of the things you did at that
23 retreat, as you explained on your direct testimony,
24 was to have each board member take a turn
25 communicating what issues were important to them. Is

1 that right?

2 A. Yes.

3 Q. And while they did that, you took notes of
4 what they were saying?

5 A. Yes.

6 Q. And you did your best to accurately record
7 the issues identified by each board member?

8 A. Yes.

9 Q. And you had your secretary type up those
10 notes after the meeting?

11 A. Yes.

12 MR. ROTHSCHILD: Matt, would you pull up
13 Exhibit P21. May I approach, Your Honor?

14 THE COURT: You may.

15 BY MR. ROTHSCHILD:

16 Q. And what we've marked as P21, which we
17 looked at as a defendants' exhibit yesterday, these
18 are the typed-up versions of the notes you took at the
19 January 9th, 2002 board retreat on board issues?

20 A. Yes.

21 Q. And this document, again, was not produced
22 with the majority of the document production, but you
23 did produce it when you found it later in your office?

24 A. That is correct.

25 Q. And on January 9, 2002, you were acting

1 superintendent. Correct?

2 A. That is correct.

3 Q. And that was your first year in the position
4 of superintendent, no matter how qualified?

5 A. First week.

6 Q. First week. And this was also actually Alan
7 Bonsell's first year on the board. Correct?

8 A. That's correct.

9 Q. And this was basically the first week for
10 him, too?

11 A. No.

12 Q. First few weeks?

13 A. Yes.

14 Q. Okay. And as we looked at yesterday under
15 his name, the first two issues listed are creationism
16 and prayer. Correct?

17 A. Yes.

18 Q. And sitting here yesterday, you claimed that
19 you had no independent memory of Mr. Bonsell saying
20 those words. Correct?

21 A. That's correct.

22 Q. But you also have no reason to doubt you
23 correctly recorded what he said?

24 A. That's correct.

25 Q. You also testified yesterday that Casey

1 Brown was opposed to something called pathways. What
2 is pathways?

3 A. Pathways is a curriculum at the high school
4 that categorizes certain curriculum to allow students
5 to specialize in areas.

6 Q. The next year you held another board
7 retreat?

8 A. Yes.

9 Q. And by this time you were no longer acting
10 superintendent, you were the full-time superintendent?

11 A. That's correct.

12 Q. And Mr. Bonsell was, by this time, the chair
13 of the curriculum committee?

14 A. Yes.

15 Q. And before that meeting, before that
16 meeting, you had sent Mr. Baksa to that seminar at
17 Messiah College on the subject of creationism?

18 A. I recommended he go, yes.

19 Q. And Messiah College is an Evangelical
20 college in the area?

21 A. I can't define what Messiah is or is not. I
22 know it's a college.

23 Q. You're familiar with the college?

24 A. Yes.

25 Q. And you know it has a religious mission?

1 A. Yes.

2 Q. In fact, an Evangelical mission?

3 A. I can't speak to that.

4 MR. ROTHSCHILD: Matt, can you pull up
5 Exhibit 785. May I approach, Your Honor?

6 THE COURT: You may.

7 MR. GILLEN: For the record, Your Honor, in
8 light of your comment this morning, I'm just going to
9 object to this document as hearsay.

10 MR. ROTHSCHILD: It's being used for
11 impeachment and to add context to the mission he sent
12 Mr. -- or what he sent Mr. Baksa to.

13 MR. GILLEN: There's no evidence that the
14 witness has ever seen this.

15 THE COURT: Well, it's not impeachment. I
16 think he answered your questions, Mr. Rothschild. If
17 it's to establish the truth of what the mission of
18 Messiah College is, then it's a hearsay document,
19 isn't it?

20 MR. ROTHSCHILD: I'll withdraw, Your Honor.

21 THE COURT: The objection then is sustained.

22 BY MR. ROTHSCHILD:

23 Q. Returning to the retreat in 2003, that was
24 in March of 2003. Correct?

25 A. Yes.

1 Q. And at that retreat, each board member in
2 attendance again had the chance to identify the issues
3 that were important to them?

4 A. Yes.

5 Q. And you took notes?

6 A. Yes.

7 Q. And, again, you did your best to accurately
8 record what the board members said?

9 A. Yes.

10 Q. And you had those notes typed up?

11 A. Yes.

12 MR. ROTHSCHILD: Matt, could you pull up
13 Exhibit P25. May I approach, Your Honor?

14 THE COURT: You may.

15 BY MR. ROTHSCHILD:

16 Q. And these are the typed-up notes from the
17 March 26th meeting?

18 A. Yes.

19 Q. And, again, these were produced in July of
20 this year?

21 A. Yes.

22 Q. And on this document you again recorded
23 Mr. Bonsell listing creationism as one of his issues.
24 Correct?

25 A. Yes.

1 Q. And also, as you testified about yesterday,
2 he had a big emphasis on American history. Correct?

3 A. Yes.

4 Q. But on the subject of creationism, again,
5 you have no independent memory of him saying that?

6 A. No.

7 Q. But you have no reason to doubt that you
8 correctly recorded that Mr. Bonsell did, again, bring
9 up creationism?

10 A. That's correct.

11 MR. ROTHSCHILD: Your Honor, may I approach?

12 THE COURT: You may.

13 BY MR. ROTHSCHILD:

14 Q. What I've presented to you is Defendants'
15 Exhibit 288. It's Bates stamped 3968 through 3971.
16 And the first page of that is your typed-up notes from
17 the January 9th, 2002 board issues. Correct?

18 A. Yes.

19 Q. And behind that you have the agenda for the
20 March 26th, 2003 retreat. Correct?

21 A. Yes.

22 Q. And on Section 5, you have an opportunity
23 for district accomplishments?

24 A. Yes.

25 Q. And that's when administrators describe what

1 they have done during the year?

2 A. Yes.

3 Q. And one of the people who gets to make a
4 presentation, in fact, two presentations, is
5 Mr. Reeser. Correct?

6 A. Yes.

7 Q. He gets to do it on maintenance, three-year
8 plan, and stadium lights and also high school
9 construction?

10 A. Yes.

11 Q. Again, that's Mr. Reeser. What was his
12 position?

13 A. He's the director of buildings and grounds.

14 Q. And he was the -- that's the same Mr. Reeser
15 who burned the mural the year before?

16 A. Yes.

17 Q. And that was a mural painted by a former
18 student?

19 A. Yes.

20 Q. And you were aware of that at the time of
21 this board retreat?

22 A. Yes.

23 Q. And you let him make a presentation in this
24 retreat?

25 A. He was an administrator, director of a

1 department.

2 MR. ROTHSCHILD: May I approach, Your Honor?

3 THE COURT: You may.

4 MR. ROTHSCHILD: Matt, could you pull up
5 Exhibit P26.

6 BY MR. ROTHSCHILD:

7 Q. This is the memo you received from Trudy
8 Peterman on or around April 1st, 2003?

9 A. Yes.

10 Q. And in that memo Dr. Peterman reports on a
11 conversation that -- and Dr. Peterman was the
12 principal at Dover High School at the time?

13 A. Yes.

14 Q. And she reported on a conversation that she
15 had had with Bert Spahr, the head of the science
16 department?

17 A. That's what it says in this memo.

18 Q. And she reports that Mrs. Spahr told her
19 about a conversation that Mrs. Spahr had had with
20 Mr. Baksa on March 31st?

21 A. That's what this memo says.

22 Q. And that was just five days after the board
23 retreat. Correct?

24 A. Yes.

25 Q. And what the memo says is that Mrs. Spahr

1 had reported that Mr. Baksa had told her that a board
2 member wanted creationism taught in biology class.

3 Correct?

4 A. That's what the memo says.

5 Q. And that this board member wanted 50 percent
6 of the topic of evolution to involve the teaching of
7 creationism?

8 A. That's what this memo says.

9 Q. And when you got this memo, you didn't
10 immediately have a conversation with Mr. Baksa about
11 it, did you?

12 A. No.

13 Q. But he did tell you some time later that the
14 board member being referred to here was Mr. Bonsell.
15 Correct?

16 A. Yes.

17 Q. And you didn't tell him right after you got
18 this memo, Mike, you know, what you're telling Bertha,
19 that's dead wrong, that didn't happen. Right? You
20 didn't have that conversation with him?

21 A. Could you ask that question again?

22 Q. I asked you whether you had spoken to
23 Mr. Baksa when you received this memo. You didn't
24 speak with him and say, Mike, you know, why did you
25 tell Bertha this, this didn't happen?

1 A. No, because I had the belief that
2 Dr. Peterman exaggerated constantly, and this
3 reflected another exaggeration.

4 Q. You didn't have a conversation with
5 Ms. Spahr about this either, did you?

6 A. No.

7 Q. You didn't tell her that the facts you're
8 reporting to Dr. Peterman are wrong?

9 A. That was up to Mr. Baksa to follow up on.

10 Q. And you didn't go to Mrs. Spahr and say --
11 ask her, you know, to clarify whether she, in fact,
12 even said that to Dr. Peterman. Correct?

13 A. No. That's Mr. Baksa's responsibility.

14 Q. And Dr. Peterman has a number of questions
15 here. Correct?

16 A. Yes.

17 Q. And you didn't answer any of those
18 questions. Correct?

19 A. No, this memo is not directed to me.

20 Q. You didn't instruct Mr. Baksa to answer
21 those questions?

22 A. He would have under his responsibility.

23 Q. But you didn't instruct him to?

24 A. I don't micromanage Mr. Baksa.

25 Q. You're not aware that he did answer them?

1 A. I'm aware that he had a conversation with
2 Dr. Peterman.

3 Q. But you're not aware that he answered these
4 questions here?

5 A. No, I don't micromanage Mr. Baksa.

6 Q. And you also didn't tell Dr. Peterman that
7 any of her instructions to the teachers about how they
8 teach science class should be changed. Correct?

9 A. No, that's Mr. Baksa's responsibility.

10 Q. You were here for Jennifer Miller's
11 testimony?

12 A. Yes.

13 MR. ROTHSCHILD: May I approach, Your Honor?

14 THE COURT: You may.

15 BY MR. ROTHSCHILD:

16 Q. Dr. Nilsen, I'm handing you an excerpt of
17 Ms. Miller's testimony in this trial.

18 MR. GILLEN: Your Honor, I'm going to object
19 to the use of this testimony unless a legitimate
20 purpose can be established.

21 MR. ROTHSCHILD: First of all, he heard the
22 testimony, and it's for purposes of impeachment and to
23 ask him about his own knowledge and understanding.

24 MR. GILLEN: Asking about his own knowledge
25 and understanding I understand. That's proper.

1 Impeaching Dr. Nilsen on something that Jen Miller
2 said is not appropriate.

3 THE COURT: Well, it's not impeachment. I
4 guess the proper mechanism, Mr. Rothschild, would be
5 to ask him if he recalls a particular statement by the
6 witness, and if he doesn't recall exactly or if he's
7 vague on it, then I think it's proper to direct him to
8 the transcript.

9 MR. ROTHSCHILD: I will direct him to the
10 transcript. It can't be hearsay. I mean, it's
11 testimony in this trial.

12 THE COURT: I don't say that it's hearsay.
13 The substance of the objection seems to be that you go
14 right to the testimony, and I guess the precursor
15 needs to be, does he recall it independently of the
16 transcript. If I understand you correctly,
17 Mr. Gillen, or do I?

18 MR. GILLEN: Perhaps I was too brief. No,
19 my understanding of impeachment is it's got to be a
20 prior statement by this witness. Otherwise, he can
21 ask the questions to see if he agrees.

22 THE COURT: It isn't impeachment. Is it?

23 MR. ROTHSCHILD: I think it's just
24 questioning the witness about whether something that
25 someone else said is what he understood.

1 MR. GILLEN: I have no objection to that.

2 THE COURT: I don't see it as impeachment.

3 Do you withdraw the objection under those

4 circumstances?

5 MR. GILLEN: To the extent that it's not
6 going to be used for impeachment purposes, yes, Your
7 Honor.

8 THE COURT: You can't impeach him with
9 somebody else's testimony, which Mr. Rothschild
10 agrees.

11 MR. GILLEN: Yes.

12 THE COURT: All right. Proceed.

13 BY MR. ROTHSCHILD:

14 Q. Dr. Nilsen, if you start on the page of --
15 on Page 14, Mr. Gillen asked whether -- asked
16 Ms. Miller about -- and I'll paraphrase until we get
17 to the important aspects here -- but whether she gave
18 instructions on teaching evolutionary theory in class.
19 That's in the middle of the page. Do you see that
20 starting on Line 14?

21 A. Yes.

22 Q. And the upshot here is that Ms. Spahr told
23 Ms. Miller, keep teaching as you teach it. Right?

24 A. I'm not sure I understand the question.

25 Q. We can read aloud, Dr. Nilsen, but all I'm

1 asking is, does this testimony indicate that
2 Ms. Miller was testifying that you -- that Ms. Miller
3 continue to teach evolution as she taught it?

4 A. Again, what's your question?

5 Q. Is that what this says, Dr. Nilsen?

6 MR. GILLEN: Objection, Your Honor. The
7 transcript of this trial speaks for itself.

8 MR. ROTHSCHILD: We can do it more
9 methodically.

10 BY MR. ROTHSCHILD:

11 Q. Mr. Gillen asked, starting at Line 23, Did
12 Bert Spahr tell you, Ms. Miller, to essentially continue
13 teaching evolution as you taught it? And Ms. Miller
14 said, Correct. Right?

15 A. Yes.

16 Q. And then Mr. Gillen asked Ms. Miller, Now, I
17 want to ask you, did she continue to -- did she tell
18 you to continue teaching creationism in the classroom?
19 And Ms. Miller answered, No. And then Mr. Gillen
20 asked, But you mentioned creationism. Correct? And
21 Ms. Miller said, No, not specifically, no.

22 And then Mr. Gillen asked, Is it your
23 testimony that you had no discussion with Bert Spahr
24 about teaching creationism in connection with your
25 presentation of evolutionary theory? And she

1 answered, Yeah, I -- I know that somewhere in here it
2 says -- I remember reading -- let me see if I can find
3 it. She explained to Mr. Baksa that all biology
4 teachers state that another theory of evolution is
5 creationism, but creationism, per se, is not taught
6 since it's not addressed by the standards. So when I
7 saw this memo for the first time, I had some
8 misgivings about that because I disagree that we state
9 that another theory of evolution is creationism, but I
10 do agree that creationism is not taught.

11 You have no reason to doubt that that is, in
12 fact, how Ms. Miller acted in her own classroom.
13 Right?

14 A. I would believe Mrs. Miller would be telling
15 the truth.

16 Q. And you certainly have no reason to believe
17 that Ms. Miller was telling the students at Dover that
18 creationism is another scientific theory on the
19 development of life. Correct?

20 A. I'm sorry, could you ask that question
21 again?

22 Q. Sure. You have no reason to believe that
23 Mrs. Miller was ever telling the students in her Dover
24 High School biology class that creationism is another
25 scientific theory on the origin or development of

1 life?

2 A. That's correct.

3 Q. And, in fact, if she was doing that, that
4 would bother you, correct, because you think
5 creationism is a religious proposition?

6 A. That's correct.

7 Q. You testified yesterday that you did not
8 punish Dr. Peterman for the content of the memo.
9 Correct?

10 A. I don't remember specifically saying that,
11 but the emphasis on the evaluation was not the
12 content, it was the process. But not drawing a fine
13 line on it, the process does impact on the content.

14 Q. But you, in fact, gave her a negative
15 evaluation for being untruthful in the April 1st, 2003
16 memo, didn't you?

17 A. No.

18 Q. Dr. Nilsen, could you turn to Page 59 of
19 your April deposition. And, Dr. Nilsen, at all four
20 of these depositions you understood you were under
21 oath. Correct?

22 A. That's correct.

23 Q. And you were required to tell the truth.
24 Correct?

25 A. That's correct.

1 Q. All right. If you could turn to Line 15 on
2 Page 59. I asked you, Did you believe when you saw
3 this memorandum that it raised -- or, I'm sorry,
4 Mr. Schmidt asked you, Did you believe when you saw
5 this memorandum, referring to the April 1st
6 memorandum, that it raised important issues that
7 required some attention by the administration? And
8 you answered, Yes, but not in the direction you're
9 heading. Mr. Schmidt asked, What attention do you
10 think it required -- it required to?

11 A. Excuse me, what line are you on?

12 Q. I'm on Line 19. Are you with me?

13 A. On 60?

14 Q. On 59.

15 A. Thank you.

16 Q. And you answered, To make sure the principal
17 was telling the truth. And Mr. Schmidt asked, What
18 part of what is in this exhibit did you think was
19 untruthful? And you answered, The third line, the
20 third sentence, Mr. Baksa mentioned that a board
21 member wanted creationism taught in Biology I class.

22 Mr. Schmidt asked, What was untruthful about
23 that statement? And you answered, I am not aware of
24 that, nor is Mr. Baksa aware of that conversation, nor
25 did I ever hear a board member mention that in any

1 capacity. Neither did Mr. Baksa.

2 Mr. Schmidt asked, When you read that, if
3 you thought it was untrue, what did you do? And you
4 answered, The germane area was directed to Mr. Baksa.
5 It is his responsibility to take care of that
6 additional quote. It is my responsibility to deal
7 with the principals, the behavior.

8 And he asked, What did you do with it? And
9 you answered, It reflected in her evaluation. And he
10 asked, In what way? And you answered, Her behavior
11 was evaluated, her conversations were evaluated
12 negatively.

13 So there was a consequence for the content
14 of that memo, wasn't there, Dr. Nilsen?

15 A. No, let me give you a fine line. If you
16 would give me a minute, because I think we continued
17 in our conversations where I clarified that.

18 Q. There is more testimony in this deposition
19 asked by -- in response to questions by your counsel,
20 so maybe we can turn there and you can see if that
21 will help.

22 If you could turn to Page 95 of that same
23 deposition. And on Line 3, you can see that there are
24 questions started by Mr. Gillen. Correct? Do you see
25 that?

1 A. On which page?

2 Q. 95.

3 A. Yes.

4 Q. And his question was, Mr. Schmidt asked you
5 a few questions. One set of them related to
6 Plaintiffs' Deposition Exhibit 9, which is that memo
7 from Dr. Peterman. Tom asked you, Did you take action
8 in light of that, and you said, No. Just to be clear
9 on this point, at that time that you received this
10 memo, did Dr. Peterman have a lot of credibility with
11 you? And you answered, Zero.

12 And he asked, Was it in large measure
13 because this memo came from Dr. Peterman which
14 explained your inaction? And you answered, Two
15 things. One, first of all, I knew no one was
16 discussing, either from the administrative standpoint
17 or the board standpoint or Mr. Baksa's standpoint or
18 my standpoint, any discussion of creationism. So a
19 memo that generated and stated that there was a
20 discussion of creationism had absolutely a
21 non-starter.

22 That was your testimony up to that point.
23 Correct?

24 A. Yes.

25 Q. And you said that even though this was a

1 memo received five or six -- less than a week after
2 the March 26th, 2003 board retreat. Correct?

3 A. Correct.

4 Q. In which you had recorded Mr. Bonsell saying
5 the word "creationism"?

6 A. Correct.

7 Q. For the second straight year in board
8 retreats. Correct?

9 A. Correct.

10 Q. You heard Bertha Spahr testify in court?

11 A. Are we skipping the questions you asked
12 before?

13 Q. I'm not skipping anything, Dr. Nilsen. Is
14 there anything you need to say?

15 A. Yes. You ended up asking me on the
16 evaluation of Mrs. -- or Dr. Peterman. Again,
17 answering that question, the evaluation reflected
18 process. And it's a fine line when you end up
19 communicating process with what is in a content.

20 She was evaluated on the process that she
21 developed a memo that did not include -- or she did
22 not communicate with the individual she was
23 memorializing in the memo.

24 Specifically, she ended up saying Mr. Baksa
25 said something to someone without asking Mr. Baksa

1 whether he had said that or not. So she was evaluated
2 on the process because she continued to send out memos
3 without incorporating the individuals that ended up
4 saying it.

5 If it reflected specifically on the content,
6 it reflected on the content due to the fact that her
7 memos constantly stated inaccurate information because
8 she did not talk to people before she ended up doing
9 the memo.

10 So the emphasis of the evaluation was
11 clearly on the process. Did it reflect on the
12 content? Yes, because the process, unless you talk to
13 people about what you're saying they're saying, it is
14 going to end up being inaccurate.

15 Q. But, Dr. Nilsen, here you're not just saying
16 process, you're saying it was inaccurate. You're
17 pretty much saying Dr. Peterman was lying in this
18 memo. Correct?

19 A. I'm saying that I talked to the assistant
20 superintendent that said that did not happen.

21 Q. You didn't do that immediately after the --
22 after you got the memo. Correct?

23 A. No, not on that individual day, but
24 subsequent to that, yes.

25 Q. And you never went to Ms. Spahr, who would

1 have been a natural person -- she was the source of
2 Dr. Peterman's information. You never went to her and
3 said, Bertha, what did you tell Dr. Peterman?

4 A. Again, that's not one of my
5 responsibilities. That's Mr. Baksa's.

6 Q. And nevertheless, you negatively evaluated
7 her because she was untruthful, she said something
8 that was a non-starter, that a board member could be
9 teaching -- could be talking about creationism?

10 A. I think the reference was a board member was
11 talking about creationism as 50/50. And, again, I go
12 back to my comment, I evaluated her based on the
13 process.

14 Q. Dr. Nilsen, let's reread your answer on Page
15 95. I knew no one was discussing, either from the
16 administrative standpoint or the board standpoint or
17 Mr. Baksa's standpoint or my standpoint, any
18 discussion of creationism. So a memo that generated
19 and stated that there was a discussion of creationism
20 had absolutely a non-starter. That was your
21 testimony. Correct?

22 A. That's correct.

23 Q. Dr. Nilsen, as I asked you a few minutes
24 ago, you were here to hear Bertha Spahr testify in
25 this trial. Correct?

1 A. Yes.

2 Q. And she actually backed up the Trudy
3 Peterman memo, didn't she? She said that Baksa did
4 tell her that there's a board member who wants to
5 teach creationism 50/50, or I think she used the
6 expression "equal time" with evolution?

7 A. She said that, yes.

8 Q. She's also being untruthful?

9 A. I can only speak to what I was told from
10 Mr. Baksa, that he said he did not say that. Whether
11 it's her interpretation of what he ended up saying or
12 not, I can't speak to.

13 Q. And you also heard Barrie Callahan testify?

14 A. Yes.

15 Q. And she was actually at that
16 March 26th, 2003 board retreat, wasn't she?

17 A. Yes, she was.

18 Q. She was still a board member at that time?

19 A. Yes, she was.

20 Q. And she took notes about what Mr. Bonsell
21 said, didn't she?

22 A. Yes.

23 Q. And what she testified was that Alan Bonsell
24 did say 50/50 creationism and evolution. Correct?

25 A. She testified to that, yes.

1 Q. Was she untruthful, too?

2 A. No, to her ability. I don't know whether he
3 did or did not say that.

4 Q. Just don't have a memory?

5 A. That's correct.

6 Q. You testified that sometime in the spring of
7 2004, Mr. Buckingham gave you two DVDs and a book?

8 A. Yes.

9 Q. And you had trouble remembering the book
10 yesterday, but was that a book called, Icons of
11 Evolution?

12 A. Sounds familiar.

13 Q. And you understood these were all from the
14 Discovery Institute?

15 A. At the time I didn't know where they were
16 from.

17 Q. You eventually developed that understanding?

18 A. Yes.

19 Q. And that was an understanding you developed
20 from Mr. Buckingham?

21 A. I don't know who gave me that understanding.

22 Q. And your understanding is that
23 Mr. Buckingham required the teachers to watch at least
24 one of those DVDs?

25 A. No, he did not.

1 Q. Did he give it to the teachers to watch?

2 A. No.

3 Q. Did he give it to Mr. Baksa to have the
4 teachers watch it?

5 A. No.

6 Q. Your understanding is Mr. Buckingham didn't
7 give it to anybody in school administration or
8 faculty?

9 A. No, I think I'm on record yesterday saying
10 that he gave them to me, and I gave them to Mr. Baksa.

11 Q. And is it your understanding that Mr. Baksa
12 gave them to the teachers to watch?

13 A. My understanding is the fact that the
14 teachers watched it on one day, on an in-service day.

15 Q. An in-service day, that's a working day for
16 teachers?

17 A. Yes.

18 Q. And you're aware, also, that Mr. Buckingham
19 had conversations with the Discovery Institute?

20 A. I'm aware of that, yes.

21 Q. And you also talked to the Discovery
22 Institute on several occasions about the biology
23 curriculum?

24 A. Yes.

25 Q. You attended the board meetings in June of

1 2004. Correct?

2 A. Yes.

3 Q. And there were quite a few newspaper
4 articles reporting about statements made in relation
5 to the discussion of a proposed new biology textbook.
6 Correct?

7 A. Yes.

8 Q. And it was your practice to read news
9 clippings of all educational related articles relating
10 to the Dover Area School District. Correct?

11 A. Correct.

12 Q. You would have your secretary clip them for
13 you, and then you would read them?

14 A. The building secretary does, yes.

15 Q. And that includes articles about the biology
16 curriculum issue that was quite dominant in 2004?

17 A. Yes.

18 Q. And including the biology textbook
19 discussion?

20 A. Yes.

21 Q. You personally never asked for a retraction
22 about anything said about the biology curriculum or
23 textbook?

24 A. Yes, as testified before, it wouldn't have
25 meant anything.

1 Q. And you never communicated to the newspapers
2 that you personally had been misquoted regarding the
3 subject of the biology curriculum?

4 A. That's correct.

5 Q. Or that anyone else had been?

6 A. That's correct.

7 Q. Now, we discussed before that -- I took your
8 deposition in early January of this year. Correct?

9 A. Correct.

10 Q. And on that same day, the depositions of
11 Mrs. Harkins, Mr. Buckingham, and Mr. Bonsell were
12 taken. Correct?

13 A. I know they were taken. I don't remember
14 what day.

15 Q. It was right around that time, if it wasn't
16 that day?

17 A. Yes.

18 Q. And that deposition was taken so that the
19 plaintiffs could decide whether to seek a temporary
20 restraining order. Correct?

21 A. That's correct.

22 Q. It was the plaintiffs' chance to take
23 evidence to determine whether they could stop the
24 district from implementing the change which did go
25 into effect in the middle of January of 2005.

1 Correct?

2 A. That's correct.

3 Q. And as you know, the depositions were taken,
4 the plaintiffs decided not to seek a temporary
5 restraining order, and, instead, we went out to
6 develop the remainder of evidence that's being
7 presented at this trial?

8 A. That's correct.

9 MR. ROTHSCHILD: Matt, could you pull up
10 P752. May I approach, Your Honor?

11 THE COURT: You may.

12 BY MR. ROTHSCHILD:

13 Q. And, Dr. Nilsen, am I correct that you read
14 the depositions -- your own deposition from that day
15 after it was given, after you got a transcript?

16 A. Yes.

17 Q. And you also read the depositions of the
18 other people who were deposed in January, Mr. Bonsell,
19 Mr. Buckingham, and Ms. Harkins?

20 A. No, not all of them, no.

21 Q. Which ones did you read?

22 A. I don't remember. I don't believe I read
23 Mr. Bonsell's.

24 Q. If you could turn to your April deposition,
25 Page 5, and if you could turn to Line 17. Mr. Schmidt

1 asked you -- are you there Dr. Nilsen?

2 A. Yes.

3 Q. Mr. Schmidt asked you, Have you reviewed the
4 transcripts of other depositions that have been taken
5 in this litigation? You answered, Yes, I have. He
6 asked, Which ones? You said, Mr. Baksa's,
7 Ms. Geesey's, Mr. Bonsell's, Alan Bonsell's, and I'm
8 not sure, but my recollection may be also, in fairness
9 of disclosure, Mr. Buckingham's.

10 So at least Mr. Buckingham's and
11 Mr. Bonsell's, it looks like?

12 A. Yes.

13 Q. If you could now return to Plaintiffs'
14 Exhibit 752. Do you recognize this document?

15 A. Yes.

16 Q. What is it?

17 A. It's a document I submit to the board on a
18 weekly basis.

19 Q. Does anybody else get it?

20 A. No. On certain occasions, certain
21 administrators.

22 Q. Does Mr. Baksa get it regularly?

23 A. Yes.

24 Q. And this is -- this document is dated
25 January 7th, 2005, and it's titled, Dr. Richard

1 Nilsen, Dover Area School District, Superintendent's
2 Weekly Update?

3 A. Yes.

4 Q. And you have a listing of meetings and
5 activities?

6 A. Yes.

7 Q. And the first one you list is, As you are by
8 now aware, the time and effort put in over the
9 holidays has produced a positive impact. The
10 plaintiffs, ACLU, could not find anything to file an
11 injunction on our biology curriculum. In conjunction
12 with the Thomas More lawyers, Mr. Baksa,
13 Mr. Buckingham, Mr. Bonsell, and Mrs. Harkins did a
14 great job. The ACLU is doing a great job of putting a
15 positive spin, in quotes, quote, positive spin, close
16 quote, on the situation, but I cannot help but feel
17 gratified that they could not stop the implementation,
18 and you know if they could, they would have. That's
19 what you wrote to the board?

20 A. Yes.

21 Q. And when you're talking about the great job
22 here, you're talking about the great job that the
23 individuals from Dover, Mr. Baksa, Mr. Buckingham,
24 Mr. Bonsell, and Mrs. Harkins, and I assume yourself,
25 did preparing for the depositions with the lawyers.

1 Correct?

2 A. Yes.

3 Q. And the great job that the witnesses did
4 testifying?

5 A. Yes.

6 Q. And just so the record is clear, Mr. Baksa
7 didn't actually testify in that January period, but
8 there were other individuals who did. Is that your
9 understanding?

10 A. I can't speak to when they did or did not
11 specifically testify.

12 Q. Now, in terms of the preparation, you all
13 met together the night before the deposition,
14 Mr. Baksa, Mr. Buckingham, Mr. Bonsell, Mrs. Harkins,
15 and yourself, with the lawyers?

16 A. Yes.

17 Q. And you remember when I took your deposition
18 in January, I asked you a number of questions about
19 statements that had been reported in the newspapers
20 about the June meetings. Correct?

21 A. Yes.

22 Q. And one of the statements I asked you about
23 was attributed to Mr. Buckingham.

24 A. Yes.

25 Q. 2,000 years ago a man died on a Cross, can't

1 someone stand up for Him now. Right?

2 A. Yes.

3 Q. And that was a statement that was in the
4 newspaper articles from that time period. Correct?

5 A. Yes.

6 Q. Two different newspapers. Correct?

7 A. I can't speak to whether it was in both. I
8 know it was in at least one.

9 MR. ROTHSCHILD: May I approach, Your Honor?

10 THE COURT: You may.

11 MR. ROTHSCHILD: Matt, could you pull up
12 Plaintiffs' Exhibit 53, please.

13 BY MR. ROTHSCHILD:

14 Q. Plaintiffs' Exhibit 53 is an article by
15 Joseph Maldonado on June 15th, 2004, in the York Daily
16 Record. Is that correct, Dr. Nilsen?

17 A. That's what it says here, yes.

18 Q. Okay. And going a little bit more than
19 halfway down the page the statement, 2,000 years ago
20 someone died on a Cross, can't someone take a stand
21 for Him, that's attributed to Mr. Buckingham?

22 A. Yes.

23 Q. And then if we turn to Plaintiffs' Exhibit
24 54, that's a June 15th, 2004 article in the York
25 Dispatch by Heidi Bernhard-Bubb. Correct?

1 A. Yes.

2 Q. It's titled, Church/State Issues Divides
3 Creationism, Draws A Hundred to Dover Meeting.
4 Correct?

5 A. Yes.

6 MR. GILLEN: Your Honor, just for the
7 record, I interpose a hearsay objection, as per a
8 motion in limine.

9 THE COURT: Well, the objection is overruled
10 inasmuch as we're taking it subject to testimony that
11 we have yet to hear.

12 MR. GILLEN: Okay.

13 THE COURT: So the objection is noted, but
14 it's overruled.

15 BY MR. ROTHSCHILD:

16 Q. And if you turn to the second page of the
17 document and go about, I guess, the fourth full
18 paragraph, the reporter attributes to Mr. Buckingham
19 the statement, Nearly 2,000 years ago someone died on
20 a Cross for us, shouldn't we have the courage to stand
21 up for Him. Right?

22 A. It says that, yes.

23 Q. And it actually says, After that, Board
24 Members Alan Bonsell and Noel Wenrich agreed with
25 Buckingham saying creationism should be taught to

1 balance evolution. Correct?

2 A. It says that, yes.

3 Q. So that was being reported about the
4 June 14th meeting in two different newspapers by two
5 different reporters. Correct?

6 A. Yes.

7 Q. And I showed you those articles in your
8 deposition, correct, and asked you whether you
9 remembered Mr. Buckingham making that statement at
10 a -- at that June board meeting. Correct?

11 A. I don't remember you showing me the
12 articles, but I remember the question.

13 Q. Okay. And you said that you didn't remember
14 him making that statement at that board meeting.
15 Correct?

16 A. That's correct.

17 Q. And, in fact, in court yesterday you were
18 quite specific it was at a meeting the year before
19 regarding the pledge controversy. Correct?

20 A. In the fall of the year before, yes.

21 Q. Fall of 2003?

22 A. Yes.

23 Q. Okay. And let me show you what
24 Mr. Buckingham said in his January deposition. Matt,
25 if you could pull up Pages 44 and 45.

1 MR. GILLEN: Your Honor, for the record, I'd
2 make the same objection to the extent it appears that
3 Mr. Rothschild --

4 THE COURT: And the objection is overruled
5 for the same reason.

6 MR. GILLEN: Okay.

7 BY MR. ROTHSCHILD:

8 Q. And Mr. Buckingham was asked -- if we start
9 at Line 14, it says, 2,000 years ago someone on the
10 Cross -- someone died on a Cross, can't someone take a
11 stand for Him. Do you see that, Mr. Buckingham?

12 Answer: Yes, I do. He was asked, Did you make either
13 of those statements? Not at this time.

14 And then if we go over to Page 45, he's
15 asked again on Line 8, 2,000 years ago someone died on
16 a Cross, can't someone take a stand for Him, did you
17 say? And he says, That goes back to taking it out of
18 the pledge. That's what he said. Right?

19 A. That's what I said. I thought you said this
20 was from --

21 Q. That's what Mr. Buckingham testified to.
22 Correct?

23 A. I'm sorry, is this mine or --

24 Q. This is Mr. Buckingham's.

25 A. So your question is? I'm sorry.

1 Q. That's what Mr. Buckingham testified to in
2 these January depositions taken so the plaintiffs
3 could decide whether to seek a temporary restraining
4 order. He said, It didn't happen in June, it happened
5 at the pledge meeting. Correct?

6 A. I can't speak to the transcript, but I would
7 expect it to be true.

8 Q. That's what it says. Correct?

9 A. That's what it says, yes.

10 Q. Matt, could you pull up Ms. Harkins'
11 deposition, Page 51.

12 MR. GILLEN: Your Honor, for the record,
13 same objection.

14 THE COURT: Understand. The objection is
15 overruled.

16 BY MR. ROTHSCHILD:

17 Q. And if you could look -- and this is
18 Ms. Harkins' deposition of January 3rd, 2005. And she
19 was asked, 2,000 years ago someone died on a Cross, he
20 said, can't someone take a stand for that -- for Him?
21 Ms. Harkins said, He never said that. And she was
22 asked, He didn't say that at a board meeting? And she
23 said, He only said that the year before, he never said
24 that again. That's what Ms. Harkins testified to?

25 A. I can only speak to what is ahead of me

1 based on the fact that I wasn't at the deposition.

2 But if the deposition reflects that, yes.

3 Q. And, Matt, if you could pull up

4 Mr. Bonsell's deposition. This is also his January

5 deposition. If you could turn to Page 49. And he was

6 asked, The statement that's attributed to

7 Mr. Buckingham, Nearly 2,000 years ago someone died on

8 a Cross for us, shouldn't we have the courage to stand

9 up for Him, did Mr. Buckingham make that statement?

10 Mr. Bonsell said, I'm not sure he said that. I'm not

11 sure he said that at this meeting.

12 He was asked, Do you recall him saying --

13 making that statement at any school board meetings?

14 It's a pretty powerful statement to say at a school

15 board meeting. Mr. Bonsell answered, I don't think it

16 has to do with what we're talking about. He was

17 asked, Do you think he made that statement at a

18 meeting? He said, I'm not positive. I think he said

19 something along those lines, but I don't believe it

20 was -- it had to do with this.

21 He was asked, What do you believe it had to

22 do with? Mr. Bonsell's answer was, There was -- a

23 year ago before this there was another discussion on

24 the pledge, but this was the year before. And to be

25 fair to Mr. Bonsell, he was asked then, Do you think

1 he made a statement along those lines regarding the
2 pledge? And he said, To be honest, I'm not sure when
3 he said it or if this is exactly what he said. I'm
4 just not sure. That's what Mr. Bonsell said. Right?

5 A. That's what the deposition in front of me
6 says.

7 Q. Yes. And you read that transcript some time
8 ago. Correct?

9 A. Yes.

10 Q. And that was true for Mr. Buckingham's, as
11 well. Correct? You read Mr. Buckingham's transcript,
12 as well, prior to today?

13 A. I believe I read one. I don't know if I
14 read both. My recollection is at least one.

15 Q. So you all were in agreement that
16 Mr. Buckingham did not make this highly provocative
17 statement at the June meeting, but rather at this
18 earlier period regarding the pledge. Right?

19 A. I believe that's what the record shows.

20 Q. And therefore the newspapers, two
21 newspapers, got it all wrong?

22 A. Yes.

23 Q. And we talked about the witness's that you
24 heard at this trial. You heard Jen Miller testify,
25 and she said that this comment was made at the June

1 meetings. Correct?

2 A. I remember her testimony at that point.

3 MR. GILLEN: Your Honor, again, I object
4 because it appears to be an attempt to impeach
5 Dr. Nilsen based on what other people have remembered
6 or testified, which is not proper.

7 MR. ROTHSCHILD: He witnessed this
8 testimony. I think it's fair to ask him, you know, he
9 heard it and whether it's true.

10 THE COURT: Well, the question is -- it's
11 not an impeachment question, I don't think,
12 Mr. Gillen. The question is, did he hear another
13 witness say that statement. How does that impeach
14 him?

15 MR. GILLEN: Well, and that question I guess
16 I can understand, but what's the purpose?

17 THE COURT: Well, the purpose is, he's got
18 your witness on cross-examination, and he may have an
19 additional question that flows from that question
20 where he asks whether a particular individual was
21 heard to have said that Mr. Buckingham said the
22 statement. So I think it's proper cross. I'll
23 overrule the objection.

24 BY MR. ROTHSCHILD:

25 Q. So, Dr. Nilsen, you heard Jennifer Miller

1 testify?

2 A. Yes.

3 Q. You heard Bertha Spahr testify?

4 A. Yes.

5 Q. You heard Casey Brown testify?

6 A. Yes.

7 Q. You heard Jeff Brown testify?

8 A. Yes.

9 Q. You heard Christy Rehm testify?

10 A. Yes.

11 Q. You heard Bryan Rehm testify?

12 A. Yes.

13 Q. You heard Fred Callahan testify?

14 A. Yes.

15 Q. They all testified that this 2,000 years ago
16 statement was made at the June meetings in the context
17 of discussing the biology textbook. That's what they
18 testified to, didn't they?

19 A. Is that a question or a statement?

20 Q. That's a question. You heard it?

21 A. I don't remember if all of them stated that.
22 I do remember some of them did.

23 Q. Okay. And so they're all wrong, too?

24 A. I can only speak to what I remember.

25 Whether they are wrong or I'm right, I can't speak to

1 that. I can only speak to my recollection.

2 Q. Now, you testified about Charlotte
3 Buckingham reading from the Bible at a board meeting
4 or stating Bible passages?

5 A. Yes.

6 Q. It was pretty unforgettable?

7 A. Yes.

8 Q. And just to clarify the record, I think you
9 testified yesterday or you may have been asked did
10 that happen on July 14th, and I think you meant to say
11 June 14th?

12 A. It was June 14th.

13 Q. And you said you were sympathetic to the
14 board president who was waiting for it to end?

15 A. Yes.

16 Q. And that board president was Mr. Bonsell.
17 Correct?

18 A. That's correct.

19 Q. And, as a matter of fact, he waited until
20 the end. Correct? He let her finish?

21 A. Yes.

22 Q. He didn't gavel the table or call a recess
23 because a public comment went too long or was
24 inappropriate?

25 A. He didn't gavel it down, no.

1 Q. Or call a recess to stop it?

2 A. No.

3 Q. But both of those are practices engaged in
4 by the Dover board now. Correct?

5 A. It has been done, yes.

6 Q. Including by the board president, Sheila
7 Harkins?

8 A. Yes.

9 Q. And you remember I asked you at your January
10 deposition whether members had expressed an interest,
11 members of the board had expressed an interest in
12 teaching creationism as was reported in the
13 newspapers. Do you remember that?

14 A. Yes.

15 Q. And you testified that you couldn't remember
16 that occurring. Correct?

17 A. That's correct.

18 Q. And I actually asked you the question,
19 Dr. Nilsen, Do I understand you correctly that
20 notwithstanding the fact that there are many articles
21 during this June period about discussion about
22 teaching creationism, you have no recollection of the
23 subject of creationism at any school board meeting?
24 And you answered, That's correct. Does that sound
25 right?

1 A. Yes.

2 Q. And I expanded my question to ask whether
3 they had made any references to creationism at any
4 time in a board meeting, and you testified you
5 couldn't remember that occurring, either. Correct?

6 A. That's correct.

7 Q. And then I expanded my question to whether
8 any board member had ever discussed teaching
9 creationism in any setting, and you denied that, as
10 well. Correct?

11 A. That's correct.

12 Q. But we know from the two board retreat issue
13 summaries that you prepared that that's not true.
14 Correct?

15 A. That's correct.

16 Q. And, in fact, in one newspaper article --
17 and why don't we actually pull up Exhibit 44.

18 MR. ROTHSCHILD: May I approach, Your Honor?

19 THE COURT: You may.

20 BY MR. ROTHSCHILD:

21 Q. Exhibit P44 is a June 8th, 2004 article in
22 the York Dispatch written by Heidi Bernhard-Bubb.
23 Correct?

24 A. Yes.

25 Q. And early in the article she reports on some

1 question and answer she had with you or statements you
2 made?

3 A. Yes.

4 Q. And I'll read that into the record. Dover
5 Area Superintendent Richard Nilsen said he is bound by
6 state law to abide by the board's decision. He said
7 the board votes on all textbooks and has the final
8 say. And then a quote is attributed to you, The
9 teachers cannot teach from a book that is not
10 board-adopted, he said. It continues, He said the
11 district will always look for textbooks that have a
12 balanced approach to all topics. And then the article
13 goes on, When asked what that means for the evolution
14 versus creationism debate, Nilsen said Dover will,
15 quote, present all options and theories.

16 And you never asked that anything that was
17 attributed to you be retracted?

18 A. No.

19 Q. Or communicated to the York Dispatch that
20 there was anything wrong with that story?

21 A. No.

22 Q. Now, you testified yesterday that
23 Mr. Buckingham brought up the *Pandas* book in July,
24 2004. Correct? That was the first time he made you
25 aware of it?

1 A. Yes.

2 Q. And he wanted to purchase it?

3 A. He wanted the district to purchase it.

4 Q. The district to purchase it. Better answer.

5 Thank you. And have it used in the classroom.

6 Correct?

7 A. Yes.

8 Q. Matt, could you pull up Page 99 of *Pandas*,
9 99 to 100, and highlight the passage beginning,
10 Intelligent design means. That statement reads,
11 Intelligent design means that various forms of life
12 began abruptly through an intelligent agency with
13 their distinctive features already intact, fish with
14 fins and scales, birds with feathers, beaks, and
15 wings, et cetera.

16 You understand that passage to be a tenet of
17 creationism, don't you?

18 A. Yes.

19 Q. Yes?

20 A. Yes.

21 Q. And, Matt, if you could now turn to Page 85
22 of *Pandas* and highlight on the right-hand side column
23 the first full paragraph. It says, in the middle of
24 the page, This strong analogy leads to the conclusion
25 that life itself owes its origin to a master

1 intellect.

2 When I asked you what you understood that to
3 be referring to at your deposition, you said it could
4 only mean God or aliens. Correct?

5 A. I remember something along those lines, yes.

6 Q. Would you like to look at your deposition on
7 that?

8 A. No, I think you're pretty close to the
9 statement.

10 Q. Is that your idea of good pedagogy, to make
11 students aware that an alternative scientific theory
12 to evolution is that biological life was made by God
13 or aliens?

14 A. I think it's good pedagogy to give them the
15 understanding that people believe that that is true
16 and that there are other options.

17 Q. You first heard of intelligent design in
18 July of 2004. Correct?

19 A. I heard of intelligent design sometime in
20 the summer of 2004. I can't speak whether it was
21 June, July.

22 Q. Could you turn to your January deposition,
23 Page 19. And if you'd look at Line 21 on Page 19.

24 A. I'm sorry, which line?

25 Q. 21, please. I asked you, When was the first

1 time you heard about intelligent design? And you
2 answered, July of 2004. Correct?

3 A. Again, that would be about that time, yes.

4 Q. No reason to believe that isn't an accurate
5 recollection?

6 A. Correct.

7 Q. Matt, could you pull up Defendants' Exhibit
8 26.

9 MR. ROTHSCHILD: May I approach, Your Honor?

10 THE COURT: You may.

11 BY MR. ROTHSCHILD:

12 Q. This is the memo or request by
13 Mr. Buckingham to you for the district to purchase --
14 to purchase the *Pandas* books?

15 A. Yes.

16 Q. And at this time he's asking to purchase
17 220, not just the 50 or 60 that were donated.
18 Correct?

19 A. That's correct.

20 Q. And the cost that he communicated here was
21 almost \$4400?

22 A. That's correct.

23 Q. And by comparison, the standard biology
24 textbook, the Miller and Levine textbook that was
25 ultimately purchased was approximately \$14,000?

1 A. That's about right.

2 Q. So this frugal board member was willing to
3 add to the textbook budget by more than 30 percent?

4 A. You're better at math than I am, but that
5 sounds about right.

6 Q. And you testified at some length about your
7 communications with Mr. Buckingham and Mr. Bonsell
8 leading up to the August 2nd meeting. Correct?

9 A. Yes.

10 Q. And you testified that Mr. Buckingham
11 communicated that he didn't have the six votes
12 necessary to accomplish the purchase of a supplemental
13 text that was not approved by the administration.
14 Correct?

15 A. Correct.

16 Q. Did you understand him to have five votes?

17 A. No. I didn't know how many votes he had.

18 Q. Good enough. In any event, you told him
19 that you wouldn't delay approval of the biology text
20 at the August 2nd, 2004 meeting. Correct?

21 A. I can't make approval or delay approval.
22 All I can do is put it on the agenda for approval.

23 Q. And that's an activity that you and the
24 board president would do. Correct?

25 A. Yes.

1 Q. And the board president at that time was
2 Mr. Bonsell?

3 A. That's correct.

4 Q. And he was in agreement with you, we're not
5 delaying this?

6 A. That's correct.

7 Q. So it didn't get delayed?

8 A. It was placed on the agenda.

9 Q. And this was pretty important because you
10 knew you were already late in approving a biology text
11 for the upcoming school year. Right?

12 A. Correct.

13 Q. And you offered a compromise to
14 Mr. Buckingham after the Miller and Levine book was
15 purchased, you would go to the teachers to discuss
16 bringing in *Pandas* as a reference text?

17 A. Correct.

18 Q. And that was with the prospect of purchasing
19 it as a reference text, wasn't it?

20 A. I don't think we ever discussed the
21 financial aspects.

22 Q. At this point you had had no offers of a
23 donation, had you?

24 A. No.

25 Q. And your understanding was that he would go

1 along with that, bring on the biology textbook, get
2 that voted on, and then we'll revisit the *Pandas*
3 issue?

4 A. Correct.

5 Q. But he reneged on that agreement, didn't he?

6 A. Correct.

7 Q. He voted against the approval of the Miller
8 and Levine book?

9 A. Correct.

10 Q. He voted to deprive the students of the
11 biology textbook they needed to learn about evolution
12 as required by state standards?

13 A. At that time.

14 Q. And he wasn't alone in voting against that,
15 was he?

16 A. No.

17 Q. Mrs. Geesey, Ms. Harkins, and Mrs. Yingling
18 all voted with him in the first vote. Correct?

19 A. Correct.

20 Q. They were all willing to deprive the
21 students of their textbooks?

22 A. They were willing at that time to vote no
23 for those textbooks.

24 Q. And a no vote, if there were enough votes on
25 that side, would result in depriving the students of

1 their textbooks. Correct?

2 A. At that time.

3 Q. With less than a month before the school
4 year starts?

5 A. Correct.

6 Q. And you expressed your displeasure about
7 this?

8 A. Yes.

9 Q. Because you knew the students and the
10 teachers needed the book. Right?

11 A. Yes.

12 Q. And you were able to convince Mrs. Yingling
13 to switch votes?

14 A. Yes.

15 Q. By your view of things, she did the right
16 thing for the students, didn't she?

17 A. Yes.

18 Q. But Mr. Buckingham, Mrs. Harkins, and
19 Mrs. Geesey didn't. Right?

20 A. Correct.

21 Q. They held firm against that biology book
22 that teaches evolution?

23 A. Correct.

24 Q. They were not going to let the students have
25 that book if their votes could control?

1 A. Correct.

2 Q. Mrs. Geesey and Mrs. Harkins are still on
3 the board, aren't they?

4 A. Yes.

5 Q. In fact, Mrs. Harkins has been elevated to
6 president. Correct?

7 A. Yes.

8 Q. And those two and Mr. Bonsell are actually
9 the only remaining members of the board -- that are
10 currently on the board that were ever elected to a
11 school board position. Correct?

12 A. No. Ms. Geesey was elected.

13 Q. Ms. Geesey, Ms. Harkins, Mr. Bonsell, they
14 were elected, the other six members were not.
15 Correct?

16 A. That's correct.

17 Q. They were handpicked by the other members of
18 the board. Correct?

19 A. They were appointed by the other members of
20 the board, yes.

21 Q. They had full authority to select them?

22 A. Yes.

23 Q. And the other thing you testified about the
24 August 2nd meeting was that no one said creationism on
25 August 2nd. Correct?

1 A. I testified that I don't remember anybody
2 saying creationism.

3 Q. Okay. So you just don't remember?

4 A. I don't remember people mentioning
5 creationism at the August 2nd meeting, no.

6 Q. You testified about the October 18th
7 meeting. You didn't just say, I don't remember, you
8 said no one said creationism. So which is it today,
9 is it no one said creationism or I don't remember?

10 A. I can only speak to what I can remember. I
11 don't remember anybody saying creationism.

12 Q. The next thing you testified about was the
13 late August meeting about *Pandas*?

14 A. Yes.

15 Q. And you testified that the teachers voiced
16 concerns about the book?

17 A. Yes.

18 Q. It was dated?

19 A. Yes.

20 Q. Had faulty science?

21 A. Yes.

22 Q. And had readability issues?

23 A. Yes.

24 Q. And by "readability issues," they thought it
25 was above the reading level of ninth-grade students.

1 Correct?

2 A. It was above some of them, yes.

3 Q. They actually did a readability study,
4 didn't they?

5 A. Yes.

6 Q. And found that it was at least grade 12,
7 maybe grade 13?

8 A. Yes.

9 Q. And these are the district science education
10 experts. Right?

11 A. Yes.

12 Q. And you also talked to Thomas More about
13 *Pandas*, didn't you?

14 A. At some time. I don't remember when.

15 Q. And you called them and you actually asked
16 whether *Pandas* was being used in any other school
17 district. Right?

18 A. Correct.

19 Q. And Mr. Thompson told you he was not aware
20 of any school district that used the book. Correct?

21 A. Correct.

22 Q. And nevertheless, you agreed to accept the
23 donation of the books?

24 A. Yes.

25 Q. And you were made aware of this opportunity

1 from Alan Bonsell?

2 A. Yes.

3 Q. And you said at that time you didn't ask who
4 was donating?

5 A. Correct.

6 Q. You did subsequently find out that his
7 father, Donald Bonsell, was one of the people
8 donating?

9 A. Yes.

10 Q. And you said you're always happy to accept
11 donations. Right?

12 A. Appropriate donations, yes.

13 Q. Fair enough. But as you said, you didn't
14 read *Pandas* before accepting the donation. Correct?

15 A. Correct.

16 Q. And so all you knew was that the district
17 science education experts had told you that it was
18 dated, it had faulty science, and it had readability
19 issues. Right?

20 A. I also knew that on the August 27th meeting,
21 the science department chairperson was willing to take
22 the book as a reference in the classroom. So with the
23 understanding that the science department was willing
24 to accept the book, that was good enough for me.

25 Q. They acquiesced to that?

1 A. Use whatever words you want, but they
2 accepted the book. Knowing Mrs. Spahr's backbone, if
3 she didn't think it was an appropriate book, she
4 wouldn't have acquiesced.

5 Q. Well, she certainly had communicated or the
6 science department communicated it was dated, had
7 faulty science, had readability problems. Correct?

8 A. Yes.

9 Q. And so far as you knew from the questions
10 you had asked the Thomas More Law Firm, nobody else
11 was using it. Correct?

12 A. That's correct.

13 Q. And so based on that, you decided it was
14 appropriate to put in the science classroom?

15 A. Yes.

16 Q. And typically when you get donations from
17 other sources, they're not added to the official
18 school curriculum, are they?

19 A. No.

20 Q. But *Pandas* has been?

21 A. Yes.

22 Q. And you testified near the end of your
23 testimony that the statement read to students has been
24 modified to refer to other books in the library.
25 Correct?

1 A. Yes.

2 Q. Those books aren't mentioned. Correct?

3 A. No.

4 Q. And *Pandas* has now been placed in the
5 reference section of the library?

6 A. Yes.

7 Q. And none of those other books about
8 intelligent design are in that section, are they?

9 A. I don't know.

10 Q. And when you refer to these other books,
11 you're primarily referring to these books donated by
12 the group you referred to in your direct testimony?

13 A. No. I'm also aware that the librarian had
14 additional books on the subject matter prior to this
15 whole situation.

16 Q. And the books that you did get donated more
17 recently were from a group called Debunk Creationism?

18 A. That's my understanding, yes.

19 Q. But you have no knowledge whether they're
20 actually placed anywhere near *Pandas*. Correct?

21 A. No. It's up to the librarian to decide
22 where she wanted them.

23 MR. ROTHSCHILD: Could I have Exhibit 753.
24 Could you pull that up, Matt. May I approach, Your
25 Honor?

1 THE COURT: You may.

2 BY MR. ROTHSCHILD:

3 Q. Do you recognize this document, P753?

4 A. Yes.

5 Q. What is it?

6 A. It's my superintendent's weekly update for
7 April the 1st, 2005.

8 Q. And this is something that goes to the
9 board?

10 A. Yes.

11 Q. And if you could go down to -- Heading A
12 says, Meetings and Activities?

13 A. Yes.

14 Q. And under Heading 2, there is some
15 discussion about the legal activities. Correct?

16 A. Yes.

17 Q. And then there's a discussion about these
18 donated books. Right?

19 A. Yes.

20 Q. Could you read that paragraph beginning, The
21 board committee?

22 A. The board committee has finished reviewing
23 the 23 donated books and will now give to the
24 administration to review. Thomas More Center has
25 stated and the board president, Mrs. Harkins, and

1 curriculum chairperson, Mr. Bonsell, all recommend we
2 take the issue off the front page and accept the
3 donation of the books. As much as it makes me mad to
4 have an outside organization dictate our library
5 collection, I understand the political and legal
6 implications. Anyone know of a pro-ID group that
7 wants to donate books? I've even received a call from
8 plaintiffs, Mrs. Callahan, asking about the status of
9 the books. My response was, this issue is part of a
10 legal matter and an item I cannot discuss with you.
11 Her response was, Oh, I forgot.

12 Q. This is an example of your "happiness to
13 accept any book that's appropriate"?

14 A. It's my reflection of the politically
15 charged aspect of people going on the front page on
16 issues without communicating directly with me. This
17 is an attempt of an individual or an organization to
18 embarrass the district. That's my frustration with
19 this.

20 Q. And you're referring to the Debunk
21 Creationism group trying to embarrass the district?

22 A. Yes.

23 Q. Now, you also testified that at the late
24 August meeting you gave Jennifer Miller a memo from
25 the city solicitor -- the school district solicitor

1 relating to the issue of *Pandas*?

2 A. I gave it to everybody at that meeting.

3 Q. And that was the members of the board
4 curriculum committee?

5 A. And the science teachers, yes.

6 Q. And I think you testified that it dealt with
7 the constitutionality of *Pandas*?

8 A. Yes.

9 MR. ROTHSCHILD: May I approach, Your Honor?

10 THE COURT: You may.

11 BY MR. ROTHSCHILD:

12 Q. Dr. Nilsen, this is Plaintiffs' Exhibit 70,
13 and do you recognize this as the advice from counsel
14 that you distributed at that late August meeting?

15 A. Yes.

16 Q. And if you go through the text of it -- and
17 just take your time to read it -- but the word
18 "*Pandas*" doesn't appear anywhere in the text, does it?

19 A. No, it does not.

20 Q. And let me represent to you that this is the
21 only legal advice document that's been produced to
22 plaintiffs in this litigation. This is a memo from
23 Steven Russell, the school district solicitor.

24 Correct?

25 A. Yes.

1 Q. And let's look at what is reported here, if
2 we could highlight the first paragraph. What
3 Mr. Russell reports to you, Dr. Nilsen, is that I
4 talked to Richard Thompson, president and chief
5 counsel for the Thomas More Law Center. There is some
6 talk about why it took awhile to get back to him. And
7 then if you go down after the parentheses, Mr. Russell
8 reports that they refer to the creationism issue as
9 intelligent design. Is that right?

10 A. That's what it says there, yes.

11 Q. That's what Mr. Russell reported to you
12 about his conversation with Mr. Thompson?

13 MR. GILLEN: Objection, Your Honor.
14 Mischaracterizes the thrust of the e-mail.

15 THE COURT: Well, it speaks for itself.
16 I'll sustain the objection to the extent that I can
17 read it and it speaks for itself.

18 BY MR. ROTHSCHILD:

19 Q. And then going on in the document, it
20 indicates that Thomas More has indicated they would
21 represent the district pro bono, for free?

22 A. Yes.

23 Q. But it also points out that they would not
24 pay any attorneys' fees to plaintiffs if the
25 plaintiffs were to prevail in this lawsuit. Correct?

1 A. Yes.

2 Q. And he explains how that works?

3 A. Yes.

4 Q. And then in the last paragraph, he expresses
5 some concerns, doesn't he?

6 A. Yes.

7 Q. And if we could highlight where it begins, I
8 say this because. I realize it's a little hard to
9 read. He says, It could be difficult to win -- it
10 could be difficult to win a case. I say this because
11 one of the common themes in some of the U.S. Supreme
12 Court decisions, especially dealing with silent
13 meditation, is that even though something is
14 voluntary, it still causes a problem because the
15 practice, whatever it may be, was initiated for
16 religious reasons.

17 And he describes another case, and then he
18 says, My concern for Dover is that in the last several
19 years, there's been a lot of discussion, newsprint, et
20 cetera, for putting religion back in the schools. In
21 my mind, this would add weight to a lawsuit seeking to
22 enjoin whatever the practice might be.

23 That's what Mr. Russell told you giving his
24 legal advice in this e-mail he sent to you?

25 A. Yes.

1 Q. And you knew exactly what he meant, didn't
2 you?

3 A. Yes.

4 MR. ROTHSCHILD: This would be a good time
5 to break, Your Honor.

6 THE COURT: All right. Let's take a break
7 until 1:20 for lunch, and we'll return and pick up
8 Mr. Rothschild's continued cross-examination at that
9 time. We'll be in recess.

10 (A luncheon recess was taken.)

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CERTIFICATION

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the within proceedings and that this copy is a correct transcript of the same.

Dated in Harrisburg, Pennsylvania, this 24th day of October, 2005.

/s/ Lori A. Shuey
Lori A. Shuey, RPR, CRR
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