

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION  
SFN 2053 (2/85) 5M



ROLL NUMBER
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DESCRIPTION

2177

2001 SENATE EDUCATION

SB 2177

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2177

Senate Education Committee

Conference Committee

Hearing Date 01-22-01

Tape Number	Side A	Side B	Meter #
1	x		31.3 - end
		x	0 - 30.3
2 (01-30-01)	x		49.0 - end
2 (01-30-01)		x	0 - 9.6
Committee Clerk Signature <i>Audie Johnson</i>			

Minutes:CHAIRMAN FREBORG called the hearing on SB 2177 which relates to the display of the Ten Commandments.

**Testimony in support of SB 2177.**

SENATOR STAN LYSON, District 1, testified in support of SB 2177. (see attached).

He presented written testimony from ED CRAWFORD, Executive Director of the Eckert Youth Homes, and a *sample* patriotic display. (see attached).

SENATOR FLAKOLL asked if the local school board, the local superintendent, or the individual classroom teacher would decide, or someone else. SENATOR LYSON stated he believes the local school board should have the responsibility, in consultation with their teachers and parents of students in the community. SENATOR CHRISTENSON asked if there are clearly religious connotations associated with the Ten Commandments. He answered he felt it is a religious document in as much as the US Constitution, the Bill of Rights, and the state constitution are religious documents. SENATOR CHRISTENSON acknowledges that the Ten Commandments

have had impact on our culture and our legal system, but the religious connotation of them would be a handicap when talking about a diverse community of people. She feels documents like the US Constitution and Declaration of Independence were specifically designed to remove the church and state affiliation so that we can acknowledge a faith but not endorse one. SENATOR FLAKOLL asked SENATOR LYSON how this might interact with the first and fourteenth amendment. He feels this would give us more rights under our freedom of speech. Discussion continued on separation of church and state. He does feel the majority should rule. SENATOR CHRISTENSON asked if SENATOR LYSON would be willing to post , along with the Ten Commandment, elements of other religions. He would not be opposed and feels it would help develop the youth.

REPRESENTATIVE DAVID DROVDAL, District 39, testified that this is a companion bill to HB 1128. He feels the Ten Commandments and religion are part of the background of this country. This bill does not mandate the Ten Commandments hang in school rooms, but it does allow them to be hung at the discretion of the local school board. The Supreme Court ruling in 1980 states that the document (Ten Commandments) can not be highlighted as a religious document nor can it be hung separately from other documents. He asks for favorable consideration of the bill because it is the right thing to do, as a guide/example for young people today. SENATOR CHRISTENSON asked Rep. Drovdal if he would acknowledge if someone were to oppose the hanging of the Ten Commandments, would they not endorse moral law and are they not Christian. He would have no problem with other people's opinion. The one great thing about this country is the diversity of religions, beliefs and principles. He would hope that the local school district could and would solve any argument for hanging the document in a school room. SENATOR FLAKOLL asked if there is a basis in law from the Ten

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Senate Education Committee

Bill/Resolution Number SB 2177

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Commandments. REP. DROVDALL feels there are parts of law that are taken from parts of the Ten Commandments. SENATOR KELSH stated there is no clear definition of "god" and that is why the Supreme Court ruled as it did.

SOPHIA PRESZLER testified the Ten Commandments will stand forever.

MRS. GARY ZENTZ feels the Ten Commandments present positive virtues and would suppose other religious documents also have positive virtues.

**Neutral Testimony on SB 2177:**

CONNIE HILDEBRAND, spoke on other ethnic beliefs. (see attached).

DOUG BAHR, Attorney Generals Office, would offer technical assistance to committee. He has reviewed HB 1128 which requires the Ten Commandments not override other documents. He feels HB 1128 would hold up to a Court decision. SENATOR KELSH asked if this legislation affects non-public schools. Mr. Bahr stated no. Private schools are not prohibited under the first amendment.

**Testimony in opposition to SB 2177:**

CAROL TWO EAGLES, member Board of Dir. ACLU, a Sundancer (similar to a minister) and is the presiding Bishop of the nonsectarian nondenominational religious and educational institution, would like the Ten Commandments not be posted in an outstanding manner. She wants the essence of traditionalism preserved and all religions provided for.

SENATOR O'CONNELL asked if the Indian culture has a document that could be posted. She answered she thought the traditions could be put on paper.

RICHARD OTT, ND Council of Educational Leaders, spoke on behalf of Bev Nielson, ND School Board Assn, also. He has six points to make:

1. He has no issue with the morality of the Ten Commandments.

2. The enforcement falls on the local district.
3. There is no help available for the local school district.
4. This is a very volatile issue. It's permissive. The group who is favorable to displaying the Ten Commandments will be pressuring the local district to make this decision. If they do display them, there almost surely will be litigation. Then, who will be responsible.
5. He would like to see this legislation amended so there is a provision that the state will protect any of the agencies that follow the law as prescribed. Also, put a fiscal note on it, because it will cost money.
6. He feels there is nothing that will influence young people more than the example we set forth

**The hearing was closed on SB 2177.**

**01-30-01, Tape 2, Side A, 49.0 - end, Side B, 0 - 9.6**

The committee discussed SB 2177. SENATOR FLAKOLL presented amendments .0101.(see attached). Committee discussion on the last line of the amendment.

**SENATOR FLAKOLL moved to adopt the amendment and delete the last sentence.**

**Seconded by SENATOR WANZEK.**

**Roll Call Vote: 6 YES. 1 NO. 0 Absent. Amendment adopted.**

**SENATOR FLAKOLL moved a DO PASS AS AMENDED. Seconded by SENATOR WANZEK.**

SENATOR COOK feels an individual teacher could hang documents and make the school board liable. SENATOR FREBORG stated that we need special legislation to hang the Ten Commandments in the classroom, but any other group can hang anything they want there.

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**Senate Education Committee**

**Bill/Resolution Number SB 2177**

**Hearing Date 01-22-01**

**SENATOR CHRISTENSON** feels no matter what we do, we're asking for litigation for the school district. **SENATOR WANZEK** feels this is basically permissive legislation.

**Roll Call Vote: 6 YES. 1 NO. 0 Absent. Motion Carried.**

**Carrier: SENATOR FLAKOLL**







**REPORT OF STANDING COMMITTEE**

**SB 2177: Education Committee (Sen. Freborg, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SB 2177 was placed on the Sixth order on the calendar.

Page 1, line 10, after the period insert "The display of an object or document containing the words of the Ten Commandments must be in the same manner and appearance generally as other objects and documents displayed and may not be presented or displayed in any fashion that results in calling attention to the object or document apart from the other displayed objects or documents."

Number accordingly

2001 HOUSE EDUCATION

SB 2177

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2177

House Education Committee

Conference Committee

Hearing Date 03/13/01

Tape Number	Side A	Side B	Meter #
#1	X		1851 to 6200
#1		X	1 to 3646
Committee Clerk Signature <i>[Handwritten Signature]</i>			

Minutes:

Chairman R. Kelsch, Vice-Chair T. Brusegaard, Rep. Bellew, Rep. Grumbo, Rep. Haas, Rep. Hanson, Rep. Hawken, Rep. Hunsakor, Rep. Johnson, Rep. Meier, Rep. Mueller, Rep. Nelson, Rep. Nottestad, Rep. Solberg, Rep. Thoreson

Chairman Kelsch: We will now open the hearing on SB2177.

Sen. Lyson: (District 1) \*Please refer to written testimony\*

Rep. Hawken: Is it not perfectly legitimate under current law to do this?

Sen. Lyson: Yes, it is.

Rep. Thoreson: Wasn't that taken out last session? Any reference to the Ten Commandments?

Sen. Lyson: No, the Attorney General's opinion tells us it is.

Chairman Kelsch: Where did you come up with this drawing?

Sen. Lyson: Ed Crawford

Chairman Kelsch: On the bottom here, the principles of conscience. Currently, can't you also have the standard of right and wrong posted in your school as well, and don't a lot of schools already have them posted?

Sen. Lyson: I think you're probably right.

Rep. Nelson: I noticed by the handout that the historical documents that have been chosen in this particular piece are from the Judeo-Christian background. Was there any thought to including some of our native historical significant documents, from their perspective as well? Is there any reason why that shouldn't be included in this display?

Sen. Lyson: This is a sketch that was drawn out to give you some ideas what the display would look like. Certainly other things could be added to that.

Rep. Droydal: (District 19) I'd encourage a favorable recommendation on this bill.

Ed Crawford: Regarding the drawing, it's just a concept. I see in this bill the potential that it has to help build conscience in our young people, and I believe there's a direct correlation between the rise in the social ills in our society and the weakening of conscience, and efforts that are designed to help remedy some of the problems that we're seeing amongst our youth must be approached that have conscience building components within it. I'm not asking that schools teach the Ten Commandments, but I am asking that the schools can play a greater supportive role in this effort. In my opinion the Ten Commandments and any teaching of religion primarily should come from the parents, but the schools play a very important role in the life of our society. This particular bill will allow the schools to play a greater supportive role in the larger effort of doing what we can to strengthen the conscience of America.

Rep. Mueller: Do you see some potential conflict in having the Ten Commandments posted in school attempting to begin to be and play the role that parents ought to be playing?

Crawford: There's always potential for conflict. I don't see the schools trying to replace what the parents are doing. Strictly to play a supportive role.

Rep. Hanson: On the handout from the Atty. General's office on page 1-16, if you can do it right now, why do we need another law?

Crawford: I can't answer what's on the books right now or why we need another law. What I do see in this bill is an opportunity for schools to make a definitive supportive statement.

Rep. Hawken: The bill that our committee looked at earlier, and we amended it to say, 'religious documents'. How would you feel about us doing the same thing to this bill?

Crawford: I would discourage the word 'religion'. I do not see a display containing the words Ten Commandments having to be viewed as a religious document. They are a code of conduct, they are authoritative. They are health benefits.

Rep. Nottestad: The Ten Commandments are certainly partially a code of conduct, certainly Williston has a less diversified population, but what about the school districts across the state that have a very diverse population, wouldn't this create a situation where school boards would be forced by the Judeo-Christian community if that should ever happen to shove this type of thing down the throats of the kid that aren't Christian?

Crawford: I don't believe that it has to be that way. If I understand the wording, is not to draw attention to Christianity or to exclude any religion by so doing it. I'm quite certain will raise a question, but when I see the potential of the supportive role the schools can play by doing this,

translating this into making a difference in some of the problems the schools are facing. I would be willing to take that risk.

Rep. Nottestad: You're saying that the Ten Commandments that we have in our churches, used them continuously, and then we're supposed to step into the classrooms and it's supposed to be the cure all for all the problems?

Crawford: I would not want to imply that someone's failed or that someone is not doing enough. I simply see the schools as an influence in a community, and for them to play a greater support role in trying to combat some of the difficulty in our schools, I think we would want to do that, and I think that can be done without implying that the churches have failed, or the families aren't doing enough. I think those areas could be improved as well. The point isn't to say someone has failed, it's can the schools play a part in strengthening this effort in getting our kids to make better decisions.

Rep. Nottestad: I think that the schools are attempting this now, and I don't think the schools are asking for this. It's a tool that a group is attempting to place into their hands whether they want it or not.

Crawford: I would not disagree with you. I think that this is an effort we can do without necessarily fighting amongst ourselves. Our kids need us. It doesn't have to be controversial. People just try to read too much into it.

Rep. Nelson: Do you currently post the Ten Commandments in your facility?

Crawford: We do have a copy on our bulletin board.

Rep. Nelson : In a situation, if one of those residents would ask for a copy of some of the spiritual teachings and the backbone of their culture. Would you object to that, and would you post that on your bulletin board as well?

Crawford: I would not have an objection to that.

Rep. Nelson: How would we deny the devil worshipping folks the same opportunity?

Crawford: The group home that I work for is Christian, so things that would come into the home that would be as contradictory to Christianity as Satan worshipping, we would be very opposed to having that.

Rep. Nelson: Public schools don't have that out.

Rep. Mueller: Line 7, what if we don't have any other cultural, legal, historical documents that someone has brought forth and put on the bulletin board, but we do have the Ten Commandments. How would you see that?

Crawford: That would be a question that the school board would have to determine.

Rep. Mueller: I think I agree with you. They do have that now, but they don't have the Ten Commandments spelled out per se in any legislation, and that eliminates some potential legal issues.

Rep. Thoreson: You have the Ten Commandments posted, is there any direct result from having them posted? Are they supposed to send a subliminal message? What's their purpose? Is there any change of behavior?

Crawford: I see a direct correlation between the strength of conscience and the ability to make healthy choices. I also believe that a conscience would be no stronger than the absoluteness of the right and wrong. The most fixed standard, the stronger the conscience will be. Yes, we



integrate them, not necessarily as a religious document, but as representing a fixed standard, representing a strong sense of right and wrong.

Rep. Nottestad: What about if you're dealing with a non-Christian child, or don't you allow them in your institution.

Crawford: We do not discriminate. They are an authoritative code of conduct that we would use with all children. There's uniformity in the Ten Commandments and in other codes of conduct.

Rep. Nottestad: You're using that with someone who does not have that belief, and in that respect it is imposed upon them whether they want it or not.

Crawford: The question has come up that why don't we have the portion of the Ten Commandments that don't refer to God, and my answer is that it's the references to God that bring with it the authoritative component. The absolute component, which is what builds the conscience. If we leave that part out, that authoritative element is missing.

Chairman Kelsch: Anyone who wishes to appear in opposition to SB2177?

Max Laird: (NDEA) I don't oppose so much by virtue of the facts of the legislation but by virtue of the legislation assuming that it passes. I'd like OT reference two items from the Atty. General's statement. Page L-15, the third paragraph down.... The problem that is posed to me as a classroom teacher, the difference between posting a document of this type and teaching to a document of this type. I don't wish to stand before you and suggest a conspiracy theory, but in situations dealing with behavior modification, how do I address the issue of posting this document either being posted on a classroom wall or a building law. Let me now refer you to L-16, the paragraph that says, 'the ND law does not prohibit the display....' The passage of this bill will not give school districts anymore authority than they currently have. There are multiple

religions represented in my classroom on a daily basis, and if I am to refer to this document, how do I refer to it in a secular manner? We don't object the posting, the issues arise in how we're going to manage this. We need the public, the faith based institutions, the parents, the families and all others to work with us, and not continually single out public schools as a place where all things should happen for all children.

Chairman Kelsch: In your school, did you have anything that would basically say, honesty, integrity, treat others as you would want to be treated? Basically as I look at them, they are just principles of daily living.

Laird: In our school, what we work from is a three ring binder which all of our students receive when they enroll in our school, and at least once sometimes twice a month, we have all school sessions where we have conversations about what's the meaning of respect and laws, and we talk about what it means.

Jennifer Ring: (ACLU of the Dakotas) Basically, a lot of what's been said up here has to do with the constitutionality or unconstitutionality of this act. I agree that this act is constitutional as written, but that's only one of the two ways that an act can be constitutional or unconstitutional. This is going to come into trouble as applied, because this act is truly unnecessary. You cannot as a legislature, try to overturn the US Constitution, and that demands that 1. You can't interfere with the individual religion and 2. You can't try and pick a religion and tell them to be. People want to hold the Ten Commandments up as an authoritative source of a moral code. You can't do that. The Ten Commandments is a religious document, and you're picking a religion to tell the children to be. And then you have to pick which kind you want to post. It's been said here that this document is authoritative because of the first four commandments that are tied to one

religious tradition. It's not saying in this bill who has the authority to make the decision. Just this last year, the Supreme Court showed its commitment to not allowing schools to push religion on children. In the TX case, it was a case of a student leading a prayer on a state owned microphone at a rally before state football games, and because the football players, the cheerleaders and some other students were required to be there, and because they were using state equipment to do it, it was deemed unconstitutional. Someday, in ND, we will have a town where Christianity will be a minority.

Carol Two Eagles: \*She spoke in opposition to the bill\*

Doug Bar: (Atty. General's office) I'm here for informational purposes.

Chairman Kelsch: I would like you to discuss the document that was prepared, and in your opinion whether it would be constitutional or not.

Bar: I should emphasize that this is not my opinion, this is the attorney general's opinion. There is nothing to indicate that these are being displayed for an educational purpose. An amendment to SB2177 could be, 'the Ten Commandments with religious documents of a cultural, legal or historical significance which has influenced the legal and governmental systems of the US'.

Chairman Kelsch: Isn't there a question whether or not the constitution was actually founded on the Ten Commandments?

Bar: I'm not suggesting that there weren't some Native American documents that were an important part of the Constitution, so I'm not suggesting that they were founded on the Ten Commandments. The point is it has to be educational, so when we have people testifying saying that we need to teach values, and they can teach values now, and the Ten Commandments can't be used to impose those values on people, but they can be used for educational purposes.

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House Education Committee  
Bill/Resolution Number SB2177  
Hearing Date 03/13/01

Rep. Hawken: I understand what we did incorrectly, but if we were to do something similar, would that then help us out?

Bar: I think what it would need to read would be, 'religious documents of cultural, historical or legal significance which have influenced the legal and governmental systems of the US and the state. May be displayed in a public school classroom or public school building or any public building together with other documents of cultural, blah, blah, blah.'

**Written testimony submitted by Bev Nielson**

Chairman Kelseh: We will now close the hearing on SB2177.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2177 **A**

House Education Committee

Conference Committee

Hearing Date 03/20/01

Tape Number	Side A	Side B	Meter #
#1	X		2155 to 5370
Committee Clerk Signature <i>John Gilbertson</i>			

Minutes:

Chairman R. Kelsch, Vice-Chair T. Brusegaard, Rep. Bellew, Rep. Grumbo, Rep. Haas, Rep. Hanson, Rep. Hawken, Rep. Hunskor, Rep. Johnson, Rep. Meier, Rep. Mueller, Rep. Nelson, Rep. Nottestad, Rep. Solberg, Rep. Thoreson

Chairman Kelsch: We will now take up SB2177.

Rep. Hawken: I move the amendments.

Rep. Thoreson: Second.

Chairman Kelsch: What are the wishes of the committee?

Rep. Thoreson: I move a DO PASS AS AMENDED.

Rep. Hunskor: Second.

Chairman Kelsch: Committee discussion.

The motion of DO PASS AS AMENDED passes with 9 YAY 6 NAY 0 ABSENT

Floor assignment: Rep. Thoreson

Date: 3/20/01  
 Roll Call Vote #: 1

**2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. SB 2177**

House House Education Committee

Subcommittee on \_\_\_\_\_  
 or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass As Amended

Motion Made By Rep. Thoreson Seconded By Rep. Hunskor

Representatives	Yes	No	Representatives	Yes	No
Chairman-RaeAnn G. Kelsch	✓		Rep. Howard Grumbo	✓	
V. Chairman-Thomas T. Brusegaard		✓	Rep. Lyle Hanson		✓
Rep. Larry Bellew	✓		Rep. Bob Hunskor	✓	
Rep. C.B. Haas		✓	Rep. Phillip Mueller		✓
Rep. Kathy Hawken		✓	Rep. Dorvan Solberg	✓	
Rep. Dennis E. Johnson	✓				
Rep. Lisa Meler	✓				
Rep. Jon O. Nelson	✓				
Rep. Darrell D. Nottestad		✓			
Rep. Laurel Thoreson	✓				

Total (Yes) 9 No 6

Absent 0

Floor Assignment Rep. Thoreson

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**SB 2177, as engrossed: Education Committee (Rep. R. Kelsch, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (9 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2177 was placed on the Sixth order on the calendar.

Page 1, line 2, replace "the Ten Commandments" with "religious objects or documents in public school buildings"

Page 1, line 6, replace "**Ten Commandments**" with "**Religious objects or documents**", replace "An" with "A religious", and replace "containing the words of the" with "of cultural, legal, or historical significance which has influenced the legal and governmental systems of the United States and this state"

Page 1, line 7, remove "Ten Commandments", remove "public school classroom or", and remove the comma

Page 1, line 8, remove "or at any public school event," and after "other" insert "objects or"

Page 1, line 10, replace "an" with "a religious" and replace "containing the words of the Ten" with "under this section"

Page 1, line 11, remove "Commandments"

Page 1, line 13, after the first "the" insert "religious" and after the period insert "A school board shall develop a policy for the proper display of any religious objects or documents."

Renumber accordingly

2001 SENATE EDUCATION

CONFERENCE COMMITTEE

SB 2177



2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2177

Senate Education Committee

Conference Committee

Hearing Date 04-06-01

Tape Number	Side A	Side B	Meter #
1	x		0 - 30.1
Committee Clerk Signature <i>Andrea Johnson</i>			

Minutes: Report of CONFERENCE COMMITTEE on SB 2177.

Members:      SENATOR WANZEK                      REPRESENTATIVE HAAS  
                    SENATOR FLAKOLU                      REPRESENTATIVE HAWKEN  
                    SENATOR CHRISTENSON                      REPRESENTATIVE MUELLER

SENATOR WANZEK called the committee to order with all (6) members present. SENATOR WANZEK asked the House to provide an explanation of their amendment. REP. HAWKEN stated the point in changing the language from "Ten Commandments" to "religious documents" was because of the diversity in many of the communities in the state. This law needs to be inclusive for all. Point was made that Fargo has 57 different religions. REP. HAAS stated the objective was to structure the law so as not to expose the local district to litigation. REP. MUELLER stated the last sentence in the bill asks the local board to develop a policy. REP. HAWKEN feels the bill is not necessary because any district can, at this time, do what this bill

states. SENATOR WANZEK stated this clarifies the law with the additional verbiage. This also does not single out any specific religious document.

DOUG BAHR, Attorney General's office, asked how the committee thinks the public sees this with so many different religions. This just broadens the scope of the legislation. The Attorney General's office feels they can defend either version, with or without the words "Ten Commandments". SENATOR FLAKOLL asked if the local boards are mandated to develop a policy. MR. BAHR feels this legislation does mandate the local boards do it. SENATOR FLAKOLL wondered if "cultural, legal or historical significance" should be added to the last sentence. MR. BAHR stated that his understanding is the purpose of the bill is to address the "ten commandments" and as expanded, "religious documents". REP. MUELLER asked about the liability issue on the local board and what the AG's office involvement would be. MR. BAHR stated the AG's office won't defend the actions of the local boards. They only defend statute. The local boards would have to absorb the cost for litigation. REP. HAWKEN feels the last sentence clarifies the intent of the bill. SENATOR WANZEK asked if the boards are immune from lawsuits today. MR. BAHR replied "NO". SENATOR FLAKOLL asked what the last sentence says exactly. MR. BAHR stated it says the local boards have to develop a policy. More discussion.

BEV NIELSON, ND School Bd. Assn., stated their issue is lawsuits. Thier group will work with the AG's office to help develop a policy for the local boards to follow.

**SENATOR CHRISTENSON moved the SENATE ACCEDE TO THE THE HOUSE AMENDMENTS. Seconded by REPRESENTATIVE HAWKEN.**

**Roll Call Vote: 6 YES. 0 NO. 0 Absent. Motion Carried.**

**Floor Assigment: SENATOR FLAKOLL/REPRESENTATIVE HAAS**



**Insert LC: .**

**REPORT OF CONFERENCE COMMITTEE**

**SB 2177, as engrossed:** Your conference committee (Sens. Wanzek, Flakoll, Christenson and Reps. Haas, Hawken, Mueller) recommends that the **SENATE ACCEDE** to the House amendments on SJ page 944 and place SB 2177 on the Seventh order.

Engrossed SB 2177 was placed on the Seventh order of business on the calendar.

REPORT OF CONFERENCE COMMITTEE  
(ACCEDE/RECEDE) - 420

07398

(Bill Number) SB 2177 (, as ~~(re)~~ engrossed):

Your Conference Committee

For the Senate:

Sen. Wanzok  
Sen. Flakoll  
Sen. Christensen

For the House:

Rep. Haus  
Rep. Hawken  
Rep. Mueller

recommends that the (SENATE) (HOUSE) (ACCEDE to) (RECEDE from)  
723/724      725/726      S724/H726      S723/H725

the (Senate/House) amendments on (SJ/HJ) page(s) 944 - \_\_\_\_\_

and place \_\_\_\_\_ on the Seventh order.  
727

, adopt (further) amendments as follows, and place  
\_\_\_\_\_ on the Seventh order:

having been unable to agree, recommends that the committee be discharged  
and a new committee be appointed. 690/515

((Re)Engrossed) \_\_\_\_\_ was placed on the Seventh order of business on the  
calendar.

DATE: \_\_\_\_/\_\_\_\_/\_\_\_\_

CARRIER: \_\_\_\_\_

LC NO. \_\_\_\_\_ of amendment

LC NO. \_\_\_\_\_ of engrossment

Emergency clause added or deleted \_\_\_\_\_

Statement of purpose of amendment \_\_\_\_\_

(1) LC (2) LC (3) DESK (4) COMM.

2001 TESTIMONY

SB 2177

Testimony of Senator Stan Lyson  
Education Committee

January 20, 2001

Mr. Chairman and Members of the Committee. My name is Stan Lyson, Senator from District 1, Williston, ND.

When I was first asked to sponsor a bill allowing the Ten Commandments to be displayed in our States Schools, I was a bit hesitant to do so. I then checked the wording of the United States Supreme Court when they were said to have ordered the removal of the Commandments from our schools. The words of the Supreme Court are: The states could not require the posting of the Ten Commandments in public schools.

I ask you now to look at Senate Bill 2177, it states that the document containing the words of the Ten Commandments may be displayed in a public school classroom or a public school building. My belief is that the Supreme Court was saying this is a local issue and they should not be required to display the Ten Commandments. This Senate Bill puts it back into the local school districts to make the decision.

Mr. Chairman and members of the committee, I personally believe that a nation cannot survive without a conscience, and the conscience of our nation was derived from these Commandments and placed into our Constitution. I believe these Commandments are a cultural and historical document and they should be allowed to be displayed within our schools along with other cultural historical documents, Declaration of Independence, The US Constitutional convention notes, The Bill of Rights, The Mayflower Compact and the Constitution of our great state.

These documents could help our students to understand what our forefathers beliefs were when this nation was established.

The Ten Commandments have been the base for our Civil and Criminal laws and yes for base of laws for nations throughout this world.

We cannot separate the religious history of this country from the government history of this country because they are intertwined. I think to cut off our history from our students; we are cutting off the roots of our nation.

I know that many are going to testify we are trying to put these documents back into the schools because of our personal religious principals, I say to them that we should be displaying these documents so our children and our grandchildren can understand why they are living in the greatest nation on earth.

Mr. Chairman, with your permission I would like to pass out a sketch of what we believe would be a proper model for a display within the schools. I would also, Mr. Chairman, like to pass out written testimony from the Executive Director of the Eckert Youth Home

in Williston. Mr. Crawford would have been here to testify however he left Saturday to lead a team of 40 individual from the Williston area to El Salvador to help with the disaster from the Earthquake in that country.

Thank you Mr. Chairman, and I would be happy to answer any questions that the committee members may have.



Mr. Chairman  
Members of the Committee

My name is Ed Crawford, I'm from Williston, North Dakota and I have been the Executive Director of the Eckert Youth Homes for the past twenty years. I am in favor of SB2177 because I see the potential in it to help empower our youth to make more healthy and responsible choices.

A fundamental assumption in my work with youth is that young people equipped with a healthy conscience are best prepared to deal with the pressures and temptations of adolescence. The key word is *conscience*. The skyrocketing occurrence of teen-related crime and promiscuity strongly supports the notion that a compelling sense of right and wrong is missing in many of our youth.

There are three major channels through which conscience comes to our kids. They are the family, the church and the school. When these three basic support systems of American society are healthy and harmoniously working together, they will influence and facilitate the development of conscience more than all other influences in a child's life.

Of the three channels, first and foremost in importance is the family. Parents are the single most important source for conscience-equipping during their children's developmental years. The second channel is the church, which has traditionally defined the standard against which conscience can be measured. The third channel is the school. No other institution has such access to the minds of our children as the public school. Because of the time spent there, the values of teachers and the moral climate of the school are certain to have impact.

SB2177 provides a practical way for the schools to contribute to the strengthening of conscience, thus helping to empower our youth to make better choices. Here's how.

A conscience can be no stronger than the absoluteness of the right and wrong on which it is based. Therefore, the conscience that will provide maximum protection in the face of temptation is the conscience that has developed from unchangeable absolutes, absolutes that can be passed from one person to another, generation to generation. The Ten Commandments meet the criteria not only as unchangeable absolutes, but they also represent common ground in most American communities today.

Should SB2177 be passed, I am developing a patriotic display, containing the words of the Ten Commandments, that I believe could be posted on the walls of public schools that would satisfy the concerns of Church and State while facilitating the strengthening of conscience at the same time. Copies are attached (rough draft) for your review.

It was Hoding Carter who said, "there are two lasting gifts we can give to our children, one is roots, the other is wings." In no country on earth is the opportunity to do both more accessible than in this great land of ours and of our children. By utilizing the provisions of SB2177, the schools can be instrumental in reminding our kids that our roots are in harmony with the Ten Commandments and that freedom can only come on the wings of responsible choices made possible by a healthy conscience.

Ed Crawford  
2023 4<sup>th</sup> Ave. East  
Williston, North Dakota 58801  
Scrawfor@dia.net

**CONNIE M. HILDEBRAND**  
**421 EAST BRANDON DRIVE**  
**BISMARCK, ND 58503-0410**  
January 22, 2001

Chairman Freborg, Vice Chairman Flakoll, and Members of the Senate Education Committee:

My name is Connie Hildebrand. I am a North Dakota citizen and a resident of Bismarck, North Dakota. I also happen to be Christian, but that's not why I'm here today.

Today I wish to speak to SB 2177, and as it is described, "the display of the Ten Commandments as it relates to other documents of cultural, legal or historical significance which have influenced the legal and governmental systems of the United States and this state."

In the 1880's, when North Dakota was being settled, North Dakota had the highest number of ethnic groups of any state in the nation. Hawaii was second. In the 1990's it is reversed. Hawaii has the highest number of ethnic groups of any state in the nation. North Dakota is second. North Dakota has, at last count and growing, some 70 distinct ethnic groups including: German, Norwegian, Irish, English, Swedish, French, American Indian, Greek, East Indian, Puerto Rican, Slovak, Kurdish, Chinese, Korean, Italian, Mexican, Japanese, Hungarian, Bosnian, Pakistani, etc etc., each of which has a rich cultural, legal, and religious history.

Each of these cultures have also produced documents of significance to the United States *and* North Dakota, including the governmental systems of ancient Greece and Rome, the Babylonian Code of Hammurabi, the Hindu deity teachings, the teachings of Muhammad, the teachings of Buddha, the Magna Carta, the teachings of the Dalai Lama, and Confucius, and Baha'u'llah, the governmental formulations of the Iroquois Nation and, the teachings of Christ.

As a young woman, I was a member of the International Club at a North Dakota college and later, a member of an International Club in the city of New York. I have been a member of the International Club of Bismarck-Mandan for nearly ten years and, I assure you, there is richness to be gained from learning about one another and sharing together one's customs and one's beliefs.

But, I assure you, exchange and understanding, communication and respect, growth and human compassion cannot be hung on the walls of our schools and our classrooms, no matter how many cultural, legal, religious, and historical documents North Dakota agrees to hang there. As responsible legislators, I ask you to ask yourselves one very simple question, what are you trying to do by voting for this bill?

Respectfully submitted,



Connie M. Hildebrand

10225.0100

Fifty-seventh  
Legislative Assembly  
of North Dakota

**HOUSE BILL NO. 1128**

Introduced by

Representatives Drovdal, Kempenich, L. Thoreson

Senator Lyson

1 A BILL for an Act to create and enact a new section to chapter 15.1-06 of the North Dakota  
2 Century Code, relating to the display of the Ten Commandments in public schools.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** A new section to chapter 15.1-06 of the North Dakota Century Code is  
5 created and enacted as follows:

6 **Ten Commandments - Display.** An object or document containing the words of the  
7 Ten Commandments may be displayed in a public school classroom or public school building,  
8 or at any public school event, together with other documents of cultural, legal, or historical  
9 significance which have influenced the legal and governmental systems of the United States  
10 and this state. The display of an object or document containing the words of the Ten  
11 Commandments must be in the same manner and appearance generally as other objects and  
12 documents displayed and may not be presented or displayed in any fashion that results in  
13 calling attention to the object or document apart from the other displayed objects and  
14 documents.

Madam Chairman + Committee

As a life long citizen of N.D,  
I would like to express, why  
I would like to see the Commandments  
posted again.

When I went to school absolutes of  
right and wrong were taught, right  
was right and wrong was wrong.  
Today they are gone. Absolutes are  
not taught. Values clarification, teaches  
children to decide for themselves what  
is right and wrong.

Everyone can see that evil has  
increased since absolutes are gone.  
I strongly believe that the 10 commandments  
are not religious as some try to  
say they are, but are a code of  
behavior, for what is right and  
what is wrong.

Example - Thou shalt not steal.  
Who would like someone to steal  
from them? Does this mean a  
child in school can steal, by

---

calling it to religious, or can kill his teacher and get away with it because this is to religious.

It is simply a code of behavior that I feel is strongly needed again in our schools, instead of alot of money spent on Counseling and other programs. Till we can get back to absolutes were wasting our time and money on all these substitutes.

Submitted by  
Barbara Schulz  
325. W. Blvd  
Bismarck, N D 58501

SB 2177

To: CHAIRMAN RAE ANN KELSCH  
HOUSE EDUCATION COMMITTEE

Re: HB 1128 - Displaying Ten Commandments Hearing - January 23, 2001 - 9:00 a.m.

From: Gary R. Thune, NDSBA Legal Counsel  
Lobbyist No. 63

Chairman Kelsch and Members of the House Education Committee:

Due to a conflict in hearing schedules, I am unable to appear before your Committee this morning. Thank you for permitting me to submit this written testimony in opposition to House Bill 1128.

In the late 1970's, I served as legal counsel to the Grand Forks School District. When a patron of that district complained that the Ten Commandments were not posted in every classroom, as mandated by Section 15-47-10 of the North Dakota Century Code, it became "front page" news. It also prompted Professor Ben Ring and the ACLU to sue the Grand Forks School District, claiming this statute to be an unconstitutional violation of the Establishment Clause and the Free Exercise Clause of the United States Constitution. In 1980 the United States District Court agreed and no appeal was filed. Subsequently, the United States Supreme Court also struck down a Kentucky statute which sought to avoid constitutional problems with posting the Ten Commandments in public schools, by prohibiting the use of public funds for printing and posting these documents. North Dakota's Ten Commandments statute remained on the books until it was repealed in 1999.

Now the 57<sup>th</sup> Legislative Assembly is being asked to adopt a new, permissive Ten Commandments statute which would require including other cultural, legal or historical documents of significance to the legal or governmental systems of the United States and North Dakota. There is no requirement to include the basic tenets or principles of any other religions.

In my opinion, this proposed bill creates a false sense of legal security and is likely to result in an opportunity for either a public school district or the State of North Dakota to return to Court as a defendant in an Establishment Clause and Free Exercise Clause lawsuit. The teaching of the basic principles of various religions in a study of comparative religions is permitted. The identification of one religion's basic principles, to the exclusion of all others, is not likely to be upheld.

For these reasons, I appear in opposition to HB 1128.

Gary R. Thune



Proposed Amendments to Senate Bill 2177  
Prepared for Sen. Flakoll (1/24/01)  
LC Amendment # .0101

Page 1, Line 10, after "the period" insert

"The display of an object or document containing the words of the Ten Commandments must be in the same manner and appearance generally as other objects and documents displayed and may not be presented or displayed in any fashion that results in calling attention to the object or document apart from the other displayed objects and documents. ~~The cost of any object or document referenced in this section may not be paid for with government funds, unless the object or document is provided by a governmental entity.~~"

Testimony of Senator Stan Lyson  
Education Committee

March 13,  
~~2001~~, 2001

Mr. Chairman and Members of the Committee. My name is Stan Lyson, Senator from District 1, Williston, ND.

When I was first asked to sponsor a bill allowing the Ten Commandments to be displayed in our States Schools, I was a bit hesitant to do so. I then checked the wording of the United States Supreme Court when they were said to have ordered the removal of the Commandments from our schools. The words of the Supreme Court are: The states could not require the posting of the Ten Commandments in public schools.

I ask you now to look at Senate Bill 2177, it states that the document containing the words of the Ten Commandments may be displayed in a public school classroom or a public school building. My belief is that the Supreme Court was saying this is a local issue and they should not be required to display the Ten Commandments. This Senate Bill puts it back into the local school districts to make the decision.

Mr. Chairman and members of the committee, I personally believe that a nation cannot survive without a conscience, and the conscience of our nation was derived from these Commandments and placed into our Constitution. I believe these Commandments are a cultural and historical document and they should be allowed to be displayed within our schools along with other cultural historical documents, Declaration of Independence, The US Constitutional convention notes, The Bill of Rights, The Mayflower Compact and the Constitution of our great state.

These documents could help our students to understand what our forefathers beliefs were when this nation was established.

The Ten Commandments have been the base for our Civil and Criminal laws and yes for base of laws for nations throughout this world.

We cannot separate the religious history of this country from the government history of this country because they are intertwined. I think to cut off our history from our students; we are cutting off the roots of our nation.

I know that many are going to testify we are trying to put these documents back into the schools because of our personal religious principals, I say to them that we should be displaying these documents so our children and our grandchildren can understand why they are living in the greatest nation on earth.

Mr. Chairman, with your permission I would like to pass out a sketch of what we believe would be a proper model for a display within the schools. ~~I would like, Mr. Chairman, like to pass out a sketch of what we believe would be a proper model for a display within the schools. I would like, Mr. Chairman, like to pass out a sketch of what we believe would be a proper model for a display within the schools.~~ ~~from the [redacted] Director of the [redacted] Youth Home~~





NORTH DAKOTA  
SCHOOL BOARDS  
ASSOCIATION

March 5, 2001

Senator Freborg and Senate Education Committee Members,

Attached to this document, you will find the "Letter Opinion" of Attorney General Wayne Stenehjem. His opinion relates to the issues of allowing schools to have a moment of silence, posting religious documents, and student and/or teacher led prayer.

This opinion affirms our previous testimony that a moment of silence for reflection and posting of religious documents as part of an educational display are already permissible within the guidelines set forth by the courts. Therefore, no further legislation is required.

The Attorney General's opinion also clearly states that student and/or teacher led prayer in public schools has consistently been found unconstitutional. By passing the proposed legislation, the State is affirming the particular practice of prayer and will be positioning itself for a showdown over a constitutional issue. An issue, I might add, that has already been fought...and an outcome that has already been determined.

If the sections of HB1437, which are quite clearly unconstitutional, are removed, it would appear that the remainder of that bill and the documents bills are unnecessary legislation.

We urge defeat of HB1128 and SB2177 in order to avoid giving the false impression that passage of these bills is necessary in order to allow schools to have a moment of silence and post religious documents when, in fact, schools can already do this.

We urge defeat of HB1437 in order to avoid giving the false impression that passage of this bill will make student and/or teacher led prayer allowable, activities that the courts have repeatedly held unconstitutional.

Thank you for taking the time to review this "Opinion Letter" and for your consideration of this very difficult issue.

Bev Nielson, North Dakota School Boards Association



Wayne Stonehjem  
ATTORNEY GENERAL

STATE OF NORTH DAKOTA  
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL  
600 E BOULEVARD AVE DEPT 125  
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(701) 328-2210 FAX (701) 328-2226

LETTER OPINION  
2001-L-04

February 15, 2001

Honorable Aaron Krauter  
State Senator  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Senator Krauter:

Thank you for your February 6, 2001, letter requesting my opinion regarding the constitutionality of Engrossed House Bills 1128 and 1437 and Engrossed Senate Bill 2177. You request my assurance that a constitutional challenge to those bills would be unsuccessful or a recommendation as to how to amend the bills to assure that they survive any constitutional challenge. You also request my opinion on how to amend the bills so that any costs of defending a lawsuit and any damages would be assumed by the State rather than the individual teachers, administrators, school board members, or local school districts.

It is the responsibility of the Attorney General to defend the constitutionality of state statutes. Accordingly, if any of the bills passes and is signed by the Governor, this office may be called upon to defend it. If enacted, it is presumed "[c]ompliance with the constitutions of the state and of the United States [was] intended." N.D.C.C. § 1-02-38. Accordingly, this office would zealously defend the law.

Solicitor General Douglas Bahr addressed the questions posed in your letter in his testimony before the legislative committees hearing these bills. Mr. Bahr's testimony was provided at the request of the committee chairs. This letter supplements and documents Mr. Bahr's testimony.

In addressing your questions, I note Justice Brennan's statement that the United States Supreme Court's "historic duty to expound the meaning of the Constitution has encountered few issues more intricate or more demanding than that of the relationship between religion and the public schools." School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). With that statement in mind, I will respond to your questions as concretely as possible based upon the current case law in this complex and evolving area of the law.

### Engrossed Senate Bill 2177

Engrossed Senate Bill 2177 provides:

An object or document containing the words of the Ten Commandments may be displayed in a public school classroom or public school building, or at any public school event, together with other documents of cultural, legal, or historical significance, which have influenced the legal and governmental systems of the United States and this state. The display of an object or document containing the words of the Ten Commandments must be in the same manner and appearance generally as other objects and documents displayed and may not be presented or displayed in any fashion that results in calling attention to the object or document apart from the other displayed objects or documents.

Initially, I point out that any challenge to the posting of the Ten Commandments in a public school would likely be brought against a school district based upon a particular display. Any discussion regarding the constitutionality of SB 2177 assumes that the display complies with the requirements of the bill.

If SB 2177 is challenged directly, the challenger would be arguing the law is unconstitutional on its face, not that a school district's particular display is unconstitutional. The burden on one making a facial challenge to the constitutionality of a law is heavy. The United States Supreme Court has repeatedly explained that a facial challenge to a law is the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the law would be valid. National Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1988); Reno v. Flores, 507 U.S. 292, 300 (1993); Rust v. Sullivan, 500 U.S. 173, 183 (1991); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 514 (1990).

A number of courts have addressed whether the government's posting of the Ten Commandments is constitutional. In Stone v. Graham, 449 U.S. 39 (1980), the United States Supreme Court struck down a Kentucky statute that required the posting of a copy of the Ten Commandments on the wall of each public classroom. The Court found that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." Id. at 194. See also Ring v. Grand Forks Pub. Sch. Dist. No. 1, 483 F. Supp. 272 (D.N.D. 1980) (striking down North Dakota's Ten Commandments law which required the display of a plaque containing the Ten Commandments in a conspicuous place in every classroom); cf. Washegesic v. Bloomingdale Pub. Sch., 813 F. Supp. 559 (W.D. Mich. 1993) (holding unconstitutional portrait of Jesus Christ outside of principal's office), aff'd, 33 F.3d 679 (6<sup>th</sup> Cir. 1994),

cert. denied, 514 U.S. 1095 (1995); Joki v. Board of Educ. of the Schuylerville Cent. Sch. Dist., N.Y., 745 F. Supp. 823 (N.D.N.Y. 1990) (finding violative of First Amendment crucifixion mural outside of high school auditorium). Based upon Stone, Ring, and related cases, the posting of the Ten Commandments, by themselves, in a classroom or school would likely be found to violate the First Amendment.

However, neither Stone nor Ring went so far as to hold that the posting of the Ten Commandments in a school would always violate the constitution. In Stone the court noted:

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function.

449 U.S. at 194 (citation omitted). Similarly, in Ring the court distinguished the challenged law from a case where the Ten Commandments were posted with other religious and non-religious symbols. 483 F. Supp. at 274. See also Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667, 677 (E.D. Ky. 2000) (finding school's display of the Ten Commandments unconstitutional, but noting the displays were not in an area with other memorials and were not incorporated as part of a larger, secular display).

Although not in the school context, one court noted: "Despite the undeniably religious nature of the Ten Commandments, federal courts have generally concluded that if there are countervailing secular passages or symbols in the content of the display or if the context of the display detracts from its religious message then the display may be constitutional." Colorado v. Freedom from Religion Found., 898 P.2d 1013, 1023 (Colo. 1995) (holding monument containing the Ten Commandments displayed among other larger and more conspicuous monuments and tributes on the grounds of the state capitol did not violate Establishment Clause), cert. denied, 516 U.S. 1111 (1996). See also Anderson v. Salt Lake City Corp., 475 F.2d 29 (10<sup>th</sup> Cir. 1973), cert. denied, 414 U.S. 879 (1973) (holding granite monolith on courthouse grounds that is inscribed with the Ten Commandments and other religious and non-religious symbols does not violate the First Amendment because the Ten Commandments are being presented for their historical significance); Suhre v. Haywood County, N.C., 55 F. Supp. 2d 384 (W.D.N.C. 1999) (finding granite frieze in a courthouse did not violate establishment clause because the sculpture recounted historical development of the law). For cases finding that an isolated display of the Ten Commandments on government property violates the constitution, see Books v. City of Elkhart, Ind., 235 F.3d 292 (7<sup>th</sup> Cir. 2000) (finding display of monument inscribed with Ten Commandments on lawn of city's municipal building violated the establishment clause); Kimbly v. Lawrence County, Ind., 119 F.

Supp. 2d 856 (S.D. Ind. 2000) (enjoining the placement of a monument containing the Ten Commandments on the Indiana Statehouse grounds); American Civil Liberties Union of Ky. v. McCreary County, Ky., 96 F. Supp. 2d 679 (E.D. Ky. 2000) (finding posting of Ten Commandments in courthouse violated First Amendment); Harvey v. Cobb County, Ga., 811 F. Supp. 669, 678 (N.D. Ga. 1993) (placement of Ten Commandments alone in an alcove of the courthouse, high on the wall, with no countervailing secular passages or symbols had effect of endorsing religion), aff'd, 15 F.3d 1097 (11<sup>th</sup> Cir. 1994), cert denied, 511 U.S. 1129 (1994).

A display of the Ten Commandments as permitted by SB 2177 may serve a secular purpose—recognition of a historical, jurisprudential cornerstone of the American and North Dakota legal systems. See County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 652 (1989) (Stevens, J., concurring in part and dissenting in part); Books v. City of Elkhart, 235 F.3d at 302 (stating "[t]he text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order"). Courts, however, look beyond the plain language of a statute to determine the actual purpose of the law or action. "[I]t is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" Wallace v. Jaffree, 472 U.S. 38 (1985). For example, in Wallace the Supreme Court looked beyond the language of Alabama's statute providing for a period of silence in public schools and determined the statute's history revealed that the enactment had no secular purpose. See also Stone, 449 U.S. at 41 (finding Kentucky's law requiring the posting of the Ten Commandments unconstitutional despite the statute's "avowed" secular purpose).

In Stone, the Court specifically stated:

If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion it is not a permissible state objective under the Establishment Clause.

449 U.S. at 42. Although SB 2177 may have a secular purpose, if the testimony in support of House Bill 1128 emphasized the religious nature of the Ten Commandments and the need for our children to read and follow the principles embodied in the Ten Commandments, the bill's likelihood of surviving a constitutional challenge would be reduced.

The United States Supreme Court has explained that "[t]he context in which a symbol appears is critical because it may determine what viewers fairly understand to be the purpose of the display, and may negate any message of endorsement that the religious

symbol might otherwise evoke." See Clever v. Cherry Hill Township Bd. of Educ., 838 F. Supp. 929, 937 (D.N.J. 1993) (citing County of Allegheny, 492 U.S. at 573). SB 2177 provides that the display of the object or document containing the words of the Ten Commandments "must be in the same manner and appearance generally as other objects and documents displayed and may not be presented or displayed in any fashion that results in calling attention to the object or document apart from the other displayed objects or documents." When the Ten Commandments are displayed in this manner, courts are less likely to determine that an objective observer would believe the display is a governmental imprimatur to religion. Joining the Ten Commandments with other documents of cultural, legal, or historical significance detracts from the display's religious message. Such a display does not convey a message that the State approves or disapproves of any religious or non-religious choices or beliefs.

As noted, there are cases upholding the constitutionality of a display containing the Ten Commandments when the display contains other secular documents that serve a secular purpose and offset the religious message of the Ten Commandments. None of these cases, however, addresses the constitutionality of such a display in the school context. They involve courthouses and other public property. In school religion cases, the courts have applied a more stringent analysis because young minds are especially susceptible to influence and because students are captive audiences. Freedom from Religion Found., 898 P.2d at 1022-23. As noted in Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987):

The [Supreme] Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. . . . Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with private beliefs of the student and his or her family. Students are impressionable---and their attendance is involuntary.

(Citations omitted.) See also Lee v. Weisman, 505 U.S. 577, 592 (1992) (stating "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"). Thus, what is constitutional on other government property or in other government buildings may not be constitutional in a public school.

Based upon the above analysis, I believe SB 2177 would survive a facial challenge. The lack of case law directly on point prevents me, however, from providing any assurance. Whether a particular display would survive a challenge requires a highly fact specific analysis that can only be approached on a case-by-case basis. Freedom from Religion Found., 898 F.2d at 1026. Whether a particular display containing the

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February 15, 2001

Page 6

Ten Commandments is constitutional would depend on the nature of the display, including what secular documents are included in the display, the actual purpose of the display, and what a person would understand the purpose of the display to be based upon its contents and history.

You ask whether I have any proposed amendments to increase the likelihood SB 2177 will survive a constitutional challenge. One possible amendment is to add language prohibiting the display unless it is integrated into the school's curriculum. Another possible amendment would be to add language prohibiting the display unless the school district determines the primary purpose of the display is to serve a secular educational function.

I should point out that North Dakota law does not prohibit the display of the Ten Commandments in a public school or classroom. Any limitation on the display of the Ten Commandments in a public school is imposed by the First Amendment to the United States Constitution. Accordingly, passage of SB 2177 will not give school districts any more authority than they currently have. If posting the Ten Commandments as permitted by SB 2177 is constitutional, school districts can do that today whether or not SB 2177 is passed. If such a posting is not constitutional, SB 2177 will not change that fact.

#### **Engrossed House Bill 1128**

Engrossed House Bill 1128 provides:

The board of a school district may authorize the display of cultural, legal, historical, and religious documents in a classroom or elsewhere in a public school. The display of religious documents, if authorized, may not be in a manner that calls attention to or otherwise promotes any particular document.

Based upon the above discussion, I have some concerns with HB 1128. First, unlike SB 2177, HB 1128 does not require that the religious documents be displayed together with the cultural, legal, and historical documents. It simply identifies types of documents that may be displayed in a classroom or elsewhere in a public school. Thus, religious documents, such as the Ten Commandments, could be displayed in one location while cultural, legal, or historical documents are displayed in another location. This would draw undue attention to the religious nature of the Ten Commandments and is more likely to violate the First Amendment.

Furthermore, HB 1128 does not require or imply that the religious documents must be displayed for a secular educational purpose. This requirement is at least implied in SB 2177.

As with SB 2177, I believe HB 1128 would survive a facial challenge. Because HB 1128 grants greater discretion to school districts than SB 2177, I believe it is more likely that a display of religious documents under HB 1128 will be found unconstitutional. Again, the likelihood of a particular display surviving a challenge must be examined on a case-by-case basis.

#### **Engrossed House Bill 1437**

If adopted as engrossed, Engrossed House Bill 1437 would amend N.D.C.C. § 15.1-19-03 to provide:

The board of a school district shall allow a classroom teacher to observe a period of silence for meditation, reflection, or prayer for up to one minute at the beginning of each schoolday. In addition, the school board may authorize the voluntary recitation of a prayer by a teacher or student and<sup>1</sup> the pledge of allegiance. The board or the teacher shall inform students that these exercises are not meant to influence an individual's religious beliefs, rather that the exercises allow students to learn about this country's freedoms, including the freedom of religion.

HB 1437 contains three significant parts. The first requires that a school district allow a classroom teacher to observe a period of silence for meditation, reflection, or prayer for up to one minute at the beginning of each schoolday. In Wallace v. Jaffree, 472 U.S. 38 (1985), the United States Supreme Court struck down an Alabama statute that required a daily period of silence in public schools for meditation or voluntary prayer. In doing so, the Court looked to the legislative history of the statute and determined that there was no secular purpose. The Court noted:

The Court does not hold that the Establishment Clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer. To the contrary, the moment of silence statutes of many States should satisfy the Establishment Clause standard we have here applied. The Court holds only that Alabama has

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<sup>1</sup> Because a conjunctive "and" is used rather than a disjunctive "or," it appears HB 1437 requires the recitation of a prayer be accompanied by the Pledge of Allegiance. I recommend "and" be replaced with "or," and assume for purposes of this opinion that a teacher or student may recite a prayer, the Pledge of Allegiance, or both.



intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of payer.

472 U.S. at 84. See also Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464 (11<sup>th</sup> Cir. 1997) (upholding Georgia's Moment of Quiet Reflection in Schools Act).

Based upon Wallace and other case law, I believe it is likely that the first sentence of HB 1437 would be found constitutional. Its likelihood of success would be increased, however, if the specific reference to prayer in line 8 is removed. This in no way would prohibit students from praying during the period of silence. Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2281 (2000) ("nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday"); Chandler v. Siegelman, 230 F.3d 1313, 1316-17 (11<sup>th</sup> Cir. 2000).

The second portion of HB 1437 permits a school board to authorize the voluntary recitation of a prayer by a teacher or student. In 1962, the United States Supreme Court held that New York's program of daily classroom prayer violated the Establishment Clause of the United States Constitution. Engel v. Vitale, 370 U.S. 421 (1962). Since that time, the Supreme Court and other courts have repeatedly found school sponsored prayer to be unconstitutional. See, e.g., Santa Fe Indep. Sch. Dist., 120 S. Ct. 2266 (2000) (holding policy of permitting student-led, student-initiated prayer before football games violates Establishment Clause); Lee v. Weisman, 505 U.S. 577 (1992) (holding that a requirement that a student stand and remain silent during giving of "nonsectarian" prayer at graduation ceremony violated Establishment Clause); School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203 (1963) (holding unconstitutional a rule providing for opening exercises in public schools embracing reading of the Bible or recitation of the Lord's Prayer); American Civil Liberties Union of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1995) (finding school board's policy of allowing vote of senior class to determine whether prayer would be included in the high school graduation ceremonies was unconstitutional); Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160 (5<sup>th</sup> Cir. 1993) (finding school's practice of permitting coach of extracurricular basketball team to conduct prayers with team at practice and at end of games violated establishment clause); Altman v. Bedford Cent. Sch. Dist., 45 F. Supp. 2d 368 (S.D.N.Y. 1999) (holding school district's promotion of Earth worship and prayer to the Earth offended the First Amendment); Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582 (N.D. Miss. 1996) (finding organized prayer time before lunch violated establishment clause); Herdahl v. Pontotoc County Sch. Dist., 887 F. Supp. 902 (N.D. Miss. 1995) (enjoining practice of allowing student group to broadcast morning prayer over intercom and allowing student-led prayers in individual classrooms during school hours).

In Lee, the Supreme Court explained:

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions in Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), and School Dist. of Abington, supra, recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

505 U.S. at 592 (citations omitted).

The prayers permitted by HB 1437 will take place on government property, under the government's control, where students are required to attend. In some cases the prayer would be offered by the teacher, a government employee. Even when the prayer is offered by a student, the school is effectively coercing students who do not wish to hear or participate in the prayer to do so. Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473, 1488 (S.D. Miss. 1994) ("[i]f students are subjected to prayer in a 'captive audience' situation, the state, although not officially delivering the prayer, may be effectively coercing students who do not wish to hear or participate in a prayer to do so"), aff'd, 88 F.3d 274 (5<sup>th</sup> Cir. 1996). Students being able to excuse themselves from the prayer would not provide a defense to a claim of unconstitutionality. Schempp, 374 U.S. at 1573. For these reasons, it is very likely a court would find this portion of HB 1437 unconstitutional.

Although a school policy or practice which actively or surreptitiously encourages prayer is unconstitutional, I would like to emphasize that students may still voluntarily pray:

The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. . . . Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.

Santa Fe Indep. Sch. Dist., 120 S. Ct. at 2281. See also Chandler, 230 F.3d at 1316-17.

The final portion of HB 1437 permits a school board to authorize the voluntary recitation of the Pledge of Allegiance by a teacher or student. The bill does not require that a student offer the Pledge of Allegiance or stand during the Pledge of Allegiance. Based upon current case law, it is my opinion that this portion of HB 1437 is likely to be found constitutional.

In 1943, the United States Supreme Court held that a student could not be forced to salute the American flag and give the Pledge of Allegiance contrary to the student's religious beliefs. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Since that time courts have repeatedly affirmed that students cannot be required to salute the flag, say the Pledge of Allegiance, or stand while the Pledge of Allegiance is said. Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978) (finding unconstitutional New Jersey statute requiring school students to show full respect to flag by standing while the Pledge of Allegiance is being given); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973) (finding regulation requiring student who refuses to salute flag to either stand or leave classroom invalid); Banks v. Board of Pub. Instruction of Dade County, 314 F. Supp. 285 (S.D. Fla. 1970), aff'd 450 F.2d 1103 (5<sup>th</sup> Cir. 1971) (holding regulation requiring student to recite the Pledge of Allegiance to the flag or to stand quietly during the ceremony violates the First Amendment); Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437 (7<sup>th</sup> Cir. 1992) (stating that it is blatantly unconstitutional for the state to compel any person to cite the Pledge of Allegiance to the flag), cert. denied, 508 U.S. 950 (1993); cf. Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963) (finding it violated students' First Amendment rights to suspend them for refusing to stand for singing of the National Anthem).

The above cases did not hold that saying the Pledge of Allegiance in school violated the Establishment Clause. Rather, they held that requiring a person to state the Pledge of Allegiance or show respect to the Pledge of Allegiance violated an individual's freedom of speech and freedom of religion. Courts have repeatedly held that schools may lead the Pledge of Allegiance daily as long as students are free not to participate. Sherman, 980 F.2d at 439; Smith v. Denny, 280 F. Supp. 651 (E.D. Cal. 1968). Courts have also held the phrase "under God" in the Pledge of Allegiance does not make the pledge a prayer, whose recitation in public school would violate the Establishment Clause of the First Amendment. Sherman, 980 F.2d at 445-48; Denny, 280 F. Supp. at 654; cf. Sheldon, 221 F. Supp. at 774 ("[T]he singing of the National Anthem is not a religious but a patriot ceremony, intended to inspire devotion to and love of country. Any religious references are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation. The Star Spangled Banner may be

freely sung in the public schools, without fear of having the ceremony characterized as an 'establishment of religion' which violates the First Amendment.").

It is my opinion that the portion of HB 1437 that permits the school board to authorize the voluntary recitation of the Pledge of Allegiance by a teacher or student will likely be upheld as constitutional if challenged.

### **Legal Defense of the Bills**

You question how to best amend the bills so the cost of defending a lawsuit and any damages would be assumed by the State. The following language could be added to the bills to accomplish that purpose:

The state, through the office of attorney general, shall furnish legal counsel to defend a school district, school board, school board member, or school employee in any action brought against the school district, school board, school board employee, or school employee to recover damages for any act taken under this section in good faith. Except for judgments for punitive damages, the state shall indemnify and save and hold harmless a school district, school board, school board member, or school employee for any final judgment for any act taken under this section in good faith. A school district, school board, school board member, or school employee may not be defended or indemnified by the state if the school district, school board, school board member, or school employee does not give written notice of the action to the attorney general within ten days after being served with a summons, complaint, or other legal pleading or if the school district, school board, school board member, or school employee does not provide complete disclosure and cooperation in defense of the action.

If any of the bills is challenged, rather than the particular action of local school officials or employees, the State is already responsible to defend the bill. Because the statute would be challenged on its face, meaning little if any discovery would be conducted, it is likely the costs of defending the lawsuit would not be substantial.

The cost of defending a lawsuit against local school officials and employees may be more fact based and include the additional costs of discovery. Furthermore, if the plaintiff prevails, in addition to paying any monetary judgment, the defendant would likely be required to pay attorney's fees and costs. Although normally each side must pay its own attorney's fees in a lawsuit, a lawsuit challenging one of these bills would likely be brought under the federal civil rights act. Under the federal civil rights act the defendant would be required to pay all attorney's fees and costs to a prevailing party.

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Accordingly, if an amendment is added to any of the bills making the State responsible to defend and indemnify local school officials and employees for acts taken under the bill, a fiscal note should be attached to cover the costs of defending lawsuits and paying any judgments.

Although it is a legislative decision, I question the policy of requiring the State to defend and indemnify local school officials and employees for acts taken under the bills. HB 1128 and SB 2177 do not mandate that school officials and employees do anything. If local school officials or employees elect to display the Ten Commandments or any other religious documents, they do so based upon advice of their legal counsel and are responsible for their decision. This responsibility encourages well-reasoned and careful decisions about their course of action. The same analysis applies to the prayer and Pledge of Allegiance portions of HB 1437.

With regard to the period of silence portion of HB 1437, although the bill mandates school districts allow teachers to observe a period of silence, it does not require teachers to do so. Whether an individual teacher allows a period of silence is a decision of a non-state employee that the State should not have to defend or be financially responsible for.

I hope this letter assists in addressing the discussed bills.

Sincerely,

Wayne Stenehjem  
Attorney General

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