

**State of New York  
Office of the Attorney General**

**Report on  
Non-Public Education**



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Attorney General  
May 2002



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## **ADVISORY COMMITTEE'S STATEMENT OF PRINCIPLES**

Our Committee membership represents a variety of perspectives in the fields of education and law. We, however, all support the commitment expressed by the New York State Board of Regents and the Commissioner of Education to raise the academic achievement of all children in the State, including children enrolled in non-public schools. Towards this end, we have identified a number of initiatives that are worthy of consideration, and have asked the New York State Attorney General to opine on their legality under the provisions of the First Amendment of the United States Constitution and the Constitution of New York State.

The programmatic initiatives that we have identified would provide funding to students rather than schools. To the extent that these initiatives require additional funding to children who attend non-public schools, it is our assumption that such funds would not be taken from monies ordinarily earmarked for children who attend public schools. In this sense our Committee does not view education funding as a zero-sum game which pits the educational needs of one group of children against those of another. To the contrary, the Committee hopes that the net effect of these initiatives, if enacted, would be to increase the overall level of education spending in the State for the purpose of improving the overall level of academic performance.

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*Message From*

## **Attorney General Eliot Spitzer**

Ensuring that our children receive a quality education that prepares them for life in the twenty-first century is an objective that is shared by parents and the State. To help meet that obligation, the New York State Education Department has developed a clearly defined set of educational standards for all schoolchildren, and administers annual assessment tests to determine whether those standards are being met. Those tests are taken by almost all public school students, and by the vast majority of students attending non-public schools.

More than 500,000 New York schoolchildren receive their education at non-public schools. The State has long recognized that it has an interest in the education those children receive, and has undertaken to assist them to the extent permitted by law. More than sixty years ago, the New York State Constitution was amended to allow the State to provide non-public school children with transportation to and from school. And for more than thirty-five years, the State has lent textbooks and other educational materials to non-public school children.

During the past five years, there have been significant legal developments affecting what aid states can provide to non-public schools and their students. In 2000, the United States Supreme Court held that a Louisiana school district can use federal funds to purchase computers to be loaned to non-public schools within that district. In 1997, the Supreme Court approved of a New York City program to send public school teachers into non-public schools to provide special education services to their students.

The United States and New York State constitutions impose limits on the aid that the State may provide to non-public schools and students. For example, the Supreme Court has invalidated statutes that authorized the State to reimburse non-public schools for their costs of teachers' salaries and instructional materials. The Court has also invalidated state statutes that provided financial assistance to non-public schools for the maintenance and repair of school facilities, and programs that provided tax relief to the parents of non-public school children.

It is fair to say that the court decisions in this area have not always been consistent. In one case (Board of Education v. Allen), the Supreme Court upheld a New York law that allowed school districts to loan textbooks to children attending non-public schools, while in another case (Meek v. Pittenger) the Court invalidated a law allowing non-public schools to obtain state-funded maps. That prompted former Senator Moynihan to ask how the Court would treat an atlas, which is a book of maps.

Although the contours of the boundary defining what is constitutionally permissible may be somewhat imprecise, there is no doubt that the Supreme Court has recently expanded those boundaries. Changes in pedagogical approaches, curriculum and educational methods, practices and techniques have kept pace with, and occasionally prompted, the evolution in the law. As Supreme Court Justice Sandra Day O'Connor noted in her opinion in Mitchell v. Helms, "computers are now as necessary as were schoolbooks thirty years ago, and they play a somewhat similar role in the educational process."

The changes in both the law and the manner in which we approach education raise several interesting questions. First, does government need to reevaluate what resources it makes available to non-public school children in light of new technologies and teaching methods? Second, once the State imposes learning standards and assessment tests, should it make available to non-public school children programs that will assist them in meeting those standards?

Although there is much debate on the issue of government aid to non-public schools, that debate focuses almost exclusively on the hot-button issues of school vouchers and tuition tax credits. That debate, which will only be resolved in the courts, has crowded out any discussion of other measures that could enhance the education of non-public school children.

I believed that people who may disagree about the broader questions concerning aid to non-public school children might be able to agree on the viability of some particular programs that serve this goal. Therefore, in the spring of 2001 I asked a distinguished group of educators, academics and advocates to serve on an Advisory Committee.

I asked the Committee members to set aside the issues of vouchers and tuition tax credits, and to focus instead on proposals that would directly enhance the education received by students attending non-public schools. After the Committee reached a consensus on proposals, I undertook to have the Department of Law analyze those proposals in light of the federal and state constitutional questions that inevitably arise when government aids non-public school students.

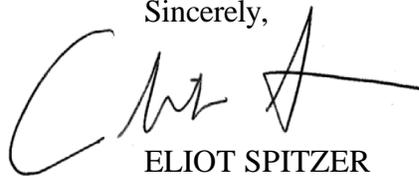
The Committee had its first meeting in July 2001, and has met regularly since then. The Committee has formulated four proposals, in the areas of (1) Academic Intervention Services; (2) Computer Equipment; (3) Teacher Training; and (4) Special Education. The Department of Law has concluded that there is no constitutional impediment to the implementation of these proposals.

Questions about the issue of aid to non-public school children reside at the intersection of the law and public policy. These proposals must therefore now move on to the Legislature, where they can be debated. It is my hope that this Report will lead to a reevaluation of the forms of assistance that the State offers to non-public schools and students, and the manner in which it delivers that assistance.

I would like to thank the members of the Advisory Committee for the dedication and creativity that they brought to this task. The members represent diverse viewpoints, and all possess firmly held opinions. But throughout the year-long process that has culminated with the issuance of this Report, the Committee members all had a singular determination to focus on devising permissible methods of improving the education received by non-public school children.

They have my gratitude, and deserve the gratitude of all who care about this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read 'Eliot Spitzer', with a large, sweeping initial 'E' and a long horizontal stroke at the end.

ELIOT SPITZER



# PROPOSALS FORMULATED BY THE ATTORNEY GENERAL'S ADVISORY COMMITTEE

## 1. Academic Intervention Services

**The Committee proposes that the State provide additional funding to school districts to defray the costs that they incur in providing Academic Intervention Services (“AIS”), and that they allow public school teachers to provide AIS to non-public school students on the premises of those students’ schools. As with public school students, eligibility for AIS for non-public school students would be based on a student’s performance on State assessment tests or on a school-district-developed procedure for making such determinations.**

Academic Intervention Services (“AIS”) are additional instruction intended to assist students who are at risk of not achieving the State learning standards in English language arts, mathematics, social studies and/or science, or who are at risk of not gaining the knowledge and skills needed to meet or exceed designated performance levels on State assessments. 8 NYCRR § 100.1(g). School districts are required to provide AIS for elementary and secondary school students upon making certain determinations, based primarily on performance on State assessment tests or on a district-developed or district-adopted procedure for making such determinations.

The Committee’s proposal for providing AIS to non-public school students incorporates the restrictions present in the New York City remedial instruction program upheld by the Supreme Court in *Agostini v. Felton*, 521 U.S. 203 (1997). Public school teachers are to be instructed that they are accountable only to their public school supervisors; that they can teach only those children who met the eligibility criteria for AIS established by their school districts; that their materials and equipment will be used only in the AIS program; that they cannot team-teach or engage in other cooperative instructional activities with non-public school teachers; that they cannot introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools; that religious symbols are to be removed from classrooms used to deliver AIS; and that consultations with a non-public school student’s regular classroom teacher must be limited to mutual professional concerns regarding the particular student’s education.

To ensure compliance with these rules, a publicly-employed field supervisor must make unannounced visits to each AIS teacher’s classroom on a regular basis.

## 2. Computer Hardware

**The Committee proposes that (1) the State provide school districts with additional per capita funding under N.Y. Educ. Law § 3602(26) to account for the number of children residing within the school district who attend non-public schools; and (2) upon request of the non-public school students, either individually or as a group, each school district be required to loan computer hardware to those students for use for instructional purposes.**

Pursuant to Education Law § 3602(26), the State provides local school districts with per capita funding for the purchase of computer hardware. The Committee's proposal would expand that funding to allow school districts to purchase computer hardware to be loaned to students within that district who attend non-public schools. The Committee intends for this program to be administratively similar to the state aid programs that provide school districts with per-capita funds for the purchase of library materials and computer software.

Non-public schools and their students will be prohibited from using the computers for religious instruction or worship, and the State will be required to implement a monitoring program to ensure compliance with those restrictions.

3. **Teacher Training**

**The Committee proposes reimbursing non-public schools and their teachers for two days each year of training (1) to properly administer, grade, compile and report the results of state-prepared examinations, such as the state assessment tests or the Regents examinations; and (2) to teach their students the subjects for which the State administers assessment tests.**

The State has long recognized the benefit to students when their teachers are well-versed in the most recent developments in curriculum and are familiar with the most up-to-date technological and pedagogical teaching techniques. For that reason, the State funds various programs to train public school teachers. For example, pursuant to section 316 of the Education Law, the State has created more than 120 teacher resource and computer training centers serving more than 650 school districts throughout the state.

The Committee proposes reimbursing non-public schools directly for the costs of training teachers to properly administer, grade, compile and report the results of state-prepared examinations, under the procedures for reimbursement set forth in Chapter 507 of the Laws of 1974, § 3, as amended by Chapter 903 of the Laws of 1985, § 52. For the training to teach their students the subjects for which the State administers assessment tests, the Committee proposes providing reimbursement directly to the non-public schools teachers, in an amount equal to the lesser of (i) the pro rata portion of their salary that they are foregoing in order to obtain such training or (ii) an amount equivalent to the pro rata portion of the average salary of public school teachers in the school districts in which the center is located.

4. **Special Education**

**The Committee proposes amending section 3602-c of the Education Law, by adding the following subdivision ten:**

**A pupil enrolled in a non-public school for whom instruction in the area of education for students with handicapping conditions is provided pursuant to the provisions of this section shall receive such instruction, and the counseling, psychological and social work services related to such instruction,**

**at the location identified in such pupil's Individualized Education Program to be educationally appropriate and in the pupil's best interest. Such location may include the non-public school in which the pupil is enrolled or a public school in the school district in which the pupil resides, or at another location identified in the Individualized Education Program.**

Pursuant to Education Law § 3602-c, local school districts are required to provide special education services to non-public school students who qualify for such services. The Committee proposes that section N.Y. Educ. Law § 3602-c be amended to clarify that, when appropriate, school districts may provide those services at the school attended by the non-public school student.



# LEGAL ANALYSIS OF THE DEPARTMENT OF LAW

## I. Introduction

Each of the proposals formulated by the Committee must be analyzed under the provisions of the First Amendment of the United States Constitution and the New York State Constitution. It is therefore necessary to provide a brief overview of the relevant constitutional provisions and the case law interpreting and applying those provisions.

### A. Establishment Clause

The United States Constitution provides: “Congress shall make no law respecting an establishment of religion . . .” U.S. Const. amend. I. In the context of government aid to non-public schools, including parochial schools, the Establishment Clause requires that a law have a secular legislative purpose and not have the principal or primary effect of advancing or inhibiting religion. See Agostini v. Felton, 521 U.S. 203, 233-34 (1997). The “three primary criteria” to evaluate whether government aid has the effect of advancing religion are whether the aid program (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement between the state and religion. Id. at 234.

For purposes of this report, we focus exclusively on the “primary effect” inquiry, because the Advisory Committee’s proposals clearly have a secular legislative purpose. See Mueller v. Allen, 463 U.S. 388, 395 (1983) (“An educated populace is essential to the political and economic health of any community, and a State’s efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State’s citizenry is well educated.”); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973) (“We do not question the propriety, and fully secular content, of New York’s interest in preserving a healthy and safe educational environment for all of its schoolchildren.”).

**B. Blaine Amendment**

Article XI, section 3, of the New York State Constitution (the “Blaine Amendment”) provides:

Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

N.Y. Const. art. XI, § 3.

This provision was ratified in 1894, and last amended in 1938. The drafters of this provision stated that its purpose was to protect the State’s public school system “from all sectarian influence or interference,” and to ensure that “public money shall not be used, directly or indirectly, to propagate [sic] denominational tenets or doctrines.” 2 Documents of 1894 Constitutional Convention Doc. 62, at 15 (1894). The drafters contemplated that the provision would, for example, “absolutely” prohibit distribution to sectarian schools of the proceedings of “the literature fund,” whereby all academies and high schools, sectarian and non-sectarian, were “entitled to a per capita allowance for every student who passed the Regents’ examinations, and also to suitable contribution to its library and scientific apparatus.” Id. at 16-17.

For purposes of assessing the Committee’s proposals under Article XI, section 3 of the New York Constitution, a critical question is whether the State’s actions constitute the use of, or permit the use of, public property or money “in aid or maintenance” of a religiously-affiliated school or of religious instruction in a school. N.Y. Const. art. XI, § 3. See, e.g., Board of Educ. v. Allen, 20 N.Y.2d 109, 115-16 (1967)(upholding statute requiring local public school authorities to loan textbooks free of charge to all children residing within the school district enrolled in certain grades in public or private

schools); People ex rel. Lewis v. Graves, 245 N.Y. 195, 198-99 (1927) (no violation of predecessor to N.Y. Const. art. XI, § 3 where public school teachers checked attendance of public school students whom, upon parents' request, were excused from public schools one half-hour per week to attend religious instruction in church schools); Scales v. Board of Educ., 41 Misc.2d 391, 397 (Sup. Ct. Nassau County 1963)(statute providing home teaching, as applied to request for home teaching by bed-ridden parochial school student, does not violate N.Y. Const. art. XI, § 3); Ford v. O'Shea, 136 Misc. 921, 923 (Sup. Ct. N.Y. County 1929)(board of education's leasing and conducting public school classes on premises owned by churches and Franciscan order, without more, did not violate predecessor to N.Y. Const. art. XI, § 3) aff'd without op., 228 A.D. 772 (1st Dep't 1930); La Rocca v. Board of Educ., 63 A.D.2d 1019, 1020 (2d Dep't 1978) (public school teacher violated N.Y. Const. art. XI, § 3 for "using her office for a prayer session during school hours and, also during school hours, repeatedly trying to induce students to become members of [religious organization] and to adopt its religious beliefs"); Lewis v. Allen, 11 A.D.2d 447, 451 (3d Dep't 1960)(rejecting challenge under predecessor to N.Y. Const. art. XI, § 3 to regulation recommending for use in schools a version of the pledge of allegiance that contained the words "under God"), aff'd without op., 14 N.Y.2d 867 (1964); cf. 64 St. Residences, Inc. v. City of New York, 4 N.Y.2d 268, 275-76 (1958) (sale of land by city to Fordham University at a price lower than that paid by city is not public subsidy to "denominational school," where Fordham agreed to develop land in accordance with urban renewal plan).

## II. Academic Intervention Services

Academic Intervention Services (“AIS”) refer to (1) “additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards as defined in 8 NYCRR § 100.1(t) and/or” (2) “student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance.” 8 NYCRR § 100.1(g)(2002). AIS is intended to “assist students who are at risk of not achieving the State learning standards in English language arts, mathematics, social studies and/or science, or who are at risk of not gaining the knowledge and skills needed to meet or exceed designated performance levels on State assessments.” Id.

Schools must provide AIS for elementary and secondary school students upon making certain determinations, based primarily on performance on State assessment tests or on a district-developed or district-adopted procedure for making such determinations. See id. § 100.2(ee). The Advisory Committee and the Department of Law have been advised by the State Education Department that school districts have a legal obligation to provide AIS for elementary and secondary school students enrolled in non-public schools as well as for those students in public schools.

The Advisory Committee has proposed that the State pay public school teachers to provide AIS to non-public school students on the premises of those students’ schools. As with public school students, eligibility for AIS for non-public school students would be based on performance on State assessment tests or on a school-district-developed or district-adopted procedure for making such determinations.

The Advisory Committee proposal to provide AIS to non-public school incorporates the restrictions present in the New York City remedial instruction program upheld by the Supreme Court in Agostini v. Felton, 521 U.S. 203 (1997). See infra. Accordingly, pursuant to the Committee’s AIS

proposal, public school teachers are to be instructed (i) that they are accountable only to their public school supervisors; (ii) that they can teach only those children who met the eligibility criteria for AIS established by their school districts; (iii) that their materials and equipment would be used only in the AIS program; (iv) that they cannot team-teach or engage in other cooperative instructional activities with non-public school teachers; (v) that they cannot introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools.

Additionally, the Committee's proposal mandates that religious symbols are to be removed from classrooms used to deliver AIS, and that consultations with a non-public school student's regular classroom teacher must be limited to mutual professional concerns regarding the particular student's education. To ensure compliance with these rules, a publicly-employed field supervisor must make unannounced visits to each AIS teacher's classroom on a regular basis, in a manner similar to the unannounced visits in the program upheld in Agostini.

**A. Establishment Clause**

Government action will be deemed to have the primary effect of advancing religion, and thus run afoul of the Establishment clause, if that proposal (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement with religion. See Agostini, 521 U.S. at 234.

Because government aid for secular instruction administered by religious school teachers in the schools where those teachers regularly teach presents serious Establishment Clause concerns, see, e.g., School Dist. v. Ball, 473 U.S. 373, 387 (1985); Levitt v. Committee for Public Educ. & Religious Liberty, 413 U.S. 472, 480 (1973), the Committee's AIS proposal advocates the use of public school teachers to provide AIS to non-public school students at their schools, and calls for the implementation of AIS in a manner identical to the New York City program that was upheld by the Supreme Court in Agostini v. Felton, 521 U.S. 203 (1997).

The program at issue in Agostini sent public school teachers into private schools to provide remedial instruction to their students during school hours pursuant to Title I of the Elementary and Secondary Education Act of 1965. Under that program, the teachers were instructed that (1) they were accountable only to their public school supervisors, (2) they had exclusive responsibility for selecting students for the program, (3) they could teach only those children who met the eligibility criteria for Title I, (4) their materials and equipment would be used only in the Title I program, (5) they could not team-teach or engage in other cooperative instructional activities with private school teachers, (6) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools, (7) all religious symbols were to be removed from classrooms used for Title I services, and (8) consultation with a student's regular classroom teacher had to be limited to mutual professional concerns regarding a particular student's education. See Agostini, 521 U.S. at 211-212. To ensure compliance with these rules, a publicly-employed field supervisor was to make at least one unannounced visit to each teacher's classroom every month. See id., at 212.

The Court concluded that the City's plan did not result in indoctrination of religion, because "there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination." Id., at 226. The Court also rejected the assumption that "the presence of Title I teachers in parochial school classrooms will, without more, create the impression of a 'symbolic union' between church and state." Id.

Moreover, the Court found that the city's Title I program did not impermissibly finance religious indoctrination, because Title I services are by law supplemental to regular curricula, and therefore do not relieve sectarian schools of the costs they otherwise would have borne in educating their students. See Id. at 228.

The Court also found that “where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis,” as in the Title I program, there is no “financial incentive to undertake religious indoctrination.” Id. at 231.

Finally, the Court concluded that the city’s Title I program did not excessively entangle the state with religion. The Court opined that two concerns -- that the Title I program would require administrative cooperation between the school district and parochial schools, and might increase the dangers of political divisiveness – were “insufficient by themselves to create an ‘excessive’ entanglement.” Id. at 233-34. The Court also rejected the concern that excessive entanglement would occur because the city’s Title I program would require pervasive monitoring by public authorities to ensure that Title I teachers did not inculcate religion:

Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employers.

Id. at 234.

We conclude that because the Committee’s AIS proposal closely resembles the Title I program upheld in Agostini, or at least contains the constitutionally relevant features of that program, it is not vulnerable to a facial Establishment Clause challenge.

**B. Blaine Amendment**

Because the Advisory Committee’s AIS proposal contains the constitutionally significant features of the program upheld in Agostini, Article XI, § 3 of the New York Constitution poses no additional constitutional barriers to implementation. No State property, credit, or money fills the coffers

of a religious school under the AIS proposal. Rather, as with the Title I program upheld in Agostini, the State pays for the public school teachers' salaries and for the instructional materials they use.

Although, but for the AIS proposal, the religious school that wishes to provide AIS to its students would have to spend its own money to provide AIS, this benefit to the religious schools does not provide a basis for finding a violation of the Blaine Amendment.

In Board of Educ. v. Allen, 20 N.Y.2d 109 (1967), the New York Court of Appeals interpreted N.Y. Const. art. XI, § 3, to uphold the predecessor to N.Y. Educ. Law § 701(3), which requires local public school authorities to loan textbooks free of charge to all children residing within the school district who are enrolled in grades seven through twelve of a public or private school that complies with the compulsory education law.

In so doing, the Court rejected the reasoning of Judd v. Board of Educ., 278 N.Y. 200 (1938), which held that a school district's furnishing of transportation with public funds for pupils to and from any private or parochial school violated the predecessor to N.Y. Const. art. XI, § 3. See Allen, 20 N.Y.2d at 115-16. The Judd Court had rejected the argument that the transportation program at issue aided the pupils of private and parochial schools, not the schools themselves, because the argument ignored not only "the spirit, purpose and intent of the constitutional provisions," Judd, 278 N.Y. at 211, but also the word "indirectly" in the text of the Blaine Amendment. See id. at 212. The Judd Court reasoned "Free transportation of pupils induces attendance at the school." Id.; see also Smith v. Donahue, 202 A.D. 656, 661 (3d Dep't 1922) (holding that even if statute authorized board of education to provide textbooks and school supplies to parochial school pupils, not parochial school, statute provided "indirect aid" to school in violation of predecessor to N.Y. Const. art. XI, § 3). The holding in Judd was overruled by amendment in November 1938.

In Allen, the Court of Appeals characterized Judd as determining that “although school busing was primarily for the benefit of the child, it still had the effect of giving an incidental benefit to sectarian schools and thus ran afoul of section 3 of article XI prohibiting indirect aid.” Allen, 20 N.Y.2d at 116. Then the Court held that the reasoning of Judd should not be followed:

The New York Constitution prohibits the use of public funds for a particular purpose; that is, aiding religiously affiliated schools. Certainly, not every State action which might entail some ultimate benefit to parochial schools is proscribed. . . . The architecture reflected in Judd would impede every form of legislation, the benefits of which, in some remote way, might inure to parochial schools. It is our view that the words ‘direct’ and ‘indirect’ relate solely to the means of attaining the prohibited end of aiding religion as such.

Id. at 115-16.

The Court concluded that the Legislature had intended the textbook statute to “bestow a public benefit upon all school children, regardless of their school affiliations. . . . Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.” Id. at 116.

We believe that the Committee’s AIS proposal does not violate the Blaine Amendment, because, by providing AIS in the manner proposed, the State does not use, or permit the use of, public property or money “in aid or maintenance” of a religiously-affiliated school or of religious instruction in a school. The primary beneficiaries of AIS services are the students in both public and non-public schools, not the schools those students attend.

### **III. Computer Hardware**

New York law currently provides that school districts are eligible for State funds for “approved expenses for” the purchase or lease of computer “equipment or terminals for instructional purposes.” N.Y. Educ. Law § 3602(26)(a). The amount of such funds to a school district is the lesser of “such approved expense” or the product of \$32.35, “the total aidable pupil units for operating aid,” and “the building aid ratio.” Id.

The Advisory Committee has proposed that (1) the State provide school districts with additional funds to purchase or lease computer hardware to also account for the number of pupils residing within the school district and enrolled in non-public schools, so that the per-pupil amount based on nonpublic school enrollment is equal to the per-pupil amount appropriated to the school district based on public school enrollment; and (2) upon requests from public and non-public school students, either individually or as a group, each school district be required to loan computer hardware to those students for use for instructional purposes. Non-public schools and their students will be prohibited from using the computers for religious instruction or worship, and the State will be required to implement a monitoring program to ensure compliance with those restrictions.

The Committee intends for its computer hardware proposal to be substantially similar to the provisions governing appropriations to school districts for, and loan to pupils, of library materials and computer software programs, as set forth in articles 15-A and 16 of the Education Law. See N.Y. Educ. Law §§ 711-12, 751-52. Accordingly, a brief exposition of those provisions is appropriate.

Under Article 15-A of the Education Law, boards of education, or their functional equivalents, must “designate school library materials,” including audio/visual materials and printed materials that meet certain criteria, to be used in schools in the district. N.Y. Educ. Law § 711(1),(2). The Commissioner of Education must apportion to each school district an amount equal to the cost of

school library materials purchased by the district, but no greater than the product of \$6.00 and the sum of public school enrollment, nonpublic school enrollment, and additional public enrollment within the school district. See id. § 711(3),(4).

These boards of education must loan “school library materials” so designated for use in New York public schools or approved by any board of education, trustees or other school authorities, to all pupils -- public and non-public -- in their districts, “upon request of an individual or group of individual pupils.” Id. § 712(1). “Such school library materials shall be required for use as a learning aid in a particular class or program, and shall be loaned for individual student use only. School library materials which are religious in nature or content shall not be purchased or loaned by a school district.” 8 NYCRR § 21.4(b).

Under Article 16 of the Education Law, boards of education, or their functional equivalents, must designate “software programs to be used in conjunction with computers of the school district.” N.Y. Educ. Law § 751(1). Such a software program is “a computer program which a pupil is required to use as a learning aid in a particular class in the school the pupil legally attends.” Id. § 751(2). Each school district receives funds that equal the cost of the software programs purchased by the district, but no greater than product of \$23.90 and the sum of public school district enrollment, nonpublic school enrollment, and additional public enrollment. See id. § 751(4).

Boards of education receiving funds to purchase these software programs must loan such software, “upon request of an individual or a group of individual pupils” to all pupils enrolled in schools in the district.” Id. § 752(1). “Software programs loaned to such pupils attending private schools shall be software programs which are designated for use in any public elementary or secondary schools of the state or are approved by any board of education, trustees or other school authorities.” Id. “Such computer software programs shall be required for use as a learning aid in a particular class or program.

Computer software programs which are religious in nature or content shall not be purchased or loaned by a school district.” 8 NYCRR § 21.3(b).

**A. Establishment Clause**

The Advisory Committee’s computer hardware proposal will survive the “primary effects” inquiry under the Establishment Clause, because it contains many of the constitutionally significant features of the federal school aid program (“Chapter 2”) upheld in Mitchell v. Helms, 530 U.S. 793 (2000). Under Chapter 2, state educational agencies channeled federal funds to local educational agencies (“LEAs”) to aid elementary and secondary schools by, among other things, using the funds to acquire instructional materials and equipment, including “computer software and hardware for instructional use.” See id. at 802. A public agency was required to control these federal funds and retain title to the materials and equipment. See id. at 802-03. LEAs were required to provide secular, neutral, and nonideological services, materials and equipment for the benefit of children enrolled in private nonprofit elementary and secondary schools in order to assure equitable participation of such children in the purposes and benefits of Chapter 2. See id.

Chapter 2 also required expenditures for such services, materials, and equipment to be “equal (consistent with the number of children to be served) to expenditures for programs . . . for children enrolled in the public schools of the [LEA].” Id. at 802. However, Chapter 2 prohibited any payment under the program for religious worship or instruction. See id. at 861.

The Mitchell Court considered only whether Chapter 2 had the primary effect of advancing religion, and only the first two of the three criteria set forth in Agostini, 521 U.S. at 234, for making this inquiry: whether the aid program results in governmental indoctrination, or defines its recipients by reference to religion. See Mitchell, 530 U.S. at 808 (plurality opinion of Thomas, J., with whom Rhenquist, C.J., Scalia, J., and Kennedy J., join); id. at 845 (O’Connor, J., with whom Breyer, J., joins, concurring in the judgment).

1. Defining Recipients By Reference To Religion

The Court concluded that Chapter 2 did not define aid recipients by reference to religion, and, in so doing, emphasized that federal funding in Chapter 2 is allocated on the basis of enrollment in public and non-public schools. See id. at 829 (plurality); id. at 846 (opinion of O’Connor, J.). In this case, the Committee’s computer hardware proposal does not define aid recipients by reference to religion, because it allocates aid to school districts for computer hardware based on the total enrollment of public and non-public school enrollment within the district, and because it permits all school students to request computer hardware without regard to whether they attend a religiously-affiliated school.

2. Religious Indoctrination Attributable to the Government

The Mitchell Court also found that the challenged Chapter 2 program did not result in religious indoctrination attributable to the government, but five members of the Court could not agree on a rationale for this conclusion.

The plurality opinion concluded that Chapter 2 does not result in governmental indoctrination, because (1) “it determines eligibility for aid neutrally,” i.e., without regard to schools’ religious affiliations or lack thereof; (2) , “it allocates that aid based on the private choices of the parents of schoolchildren,” i.e., allocates funding based on per-capita number of students at each school; and (3) “it does not provide aid that has an impermissible content,” i.e., requires that instructional materials be “secular, neutral and nonideological”. Id. at 829-30 (plurality opinion of Thomas, J., with whom Rhenquist, C.J., Scalia, J., and Kennedy J., join).

In her separate opinion, Justice O’Connor emphasized that Chapter 2 bore “the same hallmarks of the New York City Title I program that we found important in Agostini.” Id. at 848. (O’Connor, J., with whom Breyer, J., joins, concurring in the judgment). Like the plurality, Justice O’Connor noted that Chapter 2 aid “is available to assist all students, regardless of whether they attend

public or private nonprofit religious schools,” and that Chapter 2 required that all materials and equipment loaned must be “secular, neutral, and nonideological.” Id. Justice O’Connor also emphasized that under Chapter 2, religious schools “reap no financial benefit by virtue of receiving loans of materials and equipment,” because (1) Chapter 2 funds only “supplement the funds otherwise available to a religious school,” and could not “supplant funds from non-Federal sources”; and (2) no Chapter 2 funds “ever reach the coffers of a religious school,” because the funds are controlled by public agencies, and the relevant public agency must retain title to the materials and equipment loaned to public and private schools. Id. at 849-50. Justice O’Connor further noted that Chapter 2 expressly prohibited the making of any payment for religious worship or instruction. See id. at 849.

Because her opinion answers the question of why Chapter 2 does not result in governmental indoctrination on grounds narrower than that of the plurality, Justice O’Connor’s opinion controls on that issue. See Marks v. United States, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .”)(citation and internal quotation marks omitted); accord, Romano v. Oklahoma, 512 U.S. 1, 9 (1994).

The Committee’s computer hardware proposal contains many of the features of Chapter 2 that Justice O’Connor found significant, though not necessary, in reaching the conclusion that the Chapter 2 program at issue in Mitchell did not have the primary effect of advancing religion. See Mitchell, 530 U.S. at 867.

First, the Committee’s computer hardware proposal does not supplant funds otherwise available to a nonpublic school to obtain computer hardware, because the State-owned computer hardware is loaned to the students, not the schools themselves. Second, the Committee’s computer

hardware proposal will not lead State funds to reach the coffers of a religious school, again because the State-owned computer hardware is loaned to the students, not the schools themselves. Third, as with the aid program challenged in Mitchell, the Committee’s proposal expressly prohibits the use of computer hardware for religious instruction or worship. Fourth, computer hardware, standing alone, is presumably secular, neutral, and nonideological.

Importantly, while computer hardware may well be used for religious instruction, the Court agreed that religious schools cannot be presumed to use instructional materials and equipment to inculcate religion. See id. at 852-57 (opinion of O’Connor, J.); Id. at 819-25 (plurality opinion).

However, unlike the plurality, Justice O’Connor held that an Establishment Clause violation exists when “the aid in question actually is, or has been, used for religious purposes.” Id. at 857 (O’Connor, J., with whom Breyer, J., joins, concurring in the judgment). (citations omitted). This view is controlling. See DeStefano v. Emergency Housing Group, Inc., 247 F.3d 397, 419 (2d Cir. 2001). Thus, an as-applied challenge could be maintained if a non-public school violates the prohibition against using the computer hardware loaned to its students for religious instruction or worship.

Justices O’Connor also found that the adequacy of the Louisiana school district’s safeguards against actual diversion of instructional equipment for religious instruction or worship was relevant to determining whether the program at issue had the primary effect of advancing religion. See id. at 861-62, 867. Again, because this view is narrower than the plurality’s view, see id., at 833-834, it is controlling.

For the same reason, Justice O’Connor’s conclusion that the safeguards employed by Louisiana were “constitutionally sufficient,” id., at 861, is controlling. Those safeguards included a requirement that “all nonpublic schools . . . submit signed assurances that they will use Chapter 2 aid only

to supplement and not to supplant non-Federal funds, and that the instructional materials and equipment ‘will only be used for secular, neutral and nonideological purposes.’” Id. at 862 (citations omitted).

Justice O’Connor found significant that “the State retained the power to cut off aid to any school that breached an assurance,” and that the Louisiana Department of Education “conducts monitoring visits to each of the State’s LEA’s – and one or two of the nonpublic schools covered by the relevant LEA – once every three years.” Id. at 862 (citations omitted). Justice O’Connor further observed that:

At the local level, the Jefferson Parish public school system (JPPSS) requires nonpublic schools seeking Chapter 2 aid to submit applications, complete with specific project plans, for approval. The JPPSS then conducts annual monitoring visits to each of the nonpublic schools receiving Chapter 2 aid. On each visit, a JPPSS representative meets with a contact person from the nonpublic school and reviews with that person the school’s project plan and the manner in which the school has used the Chapter 2 materials and equipment to support its plan. The JPPSS representative also reminds the contact person of the prohibition on the use of Chapter 2 aid for religious purposes, and conducts a random sample of the school’s Chapter 2 materials and equipment to ensure that they are appropriately labeled and that the school has maintained a record of their usage. . . . If the monitoring does not satisfy the JPPSS representative, another visit is scheduled.

Id. at 862-63 (citations omitted).

Here, we assume that the monitoring of non-public schools to ensure compliance with the restrictions on the use of computer hardware loaned to their students will be substantially similar to the safeguards upheld by Justice O’Connor in Mitchell. However, because those safeguards were found to be constitutionally sufficient, not constitutionally required, school districts need not monitor precisely as in the program in Mitchell. For example, despite the requirement in the program in Mitchell that nonpublic schools seeking Chapter 2 aid submit applications for approval, the absence of applications in the Committee’s computer hardware proposal is not constitutionally relevant, because only the students, not the schools, can request and receive State-owned computer hardware. Nonetheless, to the extent that

nonpublic school teachers direct the instruction for which students use their State-owned computers, the presence of the kind of monitoring upheld in Mitchell is constitutionally significant.

3. Excessive Entanglement

Any monitoring in the Committee's computer hardware proposal must not produce an excessive entanglement with religion - an issue not expressly considered in Mitchell. To determine whether government entanglement with religion is excessive, a court must examine "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Lemon v. Kurtzman, 403 U.S. 602, 615 (1971). Entanglement is excessive only if it requires "comprehensive, discriminating, and continuing state surveillance" into the practices of religious organizations, id. at 619 (enforcement of restrictions on public aid to parochial schools), above and beyond routine regulatory interaction, see, e.g., Hernandez v. Commissioner, 490 U.S. 680, 696-98 (1989) (enforcement of tax rules governing charitable contributions to religious organizations); Walz v. Tax Commission, 397 U.S. 664, 674-76 (1970) (ascertaining for tax assessment purposes whether a religious organization owning property uses that property solely to conduct religious worship).

In this case, because a parochial school may decide to expedite student requests for computer hardware by itself aggregating and submitting their students' requests for computer hardware to the school district, a public school district may need to administratively cooperate with a parochial school to efficiently process such requests. Such cooperation is not likely to amount to an excessive entanglement with religion. See Agostini, 521 U.S. at 233-34 (holding that administrative cooperation between New York school district and parochial schools necessitated by city's Title I program was insufficient to create excessive entanglement).

Moreover, while the Committee’s computer hardware proposal does not specify in detail the monitoring of religious schools to ensure compliance with the restrictions placed on the use of the computer hardware, we believe that if such monitoring is substantially similar to the monitoring found constitutionally sufficient by Justices O’Connor and Breyer in Mitchell, a court is unlikely to find that such monitoring produces an excessive entanglement with religion.

In her opinion in Mitchell, in the course of defending the adequacy of the safeguards in the Chapter 2 program at issue, Justice O’Connor concluded that because religious school teachers should not be presumed to use instructional materials and equipment to inculcate religion, there was “no constitutional need for pervasive monitoring under the Chapter 2 program.” Mitchell, 530 U.S. at 861. In so concluding, Justice O’Connor relied on Agostini, 521 U.S. at 234, in which the Court rejected the concern that excessive entanglement would occur because New York City’s remedial instruction program required pervasive monitoring by public authorities to ensure that the teachers in the program did not inculcate religion. By relying on Agostini in this manner, Justice O’Connor implied that, on its face, the monitoring at issue in Mitchell is not the kind of pervasive monitoring that would produce an excessive entanglement with religion.

## **B. Blaine Amendment**

The Committee’s computer hardware will survive a facial challenge alleging that it violates the Blaine Amendment because under the Committee’s proposal, students, not religious schools, are the bailees of State-owned computer hardware.

The terms of the Blaine Amendment might appear to prohibit a loan of public property to a religious school: “Neither the state nor any subdivision thereof shall use its property . . . or authorize or permit [it] to be used, directly or indirectly, in aid or maintenance . . . of any school or institution of

learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.” N.Y. Const. art. XI, § 3 (emphasis added).

It was therefore constitutionally significant for purposes of the Blaine Amendment that the textbook statute upheld in Board of Educ. v. Allen, 20 N.Y.2d 109 (1967), provided that secular textbooks be loaned to the children enrolled in schools, not to the schools themselves.

Similarly, because it provided that students and not schools be the bailees of State-owned computer hardware, the Advisory Committee’s computer hardware proposal is not vulnerable to a facial challenge brought pursuant to the Blaine Amendment of the New York State Constitution.

#### **IV. Teacher Training**

To provide non-public school teachers with the same training currently afforded public school teachers, the Advisory Committee proposes to encourage non-public school teachers to avail themselves of teacher training (1) to properly administer, grade, compile and report the results of state-prepared examinations, such as the state assessment tests or the Regents examinations, and (2) to teach their students the subjects for which the State administers assessment tests.

For purposes of training teachers to properly administer, grade, compile and report the results of state-prepared examinations, the Committee proposes to reimburse nonpublic schools directly for the costs of such training, for no more than two days per teacher annually, under the procedures for reimbursement set forth in Chapter 507 of the Laws of 1974, § 3, as amended, which currently provides that the Commissioner of Education annually apportion to eligible non-public schools

an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

1974 N.Y. Laws 507, § 3, as amended; see also 8 NYCRR §§ 176.1-176.3 (2002).

Reimbursement cannot be approved except “upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.” 1974 N.Y. Laws 507, § 7. For purposes of this opinion, we assume without deciding that 1974 N.Y. Laws 507, § 3, as amended, does not already authorize reimbursement to nonpublic schools for the actual costs of training teachers to properly administer and report the results of state-prepared examinations.

For purposes of training non-public school teachers to teach their students the subjects for which the State administers assessment tests, the Committee proposes providing reimbursement directly

to the nonpublic schools teachers, for no more than two days per teacher annually, in an amount equal to the lesser of (i) the pro rata portion of their salary that they are forgoing in order to obtain training or (ii) an amount equivalent to the pro rata portion of the average salary of public school teachers in the school district in which the non-public school teacher works.

We note that pursuant to Section 316 of the Education Law the State already has provided for the creation of teacher resource and computer training centers throughout New York State. See N.Y. Education Law § 316. A teacher resource and computer training center is a site operated by a school district, board of cooperative educational services, or consortiums thereof, that is specifically established pursuant to section 316 of Education Law to provide professional support services to teachers within the state in order to:

(1) assist teachers, diagnose learning needs, experiment with the use of multiple instructional approaches, assess student outcomes, assess staff development needs and plans, and train other school personnel in effective pedagogical approaches;

(2) provide demonstration and training sites where teachers are trained, specifically in the use of computers as teaching aids; the criteria for school acquisition and use of computer equipment and software; and the evaluation of computer-related materials;

(3) develop and produce curricula and curricular materials designed to meet the educational needs of students being served through application of educational research or new or improved methods, practices, and techniques;

(4) provide training to improve the skills of teachers in order to enable such teachers to meet the special educational needs of the pupils they serve, and to familiarize such teachers with developments in curriculum formulation and educational research, including the manner in which the research can be used to improve teaching skills;

(5) provide a location where teachers may share resources, ideas, methods and approaches directly related to classroom instruction and become familiar with current teaching materials and products for use in their classrooms; and

(6) retrain teachers and other educational personnel to become better qualified to teach in subject areas necessary to prepare students for the developing high technology era, in the disciplines of mathematics, science and computer technology.

Id. § 316(1)(a).

New York State has established more than 120 teacher resource and computer training centers across New York State. In 2001, the State allocated more than \$30 million to support these centers, which serve more than 650 school districts.

**A. Establishment Clause**

Both aspects of the Committee's teacher training proposal comport with the requirements of the Establishment Clause. With respect to the proposal to reimburse nonpublic schools for the costs of training teachers to properly administer state-prepared examinations, Committee For Public Education & Religious Liberty v. Regan, 444 U.S. 646 (1980), is dispositive. In that case, the Supreme Court held that Chapter 507 of the Laws of 1974 complied with the Establishment Clause. The Court reasoned that this statute provided reimbursement only for "tests prepared by the State and administered on the premises by nonpublic school personnel," thereby ensuring that the nonpublic school had "no control whatsoever over the content of the tests," id. at 654, thus allowing "no substantial risk that the examinations could be used for religious educational purposes," id. at 656. Moreover, by providing for the auditing of State payments, this statute "ensur[ed] that only the actual costs incurred in providing the covered secular services are reimbursed out of state funds." Id. at 652.

The component of the Committee's proposal providing for reimbursement directly to the non-public school contains the constitutionally significant features identified in Regan. Reimbursement occurs only for instruction to teachers that is wholly secular in content. Moreover, the Committee's proposal provides for auditing by the State to ensure that only the actual costs incurred by the religious

schools in providing training to their teachers - training to properly administer, grade, compile and report the results of state-prepared examinations - are reimbursed out of state funds.

The other aspect of the Committee's proposal – providing reimbursement to nonpublic school teachers who participate in training to better teach their students in the subjects for which the State administers assessment tests – also comports with the requirements of the Establishment Clause. Again, the “three primary criteria” to evaluate whether government aid has the primary effect of advancing religion are whether the aid program (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement between the state and religion. Agostini, 521 U.S. at 234.

This aspect of the Committee's proposal satisfies these criteria. First, there is little risk of governmental indoctrination of religion, since teacher training reimbursement is limited to training teachers to teach their students the subjects for which the State administers assessment tests. Second, the proposal does not define its recipients by reference to religion, because reimbursable teacher training, such as training available at teacher training centers, is available to all teachers, not only non-public school teachers.

Finally, there is no risk that, on its face, the Committee's proposal will produce an excessive entanglement with religion because a “comprehensive, discriminating, and continuing state surveillance,” Lemon v. Kurtzman, 403 U.S. 602, 619 (1971), is not necessary to enforce compliance with the restriction on teacher training to the subjects for which the State administers assessment tests. The teacher reimbursement proposal covers the times the non-public school teacher spends participating in teacher training, not time spent teaching non-public school students. Therefore, any inquiry made by the State to enforce its restrictions on teacher reimbursement would be directed toward the entity providing the training, not the non-public school.

Where teacher training is provided by school district staff or by a non-sectarian organization retained by the district, see, e.g., N.Y. Educ. Law § 316, there is no risk of excessive entanglement with religion. Moreover, where public and non-public school teachers are trained together, there is even less reason to engage in the kind of pervasive monitoring that may produce an excessive entanglement with religion.

We conclude that the Committee’s teacher training proposal is not vulnerable to a facial challenge brought pursuant to the Establishment Clause.

**B. Blaine Amendment**

To comply with the Blaine Amendment, both components of the Committee’s teacher training proposal must be examined to determine whether they provide “aid or maintenance” in violation of Article XI, § 3 of the New York Constitution.

1. Examination and Inspection

Reimbursement to nonpublic schools by the State, as contemplated in the Committee’s proposal, does provide “aid or maintenance” to a religiously-affiliated school. However, such reimbursement does not violate Article XI, § 3 of the New York Constitution, because it falls within the Blaine Amendment’s exception for State aid “for examination and inspection.” N.Y. Const. art. XI, § 3.

The original drafters of Article XI, § 3 of the New York Constitution used the words “other than for examination or inspection” to clarify that the University of the State of New York continued to have the legal authority to administer Regents examinations in denominational schools connected with the University of the State of New York, issue certificates of the University to students in those schools that pass those examinations, and provide public aid “incidental” to examination and inspection. 2 Documents of 1894 Constitutional Convention Doc. 62, at 16 (1894). The “examination and inspection” clause was intended to make permissible the

supervision by the State University, and the system of regular examinations by which the efficiency of these [sectarian] institutions is tested . . . . We understand that the institutions themselves are very desirous of continuing the regents examinations, and of receiving the certificates of the University for such of their students as shall pass them. . . . That there may be no question of the authority of the University to continue these examinations, the words last above quoted have been introduced into this section.

Id. at 17.

We conclude that the component of the Committee’s proposal to directly reimburse non-public schools falls within the “examination and inspection” clause of N.Y. Const. art. XI, § 3, because that portion of the proposal provides reimbursement only for costs incurred in training teachers to properly administer, grade, compile and report the results of state-prepared examinations. While such State aid does not precisely cover the costs of actually administering such examinations, as does Chapter 507 of the Laws of 1974, as amended, the original drafters of N.Y. Const. art. XI, § 3 contemplated that the State aid to sectarian schools permitted under the “examination and inspection” clause would include State aid “incidental” to examination. 2 Documents of 1894 Constitutional Convention Doc. 62, at 16.

In reimbursing sectarian schools for the costs of training teachers to properly administer, grade, compile and report state-prepared examinations, the resulting State aid is properly deemed “incidental” to examination, because to properly administer state-prepared examinations, schools and their staffs must be trained how to do so.

## 2. Reimbursement of Non-Public School Teachers

To comply with the Blaine Amendment, the Committee’s proposal to provide reimbursement to non-public school teachers who avail themselves of state-funded teacher training must be examined to determine whether such payments from the State constitute “aid” to a religiously-affiliated school. N.Y. Const. art. XI, § 3.

In many important aspects, this component of the Committee’s proposal appears to fall within the scope of permissible programs contemplated by the Court of Appeals in Board of Educ. v. Allen, 20 N.Y.2d 109 (1967). In Allen, the Court upheld the textbook loan program at issue in that case, and in so doing, rejected the reasoning that the textbook program constituted indirect aid to religious nonpublic schools: “Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.” Id. at 116.

Here, the Committee intends its teacher training proposal not to assist non-public schools as such. Rather, its aim is to enhance the education non-public school students receive, by raising the proficiency of non-public school teachers in the subjects that the State considers sufficiently important to a child’s education to make the subject matter of the State’s assessment tests. The goal of the proposal is to enhance the quality of secular instruction afforded to students in nonpublic schools, a goal synonymous with the State’s motivation and intent in establishing and funding these centers, and in encouraging public school teachers to participate in their programs.

To be sure, a non-public school may well benefit from employing teachers who are better able to instruct students in certain secular topics by, for example, enhancing the school’s reputation as a provider of high quality education, or by making available monies in the school’s treasury that would have otherwise been used to train their teachers. But, Allen instructs that such benefits are properly classified as collateral, and therefore, cannot be deemed as the indirect “aid” to religious schools that the Blaine Amendment prohibits. See Allen, 20 N.Y.2d at 116. Indeed, even before the reasoning of Judd was rejected in Allen such benefits may be deemed too speculative to be properly characterized as indirect aid to a sectarian non-public school. See e.g. Scales v. Board of Educ., 41 Misc.2d 391, 397 (Sup. Ct. Nassau County 1963)(rejecting school district’s assertion that providing home teaching to a homebound student voluntarily enrolled in a sectarian non-public school would constitute prohibited

“indirect aid” under the Blaine Amendment)(“It is difficult to conceive how the parochial school will obtain any real advantage . . . The fact that home teaching will enable petitioner’s daughter to retain her level of achievement and earn promotion to the next higher grade . . . would seem to be no financial aid to the parochial school. Any benefits accruing to the parochial school, if indeed there be such, would seem too slight and remote to constitute indirect aid.”).

However, the Committee’s proposal departs from the textbook statute in Allen in one important respect. The statute in Allen provided loans of textbooks directly to public and nonpublic school children. In contrast, this component of the Committee’s proposal provides reimbursement directly to non-public school teachers, some of whom will be employees of religious schools.

This difference raises the concern that, under certain circumstances, State aid to the employees of a sectarian non-public school and the State aid specifically designated for the school in its corporate form are constitutionally indistinguishable for Blaine Amendment purposes, such as, for example, where the employees acts as agents of the school.

Such circumstances, however, do not exist in the Committee’s teacher training proposal. Because the employees receiving State funds under the Committee’s proposals are teachers, and because the condition of any financial benefit to such teachers is that they be trained to better teach their students in the subjects on the State-assessment tests, the benefit to the teachers, though employees of the religious school, cannot be deemed distinct from, or not incidental to, the intended benefit to the non-public school students: a higher quality of secular instruction in certain topic areas worthy of State testing.

We conclude that the Committee’s teacher training proposal are constitutional under the Establishment Clause and the Blaine Amendment to the New York Constitution.

## V. Special Education

Section 3602-c of the Education Law requires boards of education of all school districts to furnish “services” to pupils who are residents of New York and who attend non-public schools located in such school districts, upon the written request of the parent, guardian or persons legally having custody of any such pupil. N.Y. Educ. Law § 3602-c(3).

The statute defines “services” as “instruction in the areas of gifted pupils, career education and education for students with handicapping conditions, and counseling, psychological and social work services related to such instruction . . . provided that such instruction is given to pupils enrolled in the public schools of such district.” *Id.* § 3602-c(1)(a) (emphasis added). “Education for students with handicapping conditions” means “special education programs designed to serve persons who meet the definition of children with handicapping conditions set forth in [N.Y. Educ. Law § 4401(1)].” *Id.* § 3602-c(1)(d).

With respect to the locations at which the services authorized by N.Y. Educ. Law § 3602-c may be provided, section 3602-c(9) provides: “Pupils enrolled in non-public schools for whom services are provided pursuant to the provisions of this section shall receive such services in regular classes of the public school and shall not be provided such services separately from pupils regularly attending the public schools.” N.Y. Educ. Law § 3602-c(9).

With respect to special education services, the New York Court of Appeals has held that school districts are permitted, though not statutorily required, to provide special education services pursuant to N.Y. Educ. Law § 3602-c to non-public school pupils at the schools in which they are enrolled. See Board of Education v. Wieder, 72 N.Y.2d 174, 183-88 (1988). The Court explained that “the paramount principle that guides state law is concern for the handicapped child’s educational needs,” and that section 3602-c “does not limit the right and responsibility of educational authorities in

the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school.” Id. at 184.

Federal law governing special education also does not prohibit the location of special education services to be the non-public school. See 20 U.S.C. § 1412(a)(10)(A)(i)(II) (“[Special education and related services] may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law; 34 C.F.R. § 300.456 (a)(2002) (“Services provided to private school children with disabilities may be provided on-site at a child’s private school, including a religious school, to the extent consistent with law.”); see also Russman ex rel. Russman v. Board of Educ., 150 F.3d 219, 221-22 (2d Cir. 1998) (holding that federal law permits, but does not require, school district to provide special education services to nonpublic school student at the site of her school).

The Advisory Committee has been informed that, notwithstanding Wieder, the text of N.Y. Educ. Law § 3602-c(9) continues to confuse school district officials concerning the locations at which special education services may be provided to non-public school students. Accordingly, the Advisory Committee proposes that section 3602-c of the Education Law be amended to clarify that, when educationally appropriate, school districts may provide special education services to non-public school students at the non-public school attended by those students. Section 3602-c would be amended by adding a subdivision ten:

A pupil enrolled in a non-public school for whom instruction in the area of education for students with handicapping conditions is provided pursuant to the provisions of this section shall receive such instruction, and the counseling, psychological and social work services related to such instruction, at the location indicated in the pupil’s Individualized Education Program to be educationally appropriate and in the pupil’s best interest. Such location may be the non-public school in which the pupil is enrolled, a public school in the school district in which the pupil resides, or at another location identified in the Individualized Education Program.

This proposed amendment does not raise any concerns under the Establishment Clause or the Blaine Amendment, because it only clarifies the scope of school districts' existing authority with respect to special education services under N.Y. Educ. Law § 3602-c, as set forth in Wieder.

In any event, since Wieder, the United States Supreme Court has made clear that a school district's provision of special education services to a non-public school student on the premises of that student's school, without more, does not violate the Establishment Clause. See Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) (holding that Establishment Clause does not prohibit Arizona school district from providing deaf high school student a sign-language interpreter to accompany him to classes at a Catholic high school); see also Russman ex rel. Russman v. Sobol, 85 F.3d 1050, 1053-1054 (2d Cir. 1996), vacated on other grounds sub nom., 521 U.S. 1114 (1997).

We also conclude that the exercise of authority under N.Y. Educ. Law § 3602-c to provide special education services to students on the premises of a non-public school does not violate the Blaine Amendment for the same reasons that providing AIS on nonpublic school premises does not violate the Blaine Amendment. See supra Pt. II(B).