Statement by Seth L. Cooper Concerning Discovery Institute and the Decision in Kitzmiller v. Dover Area School Board Intelligent Design Case

December 21, 2005

The opinion of the federal court judge in Kitzmiller v. Dover Area School Board mischaracterized my role and actions on behalf of Discovery Institute in matters at issue in the case, making it necessary for me to set the record straight.

To be clear, prior to the filing of the lawsuit I never advised the members of the Dover Board in a privileged, attorney-client capacity. Further, I never advised members of the Dover Board to mandate the teaching of the theory of intelligent design or to adopt the ID policy at issue in the case. Rather, I strongly urged members of the Dover Board to either drop entirely the issue of alternatives to the teaching of evolution, or to only present scientific arguments both supporting and challenging the contemporary version of Darwin's theory and the chemical evolutionary theories for the origin of the first life. The Dover Board had their own legal counsel in their Solicitor and the public-interest law firm that they later hired. Members of the Dover Board who adopted the ID policy acted completely contrary to my strongest suggestions.

Page 100 of the PDF of Judge John Jones III's opinion for the U.S. District Court for the Middle District of Pennsylvania refers to me by name. This page, along with a few other references throughout the opinion, gives the impression that I advised and supported Dover Board Member William Buckingham and/or other Board Members in pursuing the course of action that the Dover Board took and in promulgating the ID policy that the Dover Board later adopted. But that impression is a totally false one. Unfortunately, I was neither deposed for the case nor called as a witness to testify. I was never even invited to participate in discovery or the trial to relate events as they actually happened. It is disappointing to see my actions and suggestions so mischaracterized through a judicial opinion when I was not in any way involved in the discovery or trial process. The only source in the record upon which the Judge could base his misportrayal of my actions and stated position to Board Members was the deposition and trial testimony of Dover Board Members, much of which the Judge himself has found to be contradictory or discreditable.

Taking things from the top, between August of 2003 and August of 2005 I served Discovery Institute's Center for Science & Culture as a legal and public policy analyst. In keeping with Discovery Institute's long-held public policy position, I frequently reiterated to legislators, school board members, teachers, parents and students across the country that the legally and pedagogically appropriate way to treat the topic of evolution in public schools is to fully teach the scientific arguments for and against the contemporary version of Darwin's theory as well chemical evolutionary scenarios for the origin of the first life. Although I served at an institution supporting scientific research into the new theory of intelligent design and consider myself a proponent of the same, in all my time at Discovery Institute I consistently held to our public policy position that public schools should not mandate the teaching of the theory of intelligent design.

In the spring of 2004, through an e-mailed newspaper article, I became aware of the controversy in Dover Township, PA, concerning the teaching of evolution. Proceeding to call Dover Board Member William Buckingham, I told him that his Board would run afoul of the First Amendment of the Constitution should it choose to require students to learn about creationism or to censor the teaching of the contemporary version of Darwin's theory or chemical origin of life scenarios. I also made clear to Buckingham that Discovery Institute does not support the mandating of the theory of intelligent design. Although our phone conversations touched upon matters of legality, they also concerned matters of education policy and curriculum that I did not consider privileged. I clearly and unequivocally identified myself as a legal and policy analyst for the Discovery Institute.

In the hopes of persuading Buckingham away from leading the Dover Board on any unconstitutional and unwise course of action concerning the teaching of evolution, I sent Buckingham a DVD titled Icons of Evolution, along with a companion study guide. Those materials do not include arguments for the theory of intelligent design, but instead contain critiques of textbook treatments of the contemporary version of Darwin's theory and the chemical origin of the first life. The content of the materials is in keeping with the U.S. Supreme Court's pronouncement in Edwards v. Aguillard (1987) that public school students may be taught prevailing scientific theories along with "scientific critiques of prevailing scientific theories." Even so, I never advocated that the material in Icons be given a preferred position in the curriculum or that it even be given "equal time."

It was simply my intent to provide Buckingham and his colleagues with a concrete option for teaching evolution in a full and fair manner--so as to involve the scientific arguments for the contemporary version of Darwin's theory and the chemical origin of life--along with some of the scientific criticisms that have been raised against those theories. I sought to provide him and the Board with a way of handling the topic of evolution without mandating the teaching of the theory of intelligent design or reading aloud any disclaimer mentioning it. Buckingham received the materials and later told me that the materials I sent him were the solution for their situation. Our correspondence thus ended, as I was led to believe that the Dover Board would not be requiring instruction in creationism or in the theory of intelligent design.

However, several weeks later I learned through news accounts that the Dover Board had obtained several copies of the intelligent design textbook Of Pandas & People (2d ed.) and planned on including them as part of the District's mandated curriculum. Subsequently, the Dover Board adopted the ID policy that was the subject of the ACLU's lawsuit. All through this time I reiterated to the Dover Board Members I came into contact with that the ID policy should be drastically revised, if not rescinded altogether. My comments in an Oct. 6 press release reiterate Discovery Institute’s policy position favoring the responsible teaching of scientific strengths and weaknesses of the contemporary version of Darwin’s theory and of chemical origin of life scenarios, but not the mandating of the theory of intelligent design. An August 25, 2005 USA Today article

by Jill Lawrence provides a largely correct account of one instance in which I attempted to dissuade the Dover Board from the course it had taken:

"Attorney Seth Cooper advised the Dover school board not to adopt its policy and even offered guidelines for change. ‘We do believe a lawsuit is certain in your situation,’ Cooper told Alan Bonsell, the school board curriculum chairman, in a Dec. 10, 2004, e-mail. ‘We strongly recommend some corrective action be taken.’"

That e-mail did not constitute attorney advice, but it did convey my urgent recommendations for policy withdrawal or revision. The lawsuit was filed by the ACLU on Dec. 14, 2004--the very same day Discovery Institute issued a press release calling for the withdrawal of the Dover Board’s ID policy.

Additional passages of Judge Jones' opinion bolster a misguided interpretation of my role in this matter on behalf of Discovery Institute. Page 122 of Judge Jones' opinion states that Discovery Institute was one of only two outside organizations that the Board consulted prior to its October 18, 2004 curriculum change vote, and that the purpose of such contacts was to obtain only legal advice. Also, on page 134, Judge Jones writes that the Dover Board "relied" upon legal advice by the Discovery Institute and another organization.

I take strong exception to the Judge's characterization of Discovery Institute--a secular public-policy think-tank and emphatically not a party to the lawsuit--as a culturally religious organization. Also, these references by the Judge leave open the impression that Discovery Institute somehow advised the Dover Board to adopt its ID policy. But that is completely false. The strong suggestions I gave to Buckingham prior to that vote touched upon legal matters, but my recommendations were disharmonious and completely at odds with the ID policy that the Board eventually adopted. Neither I nor anyone at Discovery Institute had any knowledge or role whatsoever in the drafting of the ID policy that the Dover Board adopted.

It should also be noted that, contrary to deposition testimony provided by Dover Board Members, neither myself nor Discovery Institute attorney Mark Ryland ever offered to represent the Dover Board. Subsequent to the ACLU's filing the lawsuit and Discovery Institute's own press release urging the ID policy's withdrawal, I met with three members of the Dover Board. I implored the Board Members in direct terms to withdraw or significantly alter their ID policy. A number of days thereafter, attorney Mark Ryland and I again met with those same three Board Members, urging them to withdraw the policy or to substantially revise it and hire as counsel local Pennsylvania attorneys that we had recommended to them. Consistent with the Dover Board's previous actions at every stage of its local evolution controversy, the Dover Board chose to completely disregard our legal and policy recommendations. As noted above, the Dover Board had its own legal counsel and ultimately chose its own course of action.

Seth L. Cooper
Former Discovery Institute Attorney