/* This case is reported as 550 N.E. 2d 240. Each time comprehensive AIDS education is proposed, objections are made to the curriculum due to some parents religious disagreement with the sexual content of the plans. In this case, a group of parents made a constitutional challenge to mandatory AIDS education. A highly divided court finds some circumstances in which such objections might be lawful-- despite the emergency nature of the need for such education. */
John WARE et al., Appellants,
v.
VALLEY STREAM HIGH SCHOOL
DISTRICT et al., Respondents.
Court of Appeals of New York.
/* The Court of Appeals is the highest state court in New York. The Supreme Court of New York is a trial court. */

Dec. 19, 1989.

OPINION OF THE COURT
KAYE, Judge.
In response to the alarming spread of AIDS, the Commissioner of Education has promulgated regulations requiring all primary and secondary school students in the State to receive extensive instruction about the disease. Plaintiffs, by this action, challenge the regulations as violative of their First Amendment right to freely exercise their religious beliefs. The Appellate Division affirmed Supreme Court's summary dismissal of the complaint. While plaintiffs ultimately must meet a high threshold of proof to sustain their contentions, on this factual record we conclude that summary rejection of their assertion of fundamental constitutional values was inappropriate, and we therefore modify the Appellate Division order and reinstate the amended complaint challenging defendants' AIDS curriculum.
The individual plaintiffs are members of the Plymouth Brethren, a religious organization of approximately 35,000 adherents worldwide, 2,000 of whom live in the United States. Plaintiff Foster Church, Inc., a New York religious corporation, owns the group's real property and other tangible assets. In this State there are two Brethren communities-known as "local gatherings" or "fellowships"-one in Valley Stream (with 140 members, including the named plaintiffs) and one in Rochester (with 120 members).
As the Appellate Division noted, the Brethren are a devoutly religious group established in the 1820's by Irish Christians who had become disenchanted with the established churches of the period (150 A.D.2d 14, 16, 545 N.Y.S.2d 316). Their faith has

consistently been dedicated to strict adherence to Biblical teachings. Fundamental to the Brethren creed is a precept of spiritual separatism by which members seek to distance themselves from all things they consider evil. Accordingly, the Brethren spend much of their time in group prayer and they shun many modern technological innovations they consider evil.
Plaintiffs complain that they are now faced with evil in the form of the mandate that each school district promulgate an AIDS curriculum for its elementary and secondary school students. Specifically, the regulations require that elementary schools provide such instruction as part of the health education program for all pupils beginning in kindergarten (8 NYCRR 135.-3[b][2]); secondary schools similarly must incorporate AIDS instruction into the required health instruction courses (8 NYCRR 135.3[c][2]).
/* This highlights the comprehensive nature of the education. */

Each curriculum must include instruction concerning the nature of the disease, methods of transmission and methods of prevention (8 NYCRR 135.3[b][2]). Recognizing the delicacy of some of the subject matter, the regulations further provide that: "No pupil shall be required to receive instruction concerning the methods of prevention of AIDS if the parent or legal guardian of such pupil has filed with the principal of the school which the pupil attends a written request that the pupil not participate in such instruction, with an assurance that the pupil will receive such instruction at home." (8 NYCRR 135[b][2]; [c][2].)
/* This provision is unusual in sex education statutes. Normally parents may prevent their children from receiving any such education. The New York law truly mandates comprehensive education. */
Plaintiffs are directly affected by the regulations requiring AIDS instruction in that approximately 35 Brethren children attend public schools in the Valley Stream High School District, where-beginning with the second semester of the 1988-1989 school year-the secondary school curriculum includes 22 lessons concerning AIDS.
In November 1988, plaintiffs asked the school district to exempt their children from the entire AIDS curriculum. That request was denied on the ground that the regulations do not authorize a local board to grant a complete exemption. The board did. however, exempt Brethren children from the segment of the curriculum labeled "Prevention," consisting of five lessons in how abstinence from illegal intravenous drug use and sexual activity can prevent the transmission of AIDS. Lessons the children must attend include "Practice skills in saying no,"

"Know ways the AIDS virus can and cannot be transmitted," and "Recognize and evaluate media messages regarding sexuality." As the school superintendent wrote plaintiffs, "We are still prepared to assist you in reasonable ways to develop your appeal [to the Commissioner of Education] for exemption from this instruction as we are not in disagreement with your position, but rather are bound by State Education Department directives."

In February 1989, plaintiffs simultaneously filed this lawsuit and a petition to the Commissioner on behalf of all children living in the Valley Stream and Rochester fellowships. The lawsuit was instituted against the Valley Stream High School District, the Commissioner and the State for a declaration that the regulations compelling AIDS-related health instruction violated both plaintiffs' constitutional rights to freely exercise their religion and their privacy right to rear their children. Plaintiffs' administrative application to the Commissioner-made pursuant to section 16.2 of the Rules of the Board of Regents (8 NYCRR 16.2) [footnote 1] and Education Law 3204(5) [footnote 2] sought a religious exemption from all aspects of the AIDS curriculum.

Brethren children have already been exempted by the school district from the portion of the health and hygiene curriculum relating to human sexuality.

In both their complaint and their administrative petition, plaintiffs asserted that the AIDS curriculum conflicts with their strictly held religious belief that followers not engage in sexual relations outside of marriage and not be exposed to instruction concerning sexuality or morality other than that which is imparted by the community. Plaintiffs further urged that an order exempting their children from AIDS instruction would not present a danger to the public, in light of the improbability of their children's participation in activities that transmit AIDS.

/* It appears that the attorneys for the plaintiffs are conceding that if there was a risk of transmission that the public health aspects of the case would over-ride their objections. */

On March 3, 1989. Supreme Court granted the Commissioner's

/* The Supreme Court of New York is the TRIAL court, not the appeals court of last resort. */

request for a stay pending the determination of the administrative petition. Shortly thereafter the Commissioner denied plaintiffs' application without passing on their constitutional claim, observing that his office was "not the appropriate forum for litigating novel questions of constitutional law."

While not questioning the sincerity of plaintiffs' religious convictions, the Commissioner denied the request on the ground

that their claims were outweighed by the State's interest in educating all students about AIDS. "At this point in the history of the disease." the Commissioner wrote, "it is well recognized that education is the most powerful and important weapon against the spread of AIDS. Clearly, immediate and universal public education must play a primary role in curbing a disease which already has had such catastrophic effects." The Commissioner further noted that some members of the Brethren may fall short of community expectations, and children may leave in pursuit of alternative life-styles -- concluding that plaintiffs' argument was "not compelling." Finally, the Commissioner admonished the local board for its failure to implement the exemption it had allowed the Brethren from instruction in AIDS prevention. Brethren children, like all other students in the physical education classes had been given pamphlets entitled "The Wellness Way: Understanding and Preventing AIDS," which contained advice to "use latex condoms plus spermicide" "if you can't be sure your partner is not infected with the virus," and to "limit the number of sexual partners to reduce your chance of exposure to the virus."

Following the Commissioner's decision plaintiffs moved in Supreme Court for summary judgment, In support of this motion plaintiffs relied upon their verified amended complaint, a recent study of the Brethren by an English academic, and two joint affirmations of plaintiffs, one of which contained an essay- "We Have a Life of our Own" -- outlining the religious and ethical principles the Brethren follow, and the manner in which members guide the lives of their children in accordance with the tenets of their faith, Based on these submissions, plaintiffs' relevant factual allegations may be summarized as follows,

First, the Plymouth Brethren are an identifiable religious group with a long history of maintaining a cohesive community separated and insulated from society. Members-who have been accorded "conscientious objector" status by the Selective Service System- are strongly moral and principled individuals practicing and reinforcing personal purity and other exemplary moral behavior, Apart from the practical necessity for this very small group to attend public school and earn a livelihood in the community, members' associations are limited to other Brethren.

Second, plaintiffs' children are not permitted to socialize with nonmember children after school, or even to eat with them at school, The Brethren do not allow television or radio, and they do not see movies or read magazines. Their lives are spent in worship, or in social activities limited to association with other members under the constant moral guidance and supervision of parents and other community adults in an "extended family."

Third, insistence upon rigorous morality is interwoven with the movement's strong sense of separateness. The central principle of the Brethren's religion is the obligation to "separate from evil." Even to know the details of evil is regarded as subversive. This injunction forms the basis of their teaching and practice.
Fourth, in that the Brethren condemn all sexual relations outside of marriage as evil and the details of that evil as subversive, "[t]he religious tenets of its members flatly * * * forbid exposure to instruction concerning sexual relations and moral teachings other than those imparted by members of the community to members of the community." Consequently, plaintiffs believe that their children's exposure to the contents of the AIDS curriculum is inimical to their religious, moral, ethical and personal well-being. In plaintiffs' own words: "to expose our children to the detail of evil amplified in the entire sex, drug and AIDS curriculum would undermine the foundations of our faith and scar the moral values which have been instilled into our children from their very earliest days and could even jeopardize their place in the holy fellowship of God's Son, our Lord Jesus Christ, if they were diverted from a path of righteousness."
Fifth, exposure to the AIDS curriculum would undermine the Brethren's ability to guide their children's moral lives in accordance with their faith. In short, as plaintiffs affirmed, such exposure "carries with it the very real threat of undermining [plaintiff's] religious community and religious practice."
Sixth, by reason of the extent to which the Brethren involve themselves in instilling exemplary behavior in their children including the teaching of the moral and health dangers of AIDS, the abstinence from all sexual relations outside of marriage, and the avoidance of illegal drugs in order to remain physically and spiritually "pure "-no public health risk will result from the exemption. Whatever the failings of society at large in educating children to avoid the dangerous and unhealthy practices by which AIDS is transmitted, in Brethren society such instruction is successful.
/* A second time in which the Brethren appear to concede that if there is even a risk of lack of education resulting in transmission that a mandatory curriculum would be appropriate. */
Finally, Brethren "children have been exposed to school disciplinary sanction by reason of their justified refusal to participate in mandatory AIDS-related instruction."
Defendants separately cross-moved for summary, judgment, arguing that plaintiffs' free exercise rights would not be violated by merely exposing their children to the information contained in

the AIDS curriculum; they urged, moreover, that the State has a compelling interest in educating its citizens to protect them from the dangers of AIDS. Defendants particularly disputed plaintiffs' allegation that they are part of an isolated community, pointing to the degree to which they are "mixed-in" and "integrated" with the general community. Defendants alleged that the need to educate plaintiffs' children about AIDS is further underscored by the possibility however remote- that disaffected members may leave or be expelled from the confines of the faith.

Supreme Court granted defendants' motions for summary judgment. The court found that plaintiffs were integrated into the local community and not outside the zone of persons in need of protection from a known hazard, that the mandated instruction was not contrary to plaintiffs' religious beliefs or destructive of the community as a whole, and that in any event compelling State interests justify the requirement. The court further upheld the Commissioner's determination on the ground that it had a rational basis. The Appellate Division affirmed, but on a somewhat different rationale. While acknowledging that the compulsory exposure of plaintiffs' children to the details of evil which their religion instructs them to avoid may burden plaintiffs' religious rights, the court nevertheless concluded that the State's compelling interest in AIDS education justified that burden.

On plaintiffs' appeal, we now modify the Appellate Division order by reversing the award of summary judgment against them.

I.

[1] As both this court and the United States Supreme Court have long recognized, public education is committed to the control of State and local school authorities. The Commissioner of Education and local officials are vested with wide discretion in the management of school affairs (see, Matter of Board of Educ. v. Ambach, 70 N.Y.2d 501, 510-511, 522 N.Y.S.2d 831, 517 N.E.2d 509; Bullock v. Cooley, 225 N.Y. 566, 576-577, 122 N.E. 630; Board of Educ. v. Pica, 457 U.S. 853, 863-864, 102 S.Ct. 2799, 2806-2807, 73 L.Ed.2d 435). Time and again the courts have made clear that the judiciary should not lightly intrude in the resolution of school conflicts, which usually are best left to the education authorities (see, Board of Educ. v. Nyquist, 57 N.Y.2d 27, 38-39, 453 N.Y.S.2d 643, 439 N.E.2d 359, appeal dismissed 459 U.S. 1138, 103 S.Ct. 775, 74 L.Ed.2d 986; Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228). Deference to the education decisions of State and local officials-particularly in matters of curriculum-embodies several important concerns, including preservation of local democratic

control over educational policy; protection of teachers' academic freedom; maintenance of policies that comport with the views of educational experts; and formulation of curriculum so as to transmit community values and foster the free exchange of ideas (see, Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629; Strossen, "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom, 47 Ohio St.L.J. 333, 354-355 [1986]).

[2] Ordinarily, judicial intervention is appropriate only when school conflicts "directly and sharply implicate basic constitutional values." (Epperson v. Arkansas, supra, 393 U.S. at 104, 89 S.Ct. at 270.) The discretion of the school authorities, however broad, plainly must be "exercised in a manner that comports with the transcendent imperatives of the First Amendment."(Board of Educ. v. Pico, supra, 457 U.S. at 864, 102 S.Ct. at 2806.)

Precisely that distinction was recognized in the decision and order by which the Commissioner rejected plaintiffs' application for a total exemption from the AIDS curriculum. Were the test merely one of rational basis, unquestionably the Commissioner's determination, evidencing care and sensitivity to plaintiffs' predicament, would be sustained. Indeed, there would be much to be said for upholding the determination on the Commissioner's stated ground that a total exemption from a portion of the school curriculum "sends the message that a pupil's participation in AIDS education is negotiable."

But as the Commissioner himself noted, plaintiffs' contention was that denial of a total exemption burdens their constitutional right of free exercise and an administrative appeal is not the appropriate forum for resolving "novel questions of constitutional law." The cases make clear that a detailed factual showing is necessary in order to sustain a contention that challenged instruction burdens sincerely held religious beliefs; such issues are plainly inappropriate for administrative resolution. Moreover, given the findings of fact and conclusions of law necessary for any such plaintiff to prevail-these plaintiffs may well be among the few that could even survive summary judgment-there need be no fear that the AIDS curriculum, or any other part of defendants' curriculum, would be widely regarded as "negotiable."

The novel question of constitutional law reserved by the Commissioner now becomes the focus of this appeal.

II.

[a] Reflecting the rich religious pluralism that characterizes and distinguishes this Nation, the First Amendment to the Federal

Constitution enjoins the State from enacting any laws "prohibiting the free exercise" of religion. [footnote 3] Under this clause a claimant may seek a religious exemption from a government requirement linked to a benefit program such as public education (Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15; see generally, Dent, Religious Children, Secular Schools. 61 S.Cal.L.Rev. 863 [1988]; Note, Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities, 90 Yale L.J. 350 [1980]).

[4] In deciding whether a claimant is entitled to such an exemption, the Supreme Court has formulated a two-step analysis. both steps obviously fact-sensitive (see generally, Mozert v. Hawkins County Pub. Schools, 765 F.2d 75 [6th Cir.] [remanding colorable free exercise claim for further factual development], on remand 647 F.Supp. 1194 [E.D.Tenn.], revd. 827 F.2d 1058, cert. denied 484 U.S. 1066, 108 S.Ct. 1029, 98 L.Ed.2d 993; Pillar of Fire v. Denver Urban Renewal Auth., 181 Colo. 411, 509 P.2d 1250 [remanding colorable free exercise claim], appeal after remand sub nom. Denver Urban Renewal Auth. v. Pillar of Fire, 191 Colo. 238, 552 P.2d 23). First, a claimant must show a sincerely held religious belief that is burdened by a State requirement (see, Hernandez v. Commissioner of Internal Revenue, 490 U.S. ---, ----, 109 S.Ct. 2136, 2148, 104 L.Ed.2d 766; Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534; see generally, Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv.L.Rev. 933 [1989]). Second, the State must demonstrate that the requirement nonetheless serves a compelling governmental purpose, and that an exemption would substantially impede fulfillment of that goal (Hobbie v. Unemployment Appeals Commn. of Fla., 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190).

With respect to both prongs of the test, this case presents material issues of fact that preclude summary judgment.

Burden on Free Exercise

[5] While the Supreme Court has been less than clear in defining just how much a State requirement need burden religion in order to violate the Free Exercise Clause plainly governmental action that merely offends religious beliefs does not implicate First Amendment values (see. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505, 72 S.Ct. 777, 96 L.Ed. 1098). This is particularly so in the context of school curriculum decisions, where important policy concerns dictate deference to education authorities. (N.Y; Const., art. I, 3).

[6, 7] It is generally acknowledged that mere exposure to ideas that contradict religious beliefs does not impermissibly burden

the free exercise of religion. [footnote 4] The First Amendment does not stand as a guarantee that a school curriculum will offend no religious group. [footnote 5] Moreover, parents have no constitutional right to tailor public school programs to individual preferences, including religious preferences (see, Epperson v. Arkansas, 393 U.S. 97,106, 89 S.Ct. 266, 271, supra). Plaintiffs accept that the Constitution offers no protection against exposure to ideas that offend their religion. They maintain, however, that the Supreme Court recognized an exception to the "mere exposure" rule in Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, supra, and that they fall squarely within that exception.

Yoder involved members of two Amish groups who refused, on the basis of religious belief, to send their children to school beyond the eighth grade. The parents were convicted of violating Wisconsin's compulsory school-attendance law, which required parents to send their children until age 16. At trial the Amish asserted that the law required what their religion forbade and thus violated the Free Exercise Clause. In addition, the Amish adduced testimony from expert witnesses, scholars on religion and education, who explained the relationship between the Amish belief concerning school attendance and the more general tenets of their religion, and described the devastating impact that compulsory high school attendance could have on the continued survival of the religious community.

The Supreme Court in Yoder held Wisconsin could not require the Amish to send their children to public school after the eighth grade. In finding an impermissible burden on free exercise, the Supreme Court examined Amish life and culture in some detail, ultimately concluding that what was in issue were long-standing beliefs shared by an organized group that the beliefs related to religious principles and pervaded and regulated Amish daily life, and that the State law threatened the continuing existence of the Old Order Amish church community.

The reach of Yoder is plainly limited. The Supreme Court itself made that clear in cautioning that its holding would apply to "probably few other religious groups or sects" and that "courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements." (406 U.S. at 235-236, 92 S.Ct. at 1543-1544.) Commentators have speculated that "[f]ew future free exercise claimants are likely to match the testimony of extreme injury relied upon by the Supreme Court in Yoder." (Pepper, Reynolds, Yoder, and Beyond Alternatives for the Free Exercise Clause, 1981 Utah L.Rev. 309, 338 [1981];

Smith, Constitutional Rights of Students, Their Families, and Teachers in the Public Schools, 10 Campbell L.Rev. 353, 376-379 [1988]; Strossen, op. cit., at 387-389, 390, n. 288.)

Nevertheless, the present case bears some striking similarities to Yoder. As in Yoder, plaintiffs seek a religious exemption from exposure to ideas that are not merely offensive but allegedly abhorrent to their central religious beliefs. And like Yoder, governmental action purportedly compels them to participate in instruction that is at odds with a fundamental tenet of their religious belief-remaining simple from evil (406 U.S. at 218, 92 S.Ct. at 1534). The Brethren assert, like the Amish in Yoder, that these are entrenched religious beliefs, not the product of "a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." (Id., at 235, 92 S.Ct. at 1543.) Their adherence to "the Principle of Separation," they say, also stems from "a sustained faith pervading and regulating [their] entire mode of life." (Id., at 219, 92 S.Ct. at 1535.)

[8] Thus, on this record we cannot agree with the sweeping conclusions reached by the Trial Judge in granting summary judgment that the mandated AIDS curriculum is neither contrary to the Brethren's religious beliefs nor destructive of the community as a whole. Rather, the record better supports the conclusion reached by the Appellate Division that "compulsory education which exposes [plaintiffs'] children to the 'details of evil' which their religion instructs them to avoid may place a limited burden upon the free exercise of their religion." (150 A.D.2d, at 19, 545 N.Y.S.2d 316.)

But it is as much plaintiffs' alleged differences from the Amish in Yoder as their similarities that give pause and persuade us that further factual development is required before a conclusion can be reached -- either way- on the question whether the free exercise of sincerely held religious beliefs is burdened by compulsory AIDS education, how great such a burden might be, and what if any further accommodation should be made. With such significant public and private interests in the balance, on this record it is at the least prudent to withhold judgment until

there is a firmer basis for the necessary findings of fact than the brief, contentious, often conclusory affidavits both sides have submitted. The trial record in Yoder is replete with fact, scholarly and expert testimony that has no parallel in the present record.

Our decision to deny summary relief in this case, however, is not based simply on prudence. Our decision rests on the traditional ground that summary judgment should be denied where there are

disputed issues of material fact, as there are in this record. Two examples of such issues are pertinent to the question of burden.

/* Another way of saying that appeals courts dislike summary judgments, which is well known by all attorney’s learned in appellate practice. */

Defendants acknowledge the sincerity of plaintiffs' religious beliefs. There is no dispute as to the tenets of their faith, and no need for the court to go behind the declared content of their religious beliefs. But defendants do very much question the extent to which plaintiffs have become part of mainstream society. They point to the not insubstantial facts that plaintiffs live and work in the Valley Stream community, their children attend public schools, and they take in new followers from the public-urging that plaintiffs are therefore not at all the isolated religious community that was the subject of Yoder. Plaintiffs, by contrast, insist that they are exactly like the Amish in Yoder, except for what they characterize as the "minimal requirements" that they attend public school and work in the community, because it is not feasible for them to do otherwise. This factual dispute goes to the heart of plaintiffs' assertions that their religious exercise would be burdened by exposure to the AIDS curriculum,. If plaintiffs in their daily lives are so thoroughly integrated into the larger society and its evils-the State requirement may in fact impose no burden , or only the "limited burden" the Appellate Division found. This clash of contentions-which divided the two lower courts-cannot be properly determined on the present record.

Somewhat relatedly, a central disputed issue exists as to whether the AIDS curriculum poses any threat to the continued existence of the Brethren as a church community. That conclusion was factually established by trial testimony and findings in Yoder (see, 406 U.S. at 209-212, 218-219, 235-236, 92 S.Ct. at 1530-1532, 1534-1535, 1543-1544); and whether or not the law actually requires such extreme injury, plaintiffs themselves by their affirmed statements have represented that they are so threatened. But defendants have steadfastly maintained that no irreversible prejudice would befall plaintiffs and that, to the contrary, the proposed instruction would only benefit their children. Again, as this case has been posited by plaintiffs themselves, the record is inadequate to choose as a matter of law between the parties' disputed assertions.

Compelling State interest

[9] Even religious rights must bow to the compelling interests of the State, pursued by the least restrictive means (Thomas v. Review Bd., 450 U.S. 707, 718, 101 S.Ct. 1425,1432, 67 L.Ed.2d

624; Sherbert v. Verner, 374 U.S. 398, 406-409, 83 S.Ct. 1790, 1795-1797, 10 L.Ed.2d 965; Wisconsin v. Yoder, 406 U.S. at 215, 221, 224, 236, 92 S.Ct. at 1533,1536,1537,1543).

If plaintiffs succeed in establishing that exposure to the AIDS curriculum substantially burdens their religious practice, defendants' refusal to grant the exemption will be then subject to "strict scrutiny." (Hobbie vs. Unemployment Appeals Commn. of Fla., 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, supra.) Both the trial court and the Appellate Division were satisfied that the State's interests in AIDS education on its face was so compelling that it necessarily would override plaintiffs' free exercise rights. While that conclusion may ultimately prove correct, it was error to reach it on the present record.

As a blanket proposition, the State has a compelling interest in controlling AIDS, which presents a public health concern of the highest order. Nor can there be any doubt as to the blanket proposition that the State has a compelling interest in educating its youth about AIDS. Education regarding the means by which AIDS is communicated is a powerful weapon against the spread of the disease and clearly an essential component of our nationwide struggle to combat it.

But the Education Law and regulations themselves provide for exemptions from the prescribed curriculum.

/* Suggesting that perhaps if there were no exceptions the rule would be upheld? */

Moreover, history teaches that constitutional protections do not readily yield to blanket assertions of exigency. As with other grave risks we have faced during the past two centuries, the threat of AIDS cannot summarily obliterate this Nation's fundamental values (see, Orland and Wise, The AIDS Epidemic: A Constitutional Conundrum, 14 Hofstra L.Rev. 137,150 [discussing Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194]). That compelling public interests underlie the mandate for AIDS education thus does not, in and of itself, end all inquiry as to whether 35 Brethren children must be denied an exemption. Where burden is established, the State must show with "particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to [these children]." (Wisconsin v. Yoder, 406 U.S. at 236, 92 S.Ct. at 1543; see also, Sherbert v Verner, 374 U.S. at 408-409, 83 S.Ct. at 1796-1797; Quaring v. Peterson, 728 F.2d 1121 [8th Cir.], affd. sub nom. Jensen v. Quaring, 472 U.S. 478, 105 S.Ct. 3492, 86 L.Ed.2d 383; Larson v. Valente, 456 U.S. 228, 248, 102 S.Ct. 1673,1685, 72 L.Ed.2d 33.) On the present record, the State has not made the showing required to support summary judgment in its favor.

As is evident from the submissions, the compelling health interest in educating school children about AIDS is controlling the spread of the disease. Defendants advance several arguments to the effect that this interest would be substantially impeded by granting plaintiffs a total exemption from the AIDS curriculum. That conclusion is not, however, self-evident, as indicated by the following two disputed fact issues.

In supporting the compelling need to educate Brethren children about AIDS, defendants point both to plaintiffs' extensive life within the community and to the possibility that some of them may go astray, or leave the fellowship, or be cast out, thus consigned to living among the general population ignorant of AIDS. Plaintiffs rejoin that their lives are indeed separate, and that the State's allegations regarding defections are pure speculation; there is no evidence either way as to defections among the New York State Brethren. Even assuming that a defection could be said to pose a public health threat, plaintiffs strenuously dispute that the education they provide their children leaves them ill equipped to cope with the dangers of AIDS. These contentions cannot be determined by the existing record.

Again somewhat relatedly, given the particular means by which AIDS is transmitted a real question is raised about the education Brethren children do receive, and whether the State can achieve its goal of AIDS control by means that would not unduly burden plaintiffs' religious practice. If plaintiffs showed that the education they offered their children was the functional equivalent of the AIDS curriculum -- giving due regard to the physical as well as moral concerns -- the State might well be required to accommodate their beliefs (see, Callahan v. Woods, 736 F.2d 1269, 1274-1275 [9th Cir.] [remanding for further factual development on whether grant of constitutionally based exemption would impede the objective sought to be advanced by the State]; Wisconsin v. Yoder, supra; Buchanan, Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values, 28 UCLA L.Rev. 1000 [1981]). On this point the parties are at loggerheads. Defendants allege that Brethren parents do not offer a suitable alternative form of education, in that they provide their children only with moral instruction which is not an adequate substitute for clinical information. The Appellate Division characterized Brethren teaching as "uncontradicted religious indoctrination which denies the existence of undeniable health crises". (150 A.D.2d, at 21, 545 N.Y.S.2d 316.) But plaintiffs strenuously contest those assertions. Although Brethren children are provided with moral instruction regarding sex and drug use, plaintiffs have

never stated that this is all they teach their children and they represent that, if granted an exemption, they would "instruct [their] children at home or in their assembly concerning the AIDS virus and epidemic." They further submit that, as a practical matter, by teaching their children to avoid all sexual activity outside of marriage and to avoid all illegal drugs in order to remain physically and spiritually "pure," they have developed "a strong AIDS-prevention program" that has been singularly successful in preventing its members from either contracting the disease themselves or transmitting it to others. This factual dispute also requires a fuller record.

In short, while the spread of AIDS heightens and intensifies the public interest in education, it does not overrun other cherished values that may not require sacrifice. [footnote 6] To be sure, plaintiffs must meet a high threshold of proof, but at this juncture we cannot summarily brush aside the passionate assertions of a longstanding, highly individual -- if not unique -- religious group in this State that exposure to defendants' AIDS curriculum could alone destroy the foundations of their faith and "jeopardize their place in the holy fellowship of God's Son."

Accordingly, the order of the Appellate Division should be modified by denying defendants' motions for summary judgment, with costs, and otherwise affirmed.

TITONE, Judge (dissenting).

I agree with many of the sentiments set forth in the majority opinion, including the majority's expressed solicitude for plaintiffs' right to the free exercise of their religious convictions. Further, like the majority, I believe that the unquestionably urgent contemporary goal of preventing the spread of AIDS should not obscure the importance of the more enduring values represented in the Free Exercise Clause of the First Amendment. However, unlike the majority, I have grave doubts about the need for a hearing on plaintiffs' claims. That disposition is troublesome to me, both because defendants' conclusory submissions seem insufficient to raise a legally significant question of fact and because, as a practical matter, it is difficult to discern what additional facts a hearing would reveal. Moreover, unlike the majority, I do not believe that this case fits neatly within the "mere exposure" rule, which affords public school authorities wide latitude in requiring attendance at classroom lessons that contain material offensive to some religious sects. Accordingly, I write separately to express my own dissenting views on the issues this case presents.

Initially, it bears emphasis that while questions involving claims for religious exemption are unquestionably fact-sensitive

(majority opn., at 124, at 173 of 551 N.Y. S.2d, at 426 of 550 N.E.2d), they are nonetheless governed by the conventional rules for granting or denying summary relief (see, Mozert v. Hawkins County Pub. Schools, 765 F.2d 75, 78 (6th Cir.), on remand 647 F.Supp. 1194 (E.D.Tenn.), revd. 827 F.2d 1058 (6th Cir.), cert denied 484 U.S. 1066,108 S.Ct. 1029, 98 L.Ed.2d 993). Under these rules, a party opposing summary judgment "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact * * * mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; accord, Friends of Animals v. Associated Fur Mfrs., 46 N.Y.2d 1065, 1067-1068, 416 N.Y. S.2d 790, 390 N.E.2d 298; Alvord & Swift v. Muller Constr. Co., 46 N.Y.2d 276, 281-282, 413 N.Y.S.2d 309, 385 N.E.2d 1238). In this case, the majority has identified several questions of fact that, in its view, require a trial. However, as I read the record, defendants' conclusory submissions do not rise to the level of proof that is required successfully to oppose summary relief.

First, the majority identifies as a triable question of fact whether plaintiffs have truly remained spiritually segregated from the larger community, and therefore insulated from exposure to its evil, as their religion assertedly demands. As the majority observes, plaintiffs have submitted substantial documentation of the manner in which their insularity is preserved i.e., rules that forbid their children from socializing with others during or after school, interdictions against exposure to television, radio, magazines and the like and rules limiting social intercourse to members of the group. This documentation is sufficient to establish, at least prima facie, the genuineness of plaintiffs' claim that separation from society and avoidance of exposure to the "details of evil" are essential features of their religious practice.

In opposition to plaintiffs' claims on this point, defendants have come forward with no specific contradictory facts or proof, in affidavit form, that plaintiffs' separatist practices are not what they have represented. Instead, defendants merely make note of the fact that plaintiffs are not totally isolated and do have some contact with the larger community through their attendance at school and work. Based upon these "facts," defendants then ask the court to infer that plaintiffs' religious exercise would not necessarily be compromised by exposure to the AIDS curriculum.

These submissions leave me to wonder what more would be elicited in an evidentiary hearing. Plaintiffs have not disputed the

allegation that they rely on the larger community to supply gainful employment and education for their children. To the contrary, they candidly acknowledge this reliance, explaining it as a practical necessity, which they keep to a minimum because of their religious commitment to separatism. Presumably, defendants have a]ready "laid bare" their proof, as they are required to do when a motion for summary judgment has been made. We may therefore assume that they have no additional proof to offer on this question. We thus have before us all of the facts that are likely to emerge. The conclusion that further proceedings may produce something additional rests on nothing more than mere "expressions of hope" or speculative theorizing of the sort that the case law forbids (e.g., Zuckerman v. City of New York, supra, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718).

Moreover, the majority's insistence upon further factual development raises troubling questions about the proper fact-finding role of the courts in this dispute. The suggestion that a factual dispute exists concerning the extent of plaintiffs' actual isolation from the mainstream of society implies questions about either the sincerity with which plaintiffs hold and practice their separatist beliefs or the extent to which their beliefs actually do require the near-complete isolation that their papers allege. Since, as the majority notes (majority opn., at 127, at 175 of 551 N.Y.S.2d, at 428 of 550 N.E.2d), defendants have not questioned the sincerity of plaintiffs' beliefs and practices, the inquiry will presumably focus on the latter question.

It is difficult to imagine, however, how a court could ever engage in such an inquiry without running directly afoul of the well-established rule that the judiciary may not become the arbiter of what a particular religious group truly believes. As this court stated in Matter of Holy Spirit Asso. v. Tax Commn., 55 N.Y .2d 512, 522, 450 N.Y.S.2d 292, 435 N.E.2d 662), "[t]he articulation of the Supreme Court in foreclosing judicial inquiry into the truth or falsity of religious beliefs is equally applicable to judicial inquiry as to the content of religious beliefs." Thus, "[n]either the courts nor the administrative agencies of the State * * * may go behind the declared content of religious beliefs" (id., at 521, 450 N.Y S.2d 292, 435 N.E.2d 662). Yet, that is precisely what the majority declares should be done here.

The same infirmity exists in the majority's statements that there must be an inquiry into whether "the AIDS curriculum poses any threat to the continued existence of the Brethren as a church community." (Majority opn., at 128, at 175 of 551 N.Y. S.2d, at 428 of 550 N.E.2d.) Plaintiffs have squarely alleged that their

religion forbids instruction on matters of morality and physical intimacy other than that given by members of their own community. According to plaintiffs' submissions, exposure to the matters addressed in the disputed AIDS curriculum "would undermine the foundations of [their] faith * * * and could even jeopardize [the children's] place in the holy fellowship of God's Son". Furthermore, both common sense and an overview of plaintiffs' submissions suggest that the success of the separatism that is so central to their creed depends upon their ability to shield their children from the larger community's more permissive values and ideas on matters of sexuality (cf, Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 [separatist Amish sect sought to avoid exposing its children to the competitive values inculcated in public schools] ).

Once again, there is nothing concrete in defendants' submissions that calls these assertions into question, apart, that is, from some conclusory assertions that plaintiffs' children would suffer no irreversible harm' from exposure to the special AIDS curriculum. [dissent footnote 1] Further, even if defendants' submissions on the issue were not so sparse, a serious question would exist as to what kind of further proof defendants could conceivably muster. Will the trial court be called upon to consider expert testimony concerning the relative importance of various aspects of the Brethren's separatist views? Will conflicting testimony by coreligionists be accepted, either to refute or explain these plaintiffs' assertions about the centrality of the religious principle requiring that they remain simple of the details of evil"? If so, will the court be called upon to decide whose position is most credible, whose views represent the true Brethren faith and, finally, what is the relative hierarchical significance of the Brethren's various beliefs and practices? How can such an inquiry be conducted consistent with the rule that there is no "right of civil authorities to examine the creed and theology of [a c]hurch and to factor out what in its * * * considered judgment are the peripheral * * * aspects" (Matter of Holy Spirit Assn. v. Tax Commn., supra, 55 N.Y.2d at 527, 450 N.Y.S.2d 292, 435 N.E.2d 662)? These are all important questions, which the majority, regrettably, leaves unanswered.

Furthermore, I cannot agree that the question of whether there is a "threat to the continued existence" of the sect as a religious community is a legally significant issue precluding summary relief. [dissent footnote 2] To be sure, the pages in the Yoder opinion that the majority cites make reference to substantial "interfer[ence] with the [child's] religious development * * * and his integration into the [community's] way of life," the

"very real threat of undermining the [religious] community * * * and religious practices" and the grave "endanger[ment] if not destr[uction of] the free exercise of [the litigants'] religious beliefs" (406 U.S. at 218-219, 92 S.Ct. at 1534-35; see also, id., at 209-212, 234-236, 92 S.Ct. at 1530-1532,1542-1544). But those references were included merely to demonstrate how serious the impact of compulsory State education would be under the particular facts of the case. Nothing in the Yoder opinion suggests that the Free Exercise Clause's protections are limited to State requirements that threaten the very existence of the religion and/or the religious community. Indeed, if that were the test for invoking the First Amendment's protective mantle, the State could, for example, require Jewish or Muslim school children whose families observe special religious dietary laws to eat pork-based food products, since such "minor" breaches of those groups' religious practices could not be said to threaten the vitality of the religious community itself. Plainly, that is not, and cannot be, the law (cf, People v. Lewis, 68 N.Y.2d 923, 510 N.Y.S.2d 73, 502 N.E.2d 988 [where State interest may be satisfied in other ways, prisoner may not be required to submit to an act which would "impinge upon" his sincerely held religious beliefs]).

The majority apparently does not disagree in principle, but nonetheless believes that the exacting standard it posits should be applied here because, in its view, plaintiffs' claim falls within the line of cases denying relief to sects seeking to avoid even the mere exposure to ideas that offend their religious principles (see, majority opn., at 124-125, nn. 4 & 5, at 174, nn. 4 & 5 of 551 N.Y.S.2d, at 427, nn. 4 & 5 of 550 N.E.2d [and cases cited therein]). Yoder (supra) is then treated in the majority's analysis as an "exception" to this line of cases (see, majority opn., at 125-126, at 174 of 551 N.Y.S.2d, at 427 of 550 N.E. 2d), with all of the rigid, fact-specific limitations that ordinarily accompany exceptions to well-established, well-regarded legal rules. It is this characterization of the issue in the present case, as well as of the significance of the Yoder decision, that lies at the heart of our disagreement.

In my view, neither this case, nor Yoder (supra), is simply an example of a religious sect's effort to obtain First Amendment protection from the "mere exposure" to inimical ideas. Instead this case, like Yoder (supra), is an attempt by plaintiffs to secure a judicial dispensation from having to perform an affirmative act that their religion forbids. Although the gist of what plaintiffs seek to avoid is, indeed, "exposure" to a certain category of information, plaintiffs are motivated not merely by a desire to steer clear of offensive or contradictory ideas (cf,

Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, supra), but rather by a religious precept that requires them, and their children, to remain innocent of "the details of evil." In a sense, plaintiffs are forbidden by their religious beliefs to eat of the tree of secular knowledge on the subject of AIDS in the same way that some observant Jewish and Muslim individuals are forbidden to eat pork-and in the same way that the Amish individuals in Yoder were forbidden to send their teen-age children to public high school, thereby removing them from the traditional farm community at a time that was critical to their spiritual development (see, 406 U.S. at 209, 211, 218, 92 S.Ct. at 1530, 1531, 1534). Accordingly, plaintiffs are entitled to the same protection, without regard to whether the continuing vitality of their religious community has been threatened.

The final "fact question" that the majority identifies concerns the importance of the State interest that is sought to be vindicated here. In this regard, I agree with the majority that although society's interest in controlling the spread of AIDS is compelling, it does not necessarily follow that the State's interest in furnishing widespread AIDS education provides a compelling basis for overriding the religious beliefs of school children's parents. Where the majority and I differ is, once again, on the questions of the sufficiency of the State's submissions in opposition to summary judgment and the likelihood that a further hearing will reveal additional, legally relevant facts.

As the majority notes, once the impairment of religious freedom has been established, the State has the burden of showing with "particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption" (Wisconsin v. Yoder, supra, at 236, 92 S.Ct. at 1543). Here, although the State has submitted a substantial amount of background material concerning the need for AIDS education, its submissions do not explain with the necessary specificity why an exemption should not be granted to this small and insular religious group. As in Yoder, the defendants' observations that Brethren occasionally withdraw from the sect and that outsiders are occasionally invited to join are too speculative to consti tute a "compelling" State interest, at least in the absence of some factual showing that such movement between the Brethren and the larger community is statistically significant (see, Wisconsin v. Yoder, supra, at 224-225, 92 S.Ct. at 1537-1538). Furthermore, the State has not introduced facts, in evidentiary form or otherwise, to support its conclusory claim that the moral training which the Brethren routinely provide, coupled with their promise to instruct their children specifically about the AIDS

virus (see, majority opn., at 130, at 177 of 551 N.Y.S.2d, at 430 of 550 N.E.2d), are not an adequate substitute for the secular education that the State proposes to provide.

Finally, as a matter of common sense and experience, I have difficulty crediting any claim by the State that its interests would be seriously impaired by granting an exemption to these plaintiffs. As the majority suggests (majority opn., at 128, at 175 of 551 N.Y.S.2d, at 428 of 550 N.E.2d), the statutory and regulatory provisions for granting exemptions on a case-by-case basis belie any potential contention by the State that strict universal AIDS education, without exception, is necessary to satisfy its interests. Moreover, although education is, unfortunately, the most effective weapon we now have against this contemporary plague, we should not lose sight of the fact that knowledge is not the equivalent of a serum that would ensure immunity (see, Matter of Hofbrauer, 47 N.Y.2d 648, 419 N.Y.S.2d 936, 393 N.E.2d 1009; cf, Jacobson v. .Massachusetts. 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643). To the contrary, the efficacy of education in this context might well be questioned, since the individuals who are most at risk, such as intravenous drug users, are also among those who are least susceptible to the influence of educators. Furthermore, given the nature of this disease and the manner in which it is spread, it seems clear that prevention depends upon a combination of personal factors, only one of which involves clinical knowledge. Equally critical are such factors as an individual's choice of life-style and sense of self-esteem-precisely the areas which the Brethren's moral and spiritual training addresses.

In the final analysis, the continued existence of our pluralistic society depends not only upon our commitment to tolerating minority viewpoints, but also upon our willingness to accommodate them. Further, I believe that we jeopardize an important element of our social structure when we too readily displace the moral and spiritual guidance that may be derived from family and church with the secular and purportedly value-neutral instruction that our public schools are equipped to provide. While I share the abhorrence of ignorance that characterizes much of modern western culture, I cannot overlook the fact that our contemporary faith in the power of secular education has not immunized us from such social ills as rampant drug abuse, an inordinately high drop-out rate, family dissolution and spiritual demoralization, as well as socially transmitted diseases such as AIDS. Accordingly, like the Yoder court (406 U.S. at 223-224, 92 S.Ct. at 1537-1538, su pra), I am most reluctant to assume that today's prevailing culture, which places its faith in objective knowledge, is "right" while plaintiffs and others like them, who place their

faith in moral and spiritual guidance, are "wrong."
For these reasons, I would prefer to simply grant plaintiffs' request for summary judgment and direct defendants to exempt plaintiffs' children from the AIDS curriculum to which they object. In light of the limited number of individuals involved, the uniqueness of plaintiffs' sect and the narrowness of the exemption from compulsory education that they seek, I can see no compelling reason to deny them that relief without further litigation. Accordingly, I dissent and vote to reverse by denying defendants' motion for summary judgment and granting plaintiffs' summary judgment motion.
BELLACOSA, Judge (dissenting).
I dissent and vote to affirm the order of the Appellate Division upholding the constitutionality of the State Commissioner of Education's AIDS Education Program (8 NYCRR 135.3[b][2]; [c][2]) as applied to plaintiffs. Essentially for the reasons expressed in the Per Curiam opinion of the Appellate Division, its order modifying the Supreme Court's grant of summary judgment to defendants dismissing the lawsuit as unfounded should be sustained.
The Commissioner's mandatory AIDS Health Education Program, approved by the State Board of Regents, is vital and valid. The regulation at issue requires all primary and secondary school students to receive: "[A]ppropriate instruction concerning * * * AIDS * * * Such instruction shall be designed to provide accurate information to pupils concerning the nature of the disease, methods of transmission, and methods of prevention [and] shall stress abstinence as the most appropriate and effective premarital protection against AIDS (8 NYCRR 135.3[b][2]; [c][2])." The regulation further provides that students may be excused from a lesson or lessons upon a parent's written assurance that suit-able home instruction will be substituted. Plaintiffs' children have availed themselves of this procedural entitlement and were excused from five lessons . In this litigation they press for a total exclusion for themselves, and presumably on precedential application for other persons or groups who may seek exemption on constitutional freedom of religious expression grounds.
The simple landscape on which this controversy is viewed includes the conceded compelling State interest of educational instruction in the transmission and prevention of a public health menace-the AIDS epidemic-and the pervasive, voluntary integration of the Brethren believers in work, education and dwelling within their chosen general community. Indisputably then, this is not a Yoder case (Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15). It is not at all like that case, and even is

distinguishable in a constitutionally crucial respect-here, plaintiffs' children were granted a substantial exemption pursuant to the challenged regulation itself, which also authorizes that flexible outlet.

The majority recognizes (majority opn., at 126, at 174 of 551 N.Y.S.2d, at 427 of 550 N.E.2d), as the United States Supreme Court has taught, that Yoder is an extraordinarily exceptional dispensation from the primacy of a universal public educational curriculum-in this case. a primacy enhanced by the urgency of a rampant public health problem, thus far apparently controllable only by educational means. Fragmentation of the curriculum, especially in this area, and segmentation of the student population are not warranted and plaintiffs have not advanced sufficient proof, within the summary judgment rubric, to withstand the defendant Commissioner's record presentations of a dominant, compelling State interest.

The essential "factual dispute", forming the primary premise for this court's rationale upsetting the lower courts' grant of summary judgment to the Commissioner of Education, springs from an assertion by plaintiffs that they have "minimal" contacts in the community and from a claimed sufficient relatedness to Yoder (supra). Denominating their claims as fact issues, however, cannot so facilely justify this inconclusive procedural remedy not even sought by plaintiffs, because the claims are facially and evidentially, in the summary judgment sense, belied by the realities and the record. The Brethren's conceded participation in the community, especially in the core relevant category of the students' otherwise full involvement in their public school education, is substantial, not minimal". Moreover, these primary attributes of community, i.e., work, school and dwelling, cannot be diminished or denied. just because the Brethren find it "not feasible * * * to do otherwise." (Majority opn., at 127, at 175 of 551 N.Y.S.2d, at 428 of 500 N.E.2d). The facts are the facts for whatever reason-and if undeniable, they are not triable. Indeed, some categories of cases are, for transcendent jurisprudential and policy reasons, particularly suitable to summary judgment resolution (see, Immuno, AG. v. Moor-Jankowski, 74 N.Y.2d 548, 561, 549 N.Y.S.2d 938, 549 N.E.2d 129). This is such a case and such a category, and the record supports only that relief in my view.

In complete context, the plaintiff Brethren's request, based on their sincere and free exercise of religious beliefs under the First Amendment to the United States Constitution, cannot therefore prevail on this record because no genuine, triable issues of fact are evident. Plaintiffs are not entitled to the trial the majority affords them, nor the summary judgment which

Judge Titone would grant. Rather, the constitutionality of the State Education Commissioner's AIDS Education Program should be upheld as both lower courts have ruled and the children should get on with their full and necessary education.

WACHTLER, C.J., and SIMONS, ALEXANDER and HANCOCK, JJ., concur with KAYE, J.
TITONE, J., dissents and votes to reverse in a separate opinion.
BELLACOSA, J., dissents and votes to affirm in another opinion.
Order modified, with costs to plaintiffs, by denying defendants' motions for summary judgment and, as so modified, affirmed.
OPINION FOOTNOTES
1. Section 16.2 of the Rules of the Board of Regents provides: "A petition. duly verified, may be filed with the commissioner by a proper person authorized to represent a religious group on a statewide basis asking that the children of parents or guardians professing the religion of such group be excused from such part of the study in health and hygiene as may be in conflict with the tenets of the religion of such group.
2. Education Law 3204(5) provides: "Subject to rules and regulations of the board of regents, a pupil may, consistent with the requirements of public education and public health. be excused from such study of health and hygiene as conflicts with the religion of his parents or guardian. Such conflict must be certified by a proper representative of their religion as defined by section two of the religious corporations law."
3. Plaintiffs have asserted no claim under the Free Exercise Clause of the State Constitution
4. Judge Titone's dissent erroneously likens this case, and the long-established line of "mere exposure cases, to the very different cases concerning governmental requirement of affirma tive conduct that is offensive to one's religious beliefs (see, Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir.) [elaborating on the distinction] ). Compelling Jewish or Muslim school children to violate their dietary laws by eating pork, or requiring prisoners to submit to acts that would impinge on sincerely held religious beliefs (dissenting opn. of Titone, J., at 135-136, at 180-181 of 551 N.Y.S.2d, at 433-434 of 550 N.E.2d), would be illustrations of the more intrusive "affirmative conduct" cases (see also, Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 [invalidating an oath of belief in God required of a notary public]; Board of Educ. v. Barnette, 319 U.S. 624, 63 S.Ct. 1178. 87 L.Ed. 1628 [compulsory secular flag salute violates First Amendment] ).
5. See, e.g.. Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1543 (9th Cir.) (Canby, J., concurring) (stating that mere

offense at having textbook in school curriculum does not support Free Exercise Clause). cert denied 474 U.S. 826, 106 S.Ct. 85, 88 L.Ed.2d 70; Wilson v. Block, 708 F.2d 735, 741 (D.C.Cir.) (finding that government actions that merely offend or cast doubt on religious beliefs do not violate Free Exercise Clause), cert. denied 464 U.S. 956,104 S.Ct. 371, 78 L.Ed.2d 330; Williams v. Board of Educ., 388 F.Supp. 93, 96 (S.D.W.Va.) (declaring that First Amendment does not preclude schools from teaching material offensive to religions), a/Id. 530 F.2d 972 (4th Cir.); Davis v. Page, 385 F.Supp. 395, 404 (D.N.H.) (holding that First Amendment offers no protection from health course found to be distasteful).

6. Judge Titone's concluding discussion in his dissenting opinion is both misdirected and undeservedly critical of the court (see, dissenting opn. of Titone, J., at 137-138 at 181-182 of 551 N.Y.S.2d, at 434-435 of 550 N.E.2d). By reversing Supreme Court and the Appellate Division and giving the Brethren an opportunity to prove their allegations. we pronounce no "right" or "wrong." It will now be for the trial court, applying the law to a proper factual record, to determine which party should prevail.

DISSENT FOOTNOTES

1. Indeed, during the oral argument in this court, the attorney for defendant school district himself demonstrated the legitimacy of plaintiff's concerns when he asserted that an important goal of the AIDS curriculum was to inculcate and teach children that AIDS victims are not "bad people." While that message is obviously a correct and worthwhile one, it is plainly inimical to plaintiff's core beliefs. In fact, such value-laden instruction based on the beliefs of the surrounding community strikes at the very heart of the isolationist principles upon which plaintiffs' religious practices are built.

2. Although the majority has stopped short of squarely stating that "the law actually requires such extreme injury" (majority opn., at 128, at 175 of 551 N.Y.S.2d. at 428 of 550 N.E.2d), its holding certainly suggests that conclusion, since plaintiffs' averments on the issue. and defendants' "steadfast" assertions to the contrary, would not be sufficient to defeat summary judgment unless the issue were deemed legally material to the resolution of the controversy.

3. The majority takes issue with this discussion, characterizing it as "misdirected" and "undeservedly critical of the court" (majority opn., at 130, n. 6, at 177, n. 6 of 551 N.Y.S.2d, at 430, n. 6 of 550 N.E.2d). However, it is not my intention to criticize the values the majority has expressed. most of which 1 share (see, 131, 136, at 177, 181 of 551

N.Y.S.2d, at 430, 434 of 550 N.E.2d infra). Rather, I am simply exercising my prerogative-and, indeed, my duty-as an appellate Judge to expose the values and beliefs that underlie my legal position.