Religious Released Time Education:
The Overlooked Open Door in Public Schools

Samuel Ericsson, Kimberlee Colby, Robert Payne and Stephen Crawford,
Center for Law and Religious Freedom of the Christian Legal Society

INTRODUCTION

A quiet, but steady revolution has taken place in the American public school system during the past three decades. The Judeo-Christian worldview has been replaced in large part by one that is markedly secular. In response to this shift, many parents have chosen alternative ways to educate their children. The most common option has been to turn to parochial and church schools. Yet, for many other parents this option is not available to them in their community. Countless others simply cannot afford the financial burden of a private education.

The vast majority of parents believe strongly in the public school system and find it to be the best alternative for their children. Yet, many wish that there could be some effective way to counteract the humanistic worldview often presented in our public schools. Religious released time education can provide parents a counter-balance. It is an opportunity overlooked by most parents, clergymen, and educators. It is our hope that the following material will serve as a catalyst and tool for those who choose to work within the public education arena.

Religious released time is the most effective open door by which students may receive religious instruction during their school day. Released time is the only means by which religious instruction intended to convert students or instruct them in a particular set of religious beliefs is allowed during the school day. All other religious instruction during the school day must be objective, intended only to inform students of different religious ideas and not to persuade them of the truth of any particular ideas.

A released time program may not always be constitutional. It must therefore be carefully crafted in order to pass applicable constitutional tests. The information in this booklet should be considered simply as general guidelines to help you and your attorney in establishing a local released time program. We will use a question and answer format.

The answers are not exhaustive because lays affecting the authority of school district to adopt released time programs vary from state to state. Before attempting to set up a local time released program, it is recommended that the organizers review state constitutional provisions, state education laws, and regulations which might bear on establishing a released time program in their community.

Also, the answers are not exhaustive because court decisions in one state, while influential, are not binding on the courts of other states. Therefore, when an answer relies on a court decision other than a United States Supreme Court decisions, be aware that the answer is merely an indication o how one court has viewed a particular aspect of a released time program. A court in your state might conclude differently.

Only two United States Supreme Court cases have dealt specifically with religious released time programs. Before the 1948 Supreme Court's decision of Illinois *ex rel. McCollum v. Board of Education*[1] no released time program had been held unconstitutional by state of federal courts. In *McCollum*, however, the Court held that a released time program in which

[1] Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

religious representatives came into public classrooms for less than on hour per week to give religious instruction was a violation of First Amendment prohibition against government establishment of an official religion. Many persons reading *McCollum* thought that any released time program might therefore be held unconstitutional.

Four years later, however, in *Zorach v. Clauson*,[2] the Supreme Court upheld a released time program. The controlling facts were that the program in *Zorach* was conducted off the school campus for one hour per week and no public funds were used to finance it.

Many lower courts, when considering the constitutionality of a released time program, specifically compare it to the *Zorach* released time program.[3] Thus, the safest approach in establishing a released time program in your school district is to model it as closely as possible to the *Zorach* plan discussed within. Yet, this may not always be possible due to local circumstances. The difficulty in creating a constitutional released time program results primarily from the Supreme Court's failure to address certain important issues in *Zorach*, such as whether credit may be given for released time programs.

Despite having been decided in 1952, *Zorach* is still a valid decision. The Supreme Court, lower federal courts, and state attorney generals still cite it approvingly.[4] In one case, a federal district court held a released time program similar to one in *Zorach* unconstitutional, arguing that *Zorach* was no longer considered good law by the Supreme Court. The federal circuit court reversed that ruling, saying that *Zorach* had not been abandoned. The Supreme Court refused to review the circuit court's decision, giving its tacit approval of the circuit court's holding.[5]

In the 1970s the Supreme Court developed a three-pronged test for determining whether a state program involving religion violates the Establishment Clause of the First Amendment. The three factors considered by courts are: 1) whether the program has a secular purpose; 2) whether the program has the primary effect of advancing or inhibiting religion; and 3) whether the program creates excessive entanglement between the state and religion. The courts which have applied this test to released time programs have found that, with minor exceptions, the program

---

[2] Zorach v. Clauson, 343 U.S. 306 (1952).

[3] Doe v. Shenandoah County School Board, 737 F. Supp 913 (W.D. Va. 1990); Smith v. Smith, 391 F. Supp 443, *rev'd*, 523 F.2d 121 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976); Holt v. Thompson, 66 Wis.2d 659, 225 N.W.2d 678 (Wis. 1975); Terry v. School District No. 81, 344 P.2d 1036 (Wash. 1959). Also, in Lewis v. Spaulding, 193 Misc. 66, 85 N.Y.S.2d 682, 688-89 (Sup. Ct. 1948), there is a good comparison of the *McCollum* and *Zorach* plans and their differences.

[4] Grand Rapids School District v. Ball, 473 U.S. 373, 390-91 (1984); Meek v. Pittenger, 421 U.S. 349, 359 (1975); Citizens Concerned for Separation of Church and State v. City and County of Denver, 252 F. Supp. 823, 829 (10th Cir. 1981); Collins v. Chandler Unified School District, 470 F. Supp 959, 963 (9th Cir. 1979); Smith, *supra* note 3; Holt, *supra* note 3, at 683; Ohio Attorney General's Opinion, No. 88-001 (Jan. 25, 1988) (Ohio Attorney General says that a local board of education may adopt a policy of release time religious instruction).

[5] Smith v. Smith, 391 F. Supp. 443, *rev'd*, 523 F.2d 121 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

meet the test.[6] Yet, if the program is not carefully tailored to avoid the appearance that government is aiding or advancing religion, the courts will not hesitate to declare the program unconstitutional in violation of the Establishment Clause of the First Amendment.[7]

QUESTION 1: What are some of the arguments favoring the adoption of a released time program by a school district?

The following reasons have been used in support of adopting programs:

1. A released time program, if properly established and administered, is constitutional.[8] In holding certain released time programs constitutional, the Supreme Court said that a released time program in which students were allowed to leave the school grounds for religious instruction was the same in principle, as allowing individual students to miss school, with their parents' permission, in order to attend a family baptism or observe religious holidays.[9]

2. A released time program respects the religious nature of the American people and accommodates the public service to those needs.[10] It is an opportunity for students to receive religious instruction that is otherwise forbidden in the public classroom under Supreme Court decisions.

3. A released time program provides a means by which students can be exposed to teaching that helps build and strengthen good morals and healthy values. This is especially important when much of the peer pressure and entertainment media create undesirable moral influences on students. Since students are often exposed to general permissiveness, drugs, opportunities to cheat or steal, and other bad influences on the school campus itself, it would seem that a school district should welcome an opportunity allowing students to voluntarily expose themselves to positive and healthy influences based on religious values and traditions. To some degree, this will also relieve the school

[6] Lanner v. Wimmer, 662 F.2d 1349, 1358 (10th Cir. 1981) (released time program aspects that involve excessive entanglement are invalid); Smith v. Smith, 391 F. Supp. 443, *rev'd*, 523 F.2d 121, 125 (4th Cir. 1975) (primary effect of released time program is not to advance religion); Holt v. Thompson, 66 Wis. 2d 659, 684-86 (Wis. 1975) (released time program meets all three prongs of test).

[7] Grand Rapids School District v. Ball, 473 U.S. 373, 390-91 (1984); Meek v. Pittenger, 421 U.S. 349, 359 (1975); Citizens Concerned for Separation of Church and State v. City and County of Denver, 252 F. Supp. 823, 829 (10th Cir. 1981); Collins v. Chandler Unified School District, 470 F. Supp. 959, 963 (9th Cir. 1979); Smith, *supra* note 3; Holt, *supra* note 3, at 683; Ohio Attorney General's Opinion, No. 88-001 (Jan. 25, 1988) (Ohio Attorney General says that a local board of education may adopt a policy of release time religious instruction).

[8] Zorach v. Clauson, 343 U.S. 306 (1952).

[9] *Id*. at 313.

[10] *Id*. at 314.

of some of the controversy inherent in the current approach to teaching values in public schools.

4. A released tome program could also be designed to provide instruction in religious literature, history, and themes that are necessary in order to more fully appreciate important works of art, music, and literature, and, therefore, necessary to a complete education.[11] Although such instruction can be given in public schools if taught objectively without any attempt to influence the beliefs of the students,[12] a released time program relieves the school of the expense of the course and of being in the controversial and difficult position of supervising the content and instruction of such a course.

5. A released time program does not involve any expense to the school district or state.

6. During its sessions, a released time program may substantially reduce the number of students in a class, enabling the teacher to give additional attention and help to the remaining students.

7. A released time program recognizes and reinforces the constitutionally protected right of parents to direct the religious upbringing of their children.[13]

8. A released time program provides a child and his parents the opportunity for religious instruction that might otherwise be unavailable. For example, at the present time, more than fifty percent of mothers with school age children work outside of the home. Work schedules often prevent these parents from taking their children to religious instruction after school. Thus, a released time program offers a very practical alternative for them to provide their children with weekday religious instruction.

9. A child is required by law to spend a substantial part of his day in the public classroom, thereby greatly reducing the time available for him to participate in weekday religious instruction before or after school. A released time program would restore some of that time to the child if his parent wishes to make use of it. It recognizes that a child's spiritual needs should be met throughout the week and not only on weekends.

10. A released time program for religious instruction is not completely unique in education, since school soften have released time programs for students to work at jobs off school grounds or to take advanced courses at a local college. In each case, the students are permitted to leave school ground during school hours in order to be given instruction, which the school is not able to provide on campus.

---

[11] School District of Abington v. Schempp, 374 U.S. 203, 225 (1963).

[12] *Id*.; Wiley v. Franklin, 468 F. Supp. 133 (E.D. Tenn. 1979); Vaughn v. Reed, 313 F. Supp 431 (W.D. Va. 1970).

[13] Yoder v. Wisconsin, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Lanner v. Wimmer, 662 F.2d 1349, 1358 (10th Cir. 1981); Smith v. Smith, 523 F.2d 121, 125 (4th Cir. 1975) *cert. denied*, 423 U.S. 1073 (1976).

QUESTION 2: What are some of the arguments against the adoption of a released time program by a school district?

In determining the constitutionality of a released time program, a court is not to consider the wisdom of the system, its efficiency from an educational point of view, or the political considerations behind its adoption.[14] However, a school district will often consider these factors in determining whether to adopt a program. Some of the reasons used in opposing local programs include:

1. The school becomes a crutch on which local churches lean in attempting to provide religious training to children in their community.

2. Since students are compelled by compulsory education laws to attend school, churches are using the state to furnish students for their religious program in violation of the principle of separation of church and state. Response: This argument in effect was rejected by the Court in *Zorach* v. *Clauson*, which stressed the principle of accommodation.

3. School children will feel pressured to attend released time programs, even if they or their parents do not agree with the religious views of the groups sponsoring such programs. Response: Although some peer pressure might be felt by the students to participate, participation is completely voluntary on the part of students and parents. Also, in contrast to religious instruction in the classroom, the students who participate in the program are the ones required to leave the classroom.[15]

4. The education of the children who do not participate in a released time program is hurt because normal class activity will be disrupted while some students attend the programs.[16] Response: The answer to this objection depends in part on the number of students who leave the class to participate in released time. Where the number is small, normal class activity may in fact be interrupted. However, this time can be used for special projects or extra help on a more individualized basis for those students remaining in the classroom. Therefore, properly structured, a released time program need not unduly disrupt the educational function of the class. Accommodation is practical and possible.

5. The primary objective of the public school is to educate its students in academic subjects such as reading, writing, and arithmetic, not to accommodate religious instruction. The objective will be disrupted if parents choose to have their children spend time on released time classes. Response: First, parents have the primary responsibility to

[14] Zorach v. Clauson, 343 U.S. at 306; Holt v. Thompson, 66 Wis. 2d 659, 225 N.W.2d 678, 687 (Wis. 1975).

[15] Zorach v. Clauson, 343 U.S. at 306; Perry v. School District No. 81, 344 P.2d 1036, 1043 (Wash. 1959).

[16] Zorach v. Clauson, 343 U.S. at 311.

determine the nature of the education of their children. Additionally, parents should therefore have the option of permitting their children to receive religious training as part of their children's general education. Moreover, instruction in religious literature, history, and other religious themes has been recognized as a proper subject for public schools, if taught objectively without any attempt to indoctrinate the students. If a school chooses not to provide these types of classes, the parents should have the right to a viable alternative.[17]

6. If it adopts a released time program, the school district may run the risk of litigation. Response: A released time program may be designed and administered to meet all legal and constitutional considerations, thereby diminishing the likelihood of litigation. In any event, the fear of litigation should not have a chilling effect on whether parents and students should be permitted to exercise option the law provides for them.

QUESTION 3: Can parents of religious groups legally require a school board to adopt a released time program?

Generally, no. Although released time programs may be constitutional, it is not a constitutional right of parents, religious groups, or students to have such programs.[18] Thus, a state or school district cannot be compelled legally to adopt a policy allowing students to be excused for off-campus religious instruction during school hours.

The courts are generally reluctant to interfere in the daily operation of a school and usually defer to the discretion of school boards in establishing education policies.[19] As a practical matter, this means that parents and churches must cooperate with school authorities in establishing and operating a released time program. This first step should be to clearly establish the authority of the school district allowing students to attend off campus religious activities during school hours. Parents and religious groups must often educate school officials as to the legality of such a program, pointing to existing state laws authorizing school boards to excuse students for released time programs. They must also educate the officials as to the desirability of such a program.

A noteworthy exception to the rule that a school board may not be compelled to adopt a released time program has been recognized in Oregon in one case. Oregon enacted a statute specifically authorizing the school district to excuse students, upon parents' requests, to attend off-campus weekday religious instruction. Yet a court interpreted that statute as requiring school

[17] School District of Abington v. Schempp, 374 U.S. 203, 225 (1963).

[18] Zorach v. Clauson, 343 U.S. at 306. *See also* Cal. Op. Att'y Gen., No. 80-1005 (Apr. 28, 1981) (parents and students do not have a constitutional right to engage in release time religious education programs unless attendance at school interferes with the free exercise of religion by unreasonably denying them the opportunity to obtain religious education).

[19] Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

boards to release students.[20] Other state courts may or may not adopt this interpretation of similar statues.

In sum, released time is an opportunity for providing religious instruction to public school students. However, it is an opportunity that must be requested rather than demanded.

QUESTION 4: What authority must a local school district have in order to adopt a released time program?

There are several ways school districts are given authority to adopt a released time program. First, some states, such as Wisconsin, have state constitutions, which explicitly authorize releasing students from public schools for religious instruction.[21] It should be noted, however, that some state constitution "establishment clauses" might be used to bar certain aspects of local programs in a given state.[22]

Second, some states expressly authorize by statute school districts to adopt released time programs.[23] Even under these statutes, the local school district has considerable discretion in establishing the specific framework of any given program.

Third, where no specific statute existed, a court in Washington allowed a school district to adopt a released time program under the compulsory education laws of the state.[24] These types of laws often provide local school boards the authority to regulate the day-to-day operation of the schools and to establish the programs and curriculum that will best serve the needs of the community. Parents and religious groups should consider seeking passage of state constitutional provisions, statutes, or regulations specifically permitting released time programs, if the state does not have adequate provisions.

---

[20] Dilger v. School District 24 CJ, 222 Or. 108; 352 P.2d 564 (Or. 1960).

[21] Holt v. Thompson, 66 Wis. 2d 659, 255 N.W.2d 678, 688 (Wis. 1975) (Wisconsin constitution amended to allow legislature to authorize released time programs).

[22] Perry v. School District No. 81, 344 P.2d 1036, 1043 (Wash. 1959) (violations of state constitution by certain aspects of released time program). The Supreme Court in *Zorach v. Clauson*, 343 U.S. 306 (1952), discusses only whether released time programs violated the federal constitution.

[23] Cal. Education Code §46014 (West); N.Y. Education Law §3210 (McKinney).

[24] Perry v. School District No. 81, 344 P.2d at 1043 (local superintendent had statutory authority to excuse students for "any other sufficient reason"); Dilger v. School District 24 CJ, 222 Or. 108, 352 P.2d 564 (Or. 1960) (note that this statute was challenged as being too vague) (concurring opinion) (school district could release students upon parental request without any legislation and purely by the exercise of administrative power).

QUESTION 5: Who may operate a time released program?

Each community will have its own unique ethnic, cultural, and religious character to consider in establishing its program. An effective program should seek to accommodate the religious needs of the students in the community and can "make room for as wide a variety of beliefs and creed as the spiritual needs of man deem necessary."[25]

The religious groups in the community must indicate the released time programs. Neither the local school nor the state can take any action that would "coerce anyone to attend church to observe a religious holiday, or to take religious instruction."[26]

It is common for various religious groups, sects, and denominations to form a common council.[27] These councils provide both the structure and the administration for the program. Each group, sect, or denomination retains control over the location, materials, and religious content of its own program.

A religious group may choose to offer released time activities even though it does not participate in a common council.[28] And where no council exists, individual churches or denominations may also arrange with school authorities for a program only involving their group.[29]

Regardless of how a program is structured, the school district must no show partiality for any particular church, sect, or denomination.[30]

QUESTION 6: What are the basic guidelines for financing and administering released time programs?

The public school can neither finance religious released time programs nor become excessively involved in administering sectarian activities.[31] Bother secular and sectarian administrators who establish and operate released time programs should keep two basic principles in mind.

---

[25] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[26] *Id*. at 314.

[27] Smith v. Smith, 523 F.2d 121 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976); Perry v. School District No. 81, 344 P.2d 1036 (Wash. 1959).

[28] *Perry*, *supra* note 3, at 1038.

[29] *See, e.g.*, Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981).

[30] Walz v. Tax Commission, 397 U.S. 664 (1970); Epperson v. Arkansas, 393 U.S. 97 (1968); Zorach v. Clauson, 343 U.S. at 314.

[31] Zorach v. Clauson, 343 U.S. at 308, 314; Lanner v. Wimmer, 662 F.2d at 1358.

First, "no tax, in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[32] Consequently, the religious groups or the parents must bear the costs of the program. Some minor, incidental but necessary administrative costs, such as those incurred filing attendance reports, have been considered too insignificant to violate the general rule.[33]

Second, a released time program should seek the alternative that will minimize the state's entanglement in administration.[34]

QUESTION 7: Are there limits on the amount of time which students may be released for religious instruction?

To some extent, yes. Before a program administrator begins discussions with public school authorities about when and for how long the school will release program participants, the administrator should consult the applicable statues and regulations to determine what limitations may exist. Usually the rime permitted for religious released time ranges from one to three hours per week.[35] The release of students for one hour per day has been allowed.[36] However, at some point, the amount of released time could become so great as to constitute the abdication of education to sectarian groups and not the mere accommodation of the religious needs of the students.[37]

If state authorities have not mandated the time limits, local school boards may regulate the time standards to best meet the needs of the school's regular schedule. In some states where the legislature has set a maximum time limit on released time activity, the school board, upon a parent's request, must allow release for the full amount of time but can designate the time when the child will be released.[38]

In order to avoid any significant disruption of the school's schedule and to minimize administrative involvement, the local school usually designates the period of the day during

---

[32] Illinois *ex rel*. McCollum v. Board of Educ., 333 U.S. 203, 210 (1948).

[33] Holt v. Thompson, 66 Wis. 2d 659, 225 N.W.2d 678, 683 (Wis. 1975).

[34] Lanner v. Wimmer, 662 F.2d 1349, 1358 (10th Cir 1981).

[35] Zorach v. Clauson, 343 U.S. 306 (1952) (one hour per week); Holt v. Thompson, 66 Wis. 2d 659, 225 N.W.2d 678 (Wis. 1975) (at least one hour but no more than three hours per week); Dilger v. School District 24 CJ, 222 OR 108, 352 P.2d 564 (Or. 1960) (no more than two hours per week).

[36] Lanner v. Wimmer, 662 F.2d at 1349.

[37] *Id*. at 1359.

[38] Dilger v. School District, 352 P.2d at 568.

which the participating groups may receive students for religious activities.[39] As a practical matter, if more than on religious group sponsors a released time program, then all groups must meet at the same time. In at least one program, the students themselves designated which class period they wanted to participate in religious instruction.[40]

QUESTION 8: May the state lower the required minimum number of hours in the school day with the practical effect of cutting released time programs?

Yes. Since the state is not required to allow a released time program, it can set the minimum number of hours in the students' school day, which could have the effect of making a released time program impractical for school district to implement. An exception to this may exist where the state has a statute authorizing released time activity which specifically requires or has been interpreted to require that school districts release students for religious instruction upon their parents' request. (See Question 3).

Also, a primary argument for a released time program is that, since compulsory education absorbs so much of the child's day, the school district should release him for a part of that time to receive religious instruction that he would otherwise have to forego. This argument becomes less convincing where the school day is shortened, since arguably children would then have more time outside of school hours to attend religious instruction in their home or church.

Thus, as a practical matter, those directing the local program must strive to cooperate with school officials as much as possible and work to make the program a truly positive addition to the district's education program. Then, if reduction in the minimum-hours requirement occurs, school administrators may be more reluctant to trim back the released time program.

QUESTION 9: Which students may participate in a released time program?

School districts can institute religious released time programs for any grade level.[41] All released time programs have required students to have parental permission to participate in religious released time programs.

---

[39] Zorach v. Clauson, 343 U.S. 306, 308 (1952); Lanner v. Wimmer, 662 F.2d 1349, 1359 (10th Cir. 1981) (time set by school officials for junior high students); Holt v. Thompson, 66 Wis. 659, 225 N.W.2d 678, 683 (Wis. 1975).

[40] Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981) (high school students selected the hour to take released time classes).

[41] *Id*. (junior and senior high level); Smith v. Smith, 523 F.2d 121 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976) (elementary level); Perry v. School District No. 81, 344 P.2d 1036, 1038 (Wash. 1959) (elementary level).

QUESTION 10: How should parental consent be obtained?

Program administrators should choose the method for obtaining parental consent that will require the least amount of school involvement.[42] For the reason, the religious groups which sponsor released time programs should take primary responsibility for distributing consent forms to parents. In one case, when a group wished to open its program to persons not members of its denomination, it obtained a student enrollment list from the public school and then mailed the consent cards to parents.[43] If the group does not wish to offer the program to all students, it can distribute cards to a select group.

Released time groups should prepare the consent cards and then mail them directly to the parents. Thereby, the groups steer clear of the prohibitions against state financing or becoming excessively entangled in administering programs. If the public school wants program participants to use a uniform consent form, the school should prepare and example which the religious organization can produce and distribute.

The practice of having public school teachers or religious group representatives distribute consent cards or explain the program in public classes has been disallowed. Release time personnel should not enter classrooms to recruit students and public school teachers should not be allowed to take an active part in the recruitment effort either by physical participation in the enrollment process or by verbal encouragement of the students.[44]

After parents have completed the consent forms, the school must verify that each child has received parental permission to participate in the program. The religious group may collect the forms and forward them to the public school officials.[45] Also, the children may return the forms to the school which then gives the cards to the religious groups in the program who then inform the school officials which students are to be released.[46]

---

[42] Lanner v. Wimmer, 662 F.2d 1349, 1358 (10th Cir. 1981).

[43] Smith v. Smith, 523 F.2d 121, 122 (4th Cir. 1975), *cert. denied* 423 U.S. 1073 (1976).

[44] Doe v. Shenandoah County School Board, 737 F. Supp. 913, 918 (W.D. Va. 1990) (temporary restraining order issued to prevent release time personnel from entering classrooms to recruit students and public school teachers from taking an active part in the recruitment effort either by physical participation in the enrollment process or by verbal encouragement of the students); Perry v. School District No. 81, 344 P.2d 1036, 1037-38 (Wash. 1959) (distribution of card in schools or the making of announcements or explanations for the purpose of obtaining the parents' consent by representatives of religious groups or instructors in the schools violated state constitution). *See also*, Op. Att'y Gen. State of Or. No.8204, April 26, 1989 (Oregon Attorney General rules that the distribution of "release time" brochures and permission slips violates the Oregon Constitution).

[45] Lanner v. Wimmer, 662 F.2d 1349, 1354 (10th Cir. 1981).

[46] Smith v. Smith, 391 F. Supp. 443, *rev'd*, 523 F.2d 121, 122 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

QUESTION 11: What information should parents receive about a released time program?

The administrators of the religious released time program should inform parents about the purpose and format of the proposed activities. Parents should be told how the program can enrich their child's education. This is especially true when a released time program is a new concept in the community. An information sheet should accompany the consent forms sent to the parents. The making of announcements of explanations in the classroom or on the school premises for the purpose of obtaining the parents' consent by representatives of religious groups or public school teachers has been disallowed.[47] (See Question 10).

The information sheet should include a description of the religious organizations that are participating in the program and how each organization wishes to conduct its religious activities. The parents should be advised where the activities will take place and how students will get to that location. The parents will also need to know how this program may affect their child's standing in the public school; for example, whether the child will be able to make up missed work. Besides informing the parents about the mechanics of the specific program, it is also helpful to include some general background information covering the history of released time.

QUESTION 12: Where may time released classes be conducted?

The United States Supreme Court has ruled that released time classes may not be held on public school grounds.[48] As long as classes are not conducted on public school property, though, released time instruction may be provided in any otherwise lawful location. For example, lower courts have allowed released tome programs in which classes were held in churches or trailers located near, but not on, school grounds,[49] in a seminary which was architecturally similar to the school located on a lot adjacent to the school,[50] and at religious centers off school grounds.[51]

While most locations off public school property will be constitutionally permissible, released time programs should avoid even the appearance of official involvement with their program. In a Virginia case, a private organization conducting a released time program used remodeled school buses as classrooms. The school buses were in all outward appearances identical to the school buses used by the local school district. The bus parked directly in front

---

[47] Perry v. School District No. 81, 344 P.2d 1036, 1043 (Wash. 1959).

[48] Compare Illinois *ex rel*. McCollum v. Board of Educ., 333 U.S. 203, 209 (1948) (released time program in which religious teachers entered public school classrooms held unconstitutional); with Zorach v. Clauson, 343 U.S. 306, 308 (l952) (released time program held constitutional because, among other reasons, classes were not held on public school grounds).

[49] Smith v. Smith, 523 F.2d 121 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

[50] Lanner v. Wimmer, 662 F.2d 1349, 1354 (10th cir. 1981).

[51] Holt v. Thompson, 66 Wis. 2d 659, 225 N.W.2d 678, 682 (Wis. 1975).

of the main entrance to an elementary school, inches from the curb, for the majority of the school day. In issuing a temporary restraining order against these methods, the court noted the appearance of official involvement with the program.[52]

QUESTION 13: Who may teach in a released time program?

Released time programs should not employ state paid professional staff, including public school teachers. The problem with utilizing state paid professional staff or public school teachers. The problem with utilizing state paid professional staff or public school teachers is indirect government subsidy benefits a participating released time denomination that would otherwise have to pay the salaries of independent religious instructors. The Court now recognizes that a subsidy may directly benefit the educational function of a sectarian enterprise if it results from the private decision-making of students and does not have the effect of advancing religion through inculcation.[53] Even though the Supreme Court has allowed state employees in sectarian schools to provide neutral secular services to nonpublic students,[54] state funded personnel for religious instruction of public students may be construed as unconstitutional state sponsorship of a sectarian educational program.[55]

Generally, participating release time educators should feel freedom to employ whomever they deem qualified but should keep in mind the following principles. The Supreme Court prohibits "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith,"[56] "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion."[57] The government is prohibited from blending secular and sectarian education.[58]

---

[52] Doe v. Shenandoah County School Board, 737 F. Supp 913, 918 (W.D. Va. 1990).

[53] Mitchell v. Helms, 530 U.S. 793, 835-836 (2000) (overruling *Meek* and *Wolman* to the extent that religious institutions can receive direct aid as long as it is neutral, passes through the student and does not result in advancing religion); Agostini v. Felton, 521 U.S. 203 (1996) (undermining basic assumptions that any public employee on the premise of a religious school results in inculcation of religion and excessive entanglement by the government)

[54] Agostini v. Felton, 521 U.S. 203, 252 (1997) (holding Title I provision of state funded teachers and material for remedial education constitutional regardless if disadvantaged student attends a sectarian school); Zobrest v. Catalina Foothills School District, 509 U.S. 1, 13 (1993) (holding it constitutional for the state to provide a sign-language interpreter to a deaf student attending a Roman Catholic high school under the Individuals for Disabilities Education Act).

[55] *See generally*, School District of the City of Grand Rapids v. Ball, 473 U.S. 373, 385-89 (1985) (education program offering secular education to nonpublic school students and employing full time nonpublic school teachers had the primary effect of advancing religion); Meek v. Pittenger 421 U.S. 349, 367-72 (1975) (statute providing for the loan of state-paid professional staff to nonpublic schools declared unconstitutional).

[56] Grand Rapids School District v. Ball, 473 U.S. at 385.

[57] Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

[58] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

QUESTION 14: In what manner should students be released from their public school classes to attend released time classes?

Public school officials should excuse students for religious instruction in the same manner that they release students for other purposes, as the situation permits. Moreover, school officials should attempt to excuse students for released time in a manner that stigmatizes neither the students excused nor those remaining. This, public school teacher and administrators may not comment on the released time program or on the students who choose to attend or not to attend.[59]

In one situation, a federal court allowed a public school to release students for religious instruction in the following manner: The public address system and bell system of a seminary in which released time classes too place was connected to the public address and bell systems used by a public school. Bells were rung to denote the beginning and ending of class, and public school announcements could be heard in the seminary, but could not be made from there. The united States Court of Appeals for the Tenth Circuit held this manner of releasing students permissible because the seminary paid for the installation of communications connections between the school and the seminary and because the interconnected system helped avoid unnecessary conflicts between seminary classes and public school classes and activities.[60]

QUESTION 15: How should students be transported from public school premises to released time classes?

According to the Supreme Court, the Constitution prohibits public schools from providing students with transportation to religious released time activities. The Supreme Court has explained that the constitutional principle of accommodating the religious needs of the people by cooperating with religion in released time programs does not justify significant financial expenditures to assist those programs.[61] Generally, religious organizations and parents must assume full responsibility for a student's attendance at religious activities. (See Question 16).

Religious administrators must, therefore, make arrangements for parents or escorts from particular religious groups to meet students at the public school and transport them to religious education activities.[62] In situations where school authorities permit high school students

---

[59] *Id*. at 311.

[60] Lanner v. Wimmer, 662 F.2d 1349, 1359 (10th Cir. 1981). The Tenth Circuit is the only court to have ruled on the permissibility of a manner of release so closely interconnecting a public with a sectarian school. Whether other courts will choose to follow the Tenth Circuit's holding is open to question.

[61] Zorach v. Clauson, 343 U.S. at 308-9, 314.

[62] Perry v. School District No. 81, 344 P.2d 1036, 1038 (Wash. 1959).

regularly to drive themselves to non-religious released time activities such as jobs, authorities also should allow students to drive or otherwise provide their own transportation to religious instruction classes.

QUESTION 16: How may attendance be recorded and enforced for released time classes?

The primary responsibility for enforcing attendance for released time classes lies with the parents and the administrators of a religious released time program. Allowing public school officials to punish truancy might amount to religious coercion, violating the free exercise rights of students.[63]

On the other hand, the public school may require attendance reports from released time administrators, since the school has a legitimate interest in knowing the whereabouts of its students during school hours.[64] Public schools also may choose not to require that attendance reports be filed.[65]

Also, it is permissible for the public school to take some action against students who are enrolled in released time education but do not attend. Thus, the public school may report repeated absences to a child's parents, although it perhaps may not report more occasional absences.[66] Also, the public school may deny permission to attend released time classes to students who in the past requested the privilege and deceiving the authorities, rather than punishing truancy.[67]

Once the public school decides to record attendance, it must choose the administrative procedure that requires it to be as uninvolved as possible in the attendance-taking procedure.[68] Religious administrators may be required to submit daily, weekly, or monthly attendance reports to the public school.[69] In one program, a court allowed a publics school to provide released time

---

[63] Zorach v. Clauson, 343 U.S. at 314; Holt v. Thompson, 66 Wis. 2d 659,225 N.W.2d 678, 688 (Wis. 1975).

[64] Zorach v. Clausen, 343 U.S. at 311 n.6; Lanner v. Wimmer, 662 F.2d 1349, 1358-59 (10th Cir. 1981); Holt v. Thompson, 66 Wis. 2d at 682.

[65] Perry v. School District No. 81, 344 P.2d 1036, 1038 (Wash. 1959).

[66] Lanner v. Wimmer, 662 F.2d at 1355.

[67] Holt v. Thompson, 66 Wis.2d at 682.

[68] Lanner v. Wimmer, 662 F.2d at 1358.

[69] Zorach v. Clauson, 343 U.S. at 308 (weekly); Lanner v. Wimmer, 662 F.2d at 1355 (daily); Holt v. Thompson, 66 Wis. 2d at 682 (monthly).

administrator with uniform attendance slips in order to integrate efficiently attendance data with that public school's records.[70] Nevertheless, this practice treads dangerously close to an expenditure of public funds for the expenses of a released time program, which the Supreme Court has ruled unconstitutional. Therefore, the burden o transmitting attendance reports from the released time program to the public school administrators should remain on the released time administrators.[71]

QUESTION 17: What activities should the public schools plan for students who are not released for religious instruction?

Students who do not participate in religious released time activities should continue with their secular school activities under the care and supervision of the school authorities. They cannot be required to leave their classroom.[72]

When planning activities for the remaining students, the school should keep two considerations in mind. On the one hand, the school has an obligation to plan constructive activities for the children who do not participate in a released time program. On the other hand, the school should be careful not to place students who participate in a released time program at a significant academic disadvantage. One possible solution would be for the school to suspend instruction in new material during released time, while continuing to provide formal supervision for activities which might include special projects, additional individual help, or perhaps a supervised study hall.[73]

In situations where the amount of released time is significant or the number of students participating in the program is small, suspending instruction in new material may be impractical. If the school does decide to continue the presentation of new material, the school should give the religious students an opportunity to make up the lesson, which they missed.

QUESTION 18: May a school district or state give credit for time spent in a released time program in order to meet the number of hours students are required to be in the custody of the school ("custodial credit")?

Yes. Only one court has specifically addressed the issue of whether time spent in a released time program may be credited toward the time, which the state requires students to be in

---

[70] Lanner v. Wimmer, *supra* note 2, at 1358.

[71] *Id*.

[72] Illinois *ex rel*. McCollum v. Board of Educ., 333 U.S. 203 (1948) (released time program in which, among other characteristics, non-participating students had to leave their classrooms when sectarian instructors arrived to teach in the public classrooms is unconstitutional).

[73] Perry v. School District No. 81, 344 P.2d 1036, 1038 (Wash. 1959).

the school's custody and it held that such credit is permissible.[74] Since a school district or state generally cannot be compelled to adopt a released time program, it is doubtful that either could be compelled to give custodial credit for the time spent in a released time program, it is doubtful that either could be compelled to give custodial credit for the time spent in a released time program. Finally, on other court, that did not address this issue directly, did note in passing that no school credit was given in that case for participation in a released time program, which it found to be essentially valid.[75]

QUESTION 19: May a school district or state credit time spent in a released time program toward the number of hours that students must complete in order to meet graduation requirements? (i.e. May released time be an "elective credit"?)

Yes. The only court to have addressed this issue held that released time classes may satisfy an elective credits requirement for graduation.[76] This court also ruled, however, that a state or school district must determine whether credit will be given for a particular released time course based on objective criteria, and not the religious content of the course.[77] That is, once a school district or state determines that it will give credit for released time coursework, it may not deny credit for a particular course based upon the religious content of that course. For example, credit could not be denied because a certain time released program was taught from a particular denominational viewpoint. It is unclear whether this means that school officials may allow credit for nonreligious released time classes but not for religious released time classes. Probably they would be allowed to distinguish between nonreligious and religious coursework by most courts.[78]

In sum, the school district or state cannot be required to give elective credit for released time classes.

In one case, the court allowed grades from released time courses to be entered into a student's permanent record. However, the grade was not recorded on the student's public school report card.[79]

Finally, one court that did not address the issue did note in passing that no credit was given for participation in a released time program, which it found to be essentially valid.[80]

---

[74] Lanner v. Wimmer, 662 F.2d 1349, 1356, 1362 (10th Cir. 1981).

[75] Perry v. School District No. 81, 344 P.2d at 1038.

[76] Lanner v. Wimmer, 662 F.2d at 1360-61.

[77] *Id*.

[78] Lanner v. Wimmer, 662 F.2d at 1360-61 could be read to prohibit such a distinction.

[79] *Id*. at 1355.

[80] Perry v. School District No. 81, 344 P.2d 1036, 1038 (Wash. 1959).

QUESTION 20: May a school district or state give credit for time spent in a released time program to meet the number of hours that students are required to be registered in order to be eligible for extracurricular activities or honor roll ("eligibility credit")?

Yes. Although only one court has addressed this issue, that court held that the hours spent in released time classes may be recognized for eligibility credit, if no test of religious content is employed.[81] That is, the school district or state may not condition credit upon the content of the particular class, but only upon objective secular criteria, such as teacher certification or the appropriateness of the subject matter of the class. (See Question 19). Again it is unclear whether a school district or state can be compelled to give eligibility credit for released time classes. Finally, one court, that did not address the issue, did note in passing that no school credit was given for participation in a released time program, which it found to be essentially valid.[82]

QUESTION 21: If a school district decides to allow credit toward graduation for released time courses, how should registration be conducted?

Registration should be conducted in the least entangling manner possible. The student may indicate on a pre-registration form or class schedule that he desires to attend a released time program, and he should plan his class schedule accordingly. Schedules for classes, school catalogues, and registration forms by the public school should not contain any schedules of released time classes. Registration for the released time course itself should occur off the school campus and involve only the released time administrators on forms supplied by the released time programs. The students may return the parental consent slips to the released time administrators, who would then forward them to the school. The school officials would thereby verify that a proper consent form exists for each student who pre-registered for released time classes. That is the extent of their involvement.[83]

---

[81] Lanner v. Wimmer, 662 F.2d 1349, 1362 (10th Cir. 1981).

[82] Perry v. School District No. 81, 344 P.2d at 1038.

[83] Lanner v. Wimmer, 662 F.2d at 1354-55, 1359.

QUESTION 22: May a school district or state count the time that students spend in a released time program in its formula for allocating state funding ("funding credit")?

Yes. A school district may count released time hours toward funding credit if the state allows it to do so.[84] Thus, the only federal court to have addressed this issue concluded that a state has discretion in determining the formula for its allocation of funding to school districts.

On the other hand, the state funding may not be used in any way to support or enhance released time classes. Also, a state has discretion to decide not to count time spent in a released time program in its funding formula. Thus, a particular school district cannot force a state to give funding credit for time spent in released time classes.[85]

Finally, it is worth noting that one court, which did not directly address the funding credit issue, did note in passing that no school credit was given for participation in a released time program, which it found to be essentially, valid.[86]

QUESTION 23: How much supervision may the public schools exercise over the content and teaching of a religious released time course?

Very little. Supervision of the content and teaching of a religious released time course is generally not allowed, since it might excessively entangle the state in religious matters.[87] On the other hand, if a school decides to give academic credit for religious instruction in a released time course, it may inquire into the training of teachers and whether a particular course covers a subject for which "credit" could be given.[88] But, when a released time program, even one that grants academic credit, is structured in such a way as to require state officials to monitor and judge what is religious and what is not religious in a private religious institution, then the entanglement inherent in such a determination exceeds permissible accommodation and offends the Establishment Clause.[89] And, a public school cannot force students in a released time program to receive academic credit, as a means for the state to ferret out religious courses.[90]

---

[84] *Id*. at 1362-63; Holt v. Thompson, 66 Wis. 2d 659, 225 N.W.2d 678, 683 n.14 (Wis. 1975).

[85] Lanner v. Wimmer, 662 F.2d at 1362-63.

[86] Perry v. School District No. 81, 344 P.2d 1036, 1038 (Wash. 1959).

[87] Illinois *ex rel*. McCollum v. Board of Educ., 333 U.S. 203, 208 (1948); Perry v. School District No. 81, 344 P.2d at 1038.

[88] Lanner v. Wimmer, 662 F.2d at 1361.

[89] *Id*.

[90] *Id*.

QUESTION 24: How can one contrast the Champaign, Illinois plan in *McCollum,* which the Supreme Court held to be unconstitutional, with the New York City plan in *Zorach,* which the Court held to be constitutional?

The points of variance between *McCollum* and *Zorach* can be summarized as follows:

CHAMPAIGN PLAN	NEW YORK CITY PLAN
1. No underlying enabling State statute.	1. Education Law, §3210 is the enabling statute which provides that "Absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public schools;" and further provides that "absence for religious observance and education shall be permitted under the rules that the commissioner shall establish."
2. Religious training took place in the school buildings and on school property.	2. Religious training takes place outside of the school buildings and off school property.
3. The place for instruction was designated by school officials.	3. The place for instruction is designated by the religious organization in cooperation with the parent.
4. Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils.	4. No element of segregation is present.
5. School officials supervised and approved the religious teacher.	5. No supervision or approval of religious teachers or course of instruction by school officials.
6. Pupils were solicited in school buildings for religious instruction.	6. School officials do not solicit or recruit pupils for religious instruction.
7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds	7. No registration cards furnished by the school or distributed by the school. No expenditures of public funds involved.
8. Non-attending pupils isolated or removed to another room.	8. Non-attending pupils stay in their regular classrooms continuing significant educational work.
	9. No credit given for attendance at the religious classes.
	10. No compulsion by school authorities with respect to attendance or truancy.
	11. No promotion or publicizing of the released time program by school officials.
	12. No public monies are used.

QUESTION 25: What constitutes legal and illegal religion studies in the public schools and how does one distinguish the difference between the propagation of a religious faith and the study of religion?

The following discussion does not involve the concept of release time by which students are excused from school to be given sectarian religious instruction but the situation in which a public school district seeks to incorporate the objective study of religion into the curriculum. A release time program taught off public school property does not need to conform to the guidelines discussed in this question.

Supreme Court decisions regarding religion and the public schools should provide the framework for any program religious education curriculum in the public schools:

> 1.PUBLIC SCHOOLS CANNOT INCULCATE PARTICULAR RELIGIOUS DOCTRINE. The public school curriculum cannot be used to inculcate religious doctrine.[91]
>
> 2.PUBLIC SCHOOLS MAY ACCOMODATE STUDENTS' SPIRITUAL NEEDS. The public school may adjust its program to accommodate the spiritual needs of schoolchildren by working with churches, synagogues and families in released time programs, by which children are excused from school to be given religious instruction during the school day by instructors of the parents' own choosing, free from direct school input or influence.[92]
>
> 3.THE GOVERNMENT MAY NOT PRESCRIBE PRAYER. It is clear that the government may not prescribe any particular form of prayer to be used in public schools.[93]
>
> 4.STATE INITIATED DEVOTIONAL EXERCISES ARE OUT; OBJECTIVE TEACHING OF RELIGION AND THE BIBLE IS DESIRABLE. State initiated devotional exercises for public schoolchildren in the public school classroom as part of the curricular program are barred by the Establishment Clause. The objective teaching about religion in history, music, literature, and art, and courses teaching the Bible as literature or comparative religion, are both permissible and desirable for a complete education.[94]
>
> 5.CURRICULUM MAY NOT HAVE THE PURPOSE OF PROMOTING A PARTICULAR RELIGIOUS TENET. A state law requiring balanced treatment of the teaching of creation science and evolution is unconstitutional if its sole purpose is to

[91] McCollum v. Board of Educ., 333 U.S. 203, (1948).

[92] Zorach v. Clauson, 343 U.S. 306 (1952).

[93] Engel v. Vitale, 370 U.S. 421 (1962).

[94] Abington School District v. Schempp, 374 U.S. 203 (1963).

change the curriculum to endorse a particular religious belief.[95]

In addition, James V. Panoch has developed a set of what he calls "pair-words" which may be used to determine what constitutes legal and illegal religion studies in the public schools. The "pair-words" are as follows:

> The school may sponsor the *study* of religion, but may not sponsor the *practice* of religion.
>
> The school may *expose* students to all religious views, but may not *impose* any particular view.
>
> The school's approach to religion is one of *instruction,* not one of *indoctrination*.
>
> The function of the school is to *educate* about all, not to *convert* to any one, religion.
>
> The school's approach to religion is *academic*, not *devotional.*
>
> The school should *study* what all people believe, but should not *teach* a pupil what he should believe.
>
> The school should strive for student *awareness* of all religions, but should not press for student *acceptance* of any one religion.
>
> The school should seek to *inform* the student about various beliefs, but should not seek to *conform* him to any other belief.[96]

Although the Supreme Court has specifically recognized the importance of the objective teaching of religion, decisions have been mixed as to whether public schools may provide any type of religious instruction during the school day.

One court has held that a public school district may not provide religious instruction during regular school hours in a public school building even on a voluntary basis. The court found such a practice is an unconstitutional advancement of religion. This was the case even though the primary purpose of the program was arguably secular (examples of secular purposes for such a program may be found in the answer to Question 1). Since a religious study course was taught on school grounds during regular school hours, the court found excessive entanglement regardless of who taught the classes.[97]

---

[95] Edwards v. Aguillard, 482 U.S. 578 (1978).

[96] Peter Bracher et al, PERSC Guidebook. Public Education Religion Studies: Questions and Answers (Dayton, Ohio: Public Education Religion Studies Center, 1974).

[97] Doe v. Human, 725 F. Supp. 1503, 1506-07 (W.D. Ark. 1989); see also the principles enunciated in Illinois *ex rel*. McCollum v. Board of Educ., 333 U.S. 306 (1952).

Other courts have found that the establishment clause permits religious education under certain circumstances. In one case, a public school system had provided classes in which the Bible was taught for over 40 years. The classes were taught to fourth and fifth grade elementary school students who received no grade or credit on their academic record for the classes. Although this specific program was found infirm because it was originally conceived and designed to inculcate religious beliefs, the court nonetheless found that the Bible could be taught in the public school system without violating the establishment clause if certain guidelines were met.[98]

QUESTION 26: Has the Supreme Court consistently acknowledged the constitutional validity of *Zorach* since it was first decided in 1952?

Yes. The Supreme Court has frequently affirmed the constitutional vitality of *Zorach.* For example, in *Abington School District* v. *Schempp,* the Supreme Court specifically distinguished *Zorach* from the religious activity it held unconstitutional in *Schempp.*[99] Even Justice Brennan in his dissent in *Schempp* upheld the constitutional validity of the *Zorach* opinion.[100]

In *Board of Education* v. *Allen,* the Supreme Court cited *Zorach* as one of the cases upon which the secular purpose and primary effect tests of the Establishment Clause were based.[101]

In *Lemon* v. *Kurtzman,* the Supreme Court cited *Zorach* with approval.[102] Several decisions contemporaneous with the *Lemon* decision also cited *Zorach* as good law.[103]

---

[98]Crockett v. Sorrenson, 568 F. Supp. 1422 (W.D. Va. 1983) (supervision and control of course should be under exclusive direction of the school board; school board should do hiring and firing of teachers for course in the same manner as it does for all other teachers; teachers should be certified in elementary education by the state; no inquiry should be made to determine religious beliefs, or lack thereof, of teacher applicants; school board should prescribe curriculum and select all teaching materials, including appropriate translation of Bible; course should be offered as elective; school board may solicit contributions from any private organization, but with "no strings attached"; and course should be taught in objective manner with no attempt made to indoctrinate children as to either truth or falsity of biblical materials); for a different formulation, see Vaughn v. Reed, 313 F. Supp. 431 (W.D. Va. 1970).

[99] 374 U.S. 203, 213

[100] *Id*. at 261-263 ("The crucial difference, I think, was that the *McCollum* program offended the Establishment Clause while the *Zorach* program did not.").

[101] Board of Educ. v. Allen, 392 U.S. 236, 242-243 (1968) ("Based on *Everson*, *Zorach*, *McGowan*, and other cases, Abington School District v. Schempp fashioned a test subscribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits...").

[102] Lemon v. Kurtzman, 403 U.S. 236, 614 (1971) ("Some relationship between government and religious organizations is inevitable").

[103] *See* Walz v. Tax Commission, 397 U.S. 664, 669, 672 (1970); id. at 701 (Douglas, J. dissenting) ("There is a line between what a State may do in encouraging 'religious' activities, Zorach, and what a State may not do by using its resources to promote 'religious' activities, McCollum, or bestowing benefits because of them."); Gillette v. United States, 401 U.S. 437, 450 (1971).

Furthermore, the Supreme Court since *Lemon* has consistently cited *Zorach* as constitutionally valid. For example, in *Meek* v. *Pittenger,* the Court cited *Zorach* for its statement that: "It is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution."[104] In *TWA v. Hardison,* Justice Marshall in his dissent cited *Zorach* as support for the statement: "This Court has repeatedly found no Establishment Clause problems in exempting religious observers from state-imposed duties. "[105]

In *Larson* v. *Valente,* the Court cited *Zorach* for the proposition that the government must be neutral between religious sects.[106] In *Lynch* v. *Donnelly,* the Supreme Court cited *Zorach* for the proposition that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require 'the callous indifference' we have said was never intended by the Establishment Clause. "[107]

As recently as 1985, Justice Brennan, writing for the majority in *Grand Rapids* v. *Ball,* relied on *Zorach* as good, instructive precedent:

> Yet in *Zorach* v. *Clauson,* 343 U.S. 306 (1952), the Court held that a similar program conducted off the premises of the public school passed constitutional muster. The difference in symbolic impact helps to explain the difference between the cases. The symbolic connection of the church and state in the *McCollum* program presented the students with a graphic symbol of the 'concert or union or dependency' of church and state, see *Zorach, supra,* at 312. This very symbolic union was conspicuously absent in the *Zorach* program.[108]

The Court compared favorably the constitutionality of the released time program in *Zorach* to the unconstitutionality of the released time program in *McCollum* v. *Board of Education.*[109]

---

[104] 421 U.S. 349, 359 (1957).

[105] 432 U.S. 63, 90(1977).

[106] 456 U.S. 228, 246 (1982).

[107] 104 S. Ct. 1355, 1359 (1984).

[108] 53 U.S.L.W. 5006, 5010 (July 1, 1985).

[109] 333 U.S. 203 (1948).

CONCLUSION[110]

Thirty years ago, Justice William O. Douglas of the United States Supreme Court made this comment about release-time programs:

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not, would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Few churches bother going through this open door. An effective release-time program requires work, planning, preparation, administration, and most of all, time. Tragically, many Christians have written off the 75 percent of American children still attending the public schools because they no longer feel that they can influence the education system. This door is still open. Let's use it before we lose it!

[110] The conclusion is a quotation from Lynn Buzzard and Samuel Ericsson, The Battle for Religious Liberty, (Elgin, Illinois: David C. Cook Publishing, 1982).

ADDENDUM

Supreme court decisions regarding religion and the public schools:

The *Mergens* decision and the Equal Access Act are consistent with earlier Supreme Court decisions involving the constitutional protection of freedom of speech and free exercise of religion.

1. FIRST AMENDMENT: A CHECK ON THE FEDERAL GOVERNMENT. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble...." [First Amendment (1791)].

2. FOURTEENTH AMENDMENT: A CHECK ON STATE AND LOCAL GOVERNMENTS. "No state shall...deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [Fourteenth Amendment (1868)].

3. THE FEDERAL PROTECTION OF FREE EXERCISE OF RELIGION APPLIES TO THE STATES. The Free Exercise Clause applies to state and local governmental entities. [Cantwell v. Connecticut, 310 U.S. 296 (1940)].

4. SCHOOLS CANNOT FORCE STUDENTS TO VIOLATE RELIGIOUS CONVICTIONS. Public school students cannot be forced to participate in an activity that violates their religious convictions. [West Virginia Board of Education v, Barnette, 319 U.S. 624 (1943)].

5. THE ESTABLISHMENT CLAUSE APPLIES TO THE STATES. The Establishment Clause applies to state and local governmental entities and not just the federal government. [Everson v. Board of Education, 330 U.S. 1 (1947)].

6. PUBLIC SCHOOLS CANNOT INCULCA TE "THE FAITH." The public school curriculum cannot be used to inculcate "the faith", whether Catholicism, Protestantism, Mormonism, Judaism or any other "ism" [McCollum v. Board of Education, 333 U.S. 203 (1948)].

7. PUBLIC SCHOOLS MAY ACCOMMODATE STUDENTS' SPIRITUAL NEEDS. The public school may adjust its program to accommodate the spiritual needs of schoolchildren by working with churches, synagogues and families in released time programs, by which children are excused from school to be taught "the faith" during the schoolday by instructors of the parents' own choosing, free from direct school input or influence. [Zorach v. Clauson, 343 U.S. 306 (1952)].

8. OFFICIAL STATE-COMPOSED PRAYERS FOR STUDENTS ARE OUT. The state cannot write official school prayers to be recited by children in the

public schools. [Engel v. Vitale*,* 370 U.S. 421 (1962).

9. STATE-INITIATED DEVOTIONAL EXERCISES ARE OUT; OBJECTIVE TEACHING OF RELIGION AND THE BIBLE IS DESIRABLE. State-initiated devotional exercises for public schoolchildren in the public school classroom as part of the curricular program are barred by the Establishment Clause. The objective teaching about religion in history, music, literature, and art, and courses teaching the Bible as literature or comparative religion, are both permissible and desirable for a complete education. [Abington School Dist. v. Schempp, 374 U.S. 203 (1963)].

10. EVOLUTION CANNOT BE EXCLUDED FOR RELIGIOUS REASONS. The state cannot exclude the teaching of evolution in the public schools for religious reasons. [Epperson v. Arkansas, 393 U.S. 97 (1968)].

11. STUDENTS DO NOT LEAVE THEIR CONSTITUTIONAL RIGHTS AT THE SCHOOLHOUSE GATE. Public school students and teachers do not leave their First Amendment rights at the schoolhouse gate. Students may discuss controversial subjects in and out of the classroom during the school day as long as school discipline is not disrupted and the rights of others are not invaded. [Tinker v. Des Moines School District, 393 U.S. 503 (1969)].

12. STUDENT GROUPS MAY ENGAGE IN CONTROVERSIAL SPEECH. Banning by university officials of a student group engaged in controversial speech violates the First Amendment. [Healy v. James, 408 U.S. 169 (1972)].

13. PARENTS DIRECT THEIR CHILDREN'S EDUCATION. Parents have the primary responsibility for directing the education of their children in a manner consistent with their religious convictions. [Wisconsin v. Yoder, 406 U.S. 205 (1972); Employment Division v. Smith, 494 U.S. 872 (1990)(dicta)].

14. A PUBLIC UNIVERSITY MAY NOT DENY EQUAL ACCESS. A public university may not deny voluntary student groups equal access to the use of the university facilities because the content of their speech is religious. Worship is a form of protected speech. [Widmar v. Vincent*,* 454 U.S. 263 (1981)].

15. STATE-INITIATED, STUDENT-LED DEVOTIONS ARE OUT. State-initiated programs allowing students to lead classroom devotional exercises as part of the daily curricular activities of the school violates the Establishment Clause. [Karen B. v. Treen*,* 653 F.2d 897 (5th Cir. 1981), *aff'd,* 455 U.S. 913 (1982)].

16. A MOMENT OF SILENCE DURING THE SCHOOLDAY PROBABLY IS PERMISSIBLE. A moment of silence must not be instituted for the purpose of putting "prayer in schools". However, a school probably may have a period of silence during the schoolday during which individual students may think about

whatever they want, including pray. The state, school, or teacher may not encourage students to use the time to pray, although students may use the time to pray. [Brown v. Gilmore, 533 U.S. 1301 (2001); Wallace v. Jaffree, 472 U.S. 38 (1985)].

17. EQUAL ACCESS REINSTATED. The Supreme Court effectively reinstated a federal district court decision permitting public high school students to meet during a student activity period for prayer, Bible study and religious discussion during the schoolday on campus. [Bender v. Williamsport Area School District, 475 U.S. 534 (1986)].

18. SCHOOL ADMINISTRATORS MAY PUNISH STUDENTS FOR LEWD SPEECH. Public school administrators may discipline students for offensively lewd and indecent speech. The Court notes that the fundamental values to be taught in public school include tolerance of divergent political and religious views, even when the views expressed may be unpopular. [Bethel School District v. Fraser, 478 U.S. 675 (1986)].

19. CURRICULUM MAY NOT HAVE THE PURPOSE OF PROMOTING A PARTICULAR RELIGIOUS TENET. A state law requiring balanced treatment of the teaching of creation science and evolution is unconstitutional if its sole purpose is to change the curriculum to endorse a particular religious belief. [Edwards v. Aguillard, 482 U.S. 578 (1987)].

20. SCHOOL MAY REGULATE CURRICULAR SPEECH. A school may exercise editorial control over the content of a school newspaper that is published as a regular class activity for which students receive grades and academic credit. Students' personal speech remains protected under *Tinker.* [Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)].

21. A PUBLIC SECONDARY SCHOOL MAY NOT DENY EQUAL ACCESS. A public school that allows one noncurriculum related student group to meet must allow a religious student group to meet under the Equal Access Act. [Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990)].

22. PUBLIC MIDDLE AND HIGH SCHOOLS MAY NOT INCLUDE NONSECTARIAN PRAYER AT GRADUATION CEREMONY. Public schools requiring students to stand during a nonsectarian prayer by a Chaplain at the graduation ceremony results in coercion of the students and a violation of the Establishment Clause. [Lee v. Weisman, 505 U.S. 577 (1992)].

23. SCHOOL DISTRICT SUPPORTED STUDENT-LED, STUDENT-INIATIATED PRAYER ON SCHOOL PROPERTY IS OUT. Student-led and student-initiated prayer before football games over the public address system deemed to violate the Establishment Clause because the invocations were not personal speech when conducted on government property at government-

sponsored events. They may be construed as a public expression of the school district's approval of a certain religious message. [Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000)].

24. A PUBLIC ELEMENTARY AND MIDDLE SCHOOL MAY NOT DENY EQUAL ACCESS. A public school that allows one noncurriculum related student group to meet must allow a religious student group to meet under the Equal Access Act. [Good News Club v. Milford Central School, 533 U.S. 98 (2001)].