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RELEASED TIME AND TRANSFER CREDIT: POLICY IMPLICATION**Overview**

First Amendment religion issues remain one of the most popular areas of discussion in contemporary education law literature—including several past issues of this commentary series. While most essays, articles, and court cases consistently deal with such subjects as prayer, Bible reading, and student clubs, it has been some time since *released time* (*i.e.*, allowing public school students to leave the building, during the school day, to receive religious instruction) has been included.

Released Time: Historical Background

More than sixty years ago, the United States Supreme Court struck down a *released time* program that allowed public school students to receive religious instruction in classrooms located in their school buildings. In writing for the Court Justice Black made it clear that use of tax-supported property (classrooms in public school buildings) for religious instruction, when coupled with compulsory attendance, violated both the First and Fourteenth Amendments to the United States Constitution. *McCollum v. Board of Education* (1948) However, while Justice Black's opinion characterized close cooperation between school authorities and religious organizations as unconstitutional (*i.e.*, invaluable aiding in the spread of religious faith) it did not depict the Court's decision as showing "governmental hostility to religion or religious teachings." Citing *Everson v. Board of Education* (1947), Justice Black opined that while the First Amendment's guarantee of free exercise of religion is embedded in our tradition, we must remember that "the First Amendment has erected a wall between Church and State which must be kept high and impregnable"

Four years later, in a New York City case, the United States Supreme Court upheld a *released time* program that allowed public school students, who had prior parental permission, to attend religious classes held during the school day but off school grounds at religious centers. *Zorach v. Clauson* (1952) While participating churches made weekly reports to schools, sending to teachers a list of children released from school but who did not report for religious instruction, the Court held that the program passed constitutional muster. Unlike *McCollum* (1948), the released time program in this case did not involve religious instruction on public school property. In

addition the program did not utilize public funds and no coercion of students to participate in the program was shown. Justice Douglas, for the Court, characterized the *Zorach* (1952) *released time* program as one implemented in a “spirit of accommodation.” In essence, the program did not promote religion—it merely involved school system cooperation with community religious authorities. In my view, and that of my colleagues, the high court in *Zorach* (1952) established a new and more flexible standard of *neutrality* (*i.e.*, an endorsement test) —one that envisioned “a permissible role for government in fulfilling religious needs of the people, so long as government does not become too involved in or exercise control over the activity.” (Vacca, Hudgins, Millhouse, 1997)

Subsequently, some courts assumed a *Zorach* (1952) attitude and reached a similar “accommodation” conclusion. In a Wisconsin case, for example, a state statute that allowed local school boards to dismiss students who had parental permission to attend religious instruction was upheld. In this set of facts the instruction was done off-school grounds in churches, and while public school teachers checked monthly attendance reports sent by the religious teachers they were not involved in “promoting” the activity. *State ex rel. Holt v. Thompson* (Wis. 1975).

Recently, while doing research in the law library I came across a federal appellate court decision where *released time* was once again at the center of the controversy. In *Moss v. Spartanburg County School District* (4th Cir. 2012), the court was faced with the following issue: should public students receive Carnegie unit credit for the successful completion of a *released time* class taken during the school day and off-school grounds? Because *Moss* contains an interesting twist (transfer credit), it is the subject of this month’s commentary.

Moss v. Spartanburg County School District (4th Cir. 2012)

Facts: In 2006, The South Carolina General Assembly enacted a Released Time Credit Act (2006 S.C. Acts 322) which enabled local school boards to award students with no more than two Carnegie units of elective credit for “the completion of released time classes in religious instruction....” The General Assembly enacted this legislation because it found that “the absence of an ability to award [academic credit] ha[d] essentially eliminated the school districts’ ability to accommodate parents’ and students’ desires to participate in released time programs.” The Act specified that: (1) the religious classes had to be evaluated applying substantially the same criteria used to evaluate similar classes at established private schools in determining the acceptability of transfer elective credit to public schools, and (2) the decision to award elective Carnegie unit credit is a neutral one and does not involve any test for religious content or denominational affiliation. The Act also specified that the “secular criteria used for evaluation” include but are not limited to: (1) the number of hours of classroom instruction; (2) a review of the course syllabus which reflects course requirements and materials used; (3) methods of assessments used in the course; and (4) whether the course was taught by a certified teacher.

In March of 2007, the school board of Spartanburg School District Seven (hereafter referred to as School District Seven) adopted a policy allowing students to receive no more than two elective Carnegie unit credits for off-campus religious instruction offered during the school day. The policy stated that the district will evaluate the classes on the basis of purely “secular criteria” prior to accepting credit, and that transfer credit for released time classes had to have “prior approval.”

That same year, a private, unaccredited religious organization (hereafter referred to as Bible School) approached several South Carolina public school districts requesting that students be allowed to participate in a released time, two semester religious course—for academic credit. School District Seven officials said that consistent with the past practice requiring that school administrators receive requests for transfer of credit only in the form

of a “transfer transcript” from an “accredited” private school. Subsequently, Spartanburg Bible School entered an arrangement with Oakbrook Preparatory School, an accredited private Christian school, through which it would submit student released time program grades to Spartanburg High School. Oakbrook agreed to meet the specific transfer policy requirements contained in the School District Seven policy. The arrangement was implemented. While Spartanburg High School participated in the arrangement it neither promoted the Bible School released time course nor listed it in the school’s course catalogue. Also, even though course flyers were provided to Spartanburg High School guidance counselors they only could discuss the Bible School and the flyers with parents and students who had already expressed an interest in learning about the program. The Bible School could not advertise in any public school classroom but was allowed to staff an informational table, along with other outside organizations, at the annual high school registration open house for parents and students.

The released time transfer course arrangement was in effect for three years. During that time 20 Spartanburg High School students out of 1,500 students in each school year participated in the program.

District Court Action: Parents of two Spartanburg High School students filed an action in federal district court under 42 U.S.C. 1983, alleging that School District Seven’s released time policy violated the Establishment Clause of the First Amendment by impermissibly endorsing religion and entangling church and state. The defendants filed a motion for summary judgment contending: (1) plaintiffs lacked standing to sue because they were in no way injured by the policy (*e.g.*, neither of the students participated in the released time course, nor had they been harassed), and (2) the policy, in any event, was constitutional in that it was neutrally stated and administered—and that it had the secular purpose of “accommodating students” desire to receive religious instruction. Plaintiffs then filed a cross motion for summary judgment in which they argued that the purpose and primary effect of the policy was “to promote Christianity.” Relying on the three-pronged *Lemon v. Kurtzman* (1971) standard the district court concluded that School District Seven’s released time policy did not violate the Establishment Clause of the First Amendment.” Summary judgment was granted to defendants in *Moss v. Spartanburg County School District* (D.S.C 2011), and plaintiffs next took their case to the United States Court of Appeals for the Fourth Circuit.

Fourth Circuit Opinion and Decision. On the standing issue the appellate court held that only one of the two plaintiff parents (*Moss*) had standing to bring the suit. A merely “generalized interest” in an issue, said the Court, is not enough to establish standing to sue.

Turning to a detailed analysis of the school system’s released time policy, the Fourth Circuit utilized such old Supreme Court chestnuts as: *Pierce v. Society of Sisters* ((1925); *Everson v. Board of Education* (1947); *McCullum v. Board of Education* (1948); *Zorach v. Clauson* (1952); *Abington Township v. Schempp* (1963); *Walz v. Tax Comm’n* (1970); *Lemon v. Kurtzman* (1971); *Committee for Public Education and Religious Liberty v. Nyquist* (1973); and the Fourth Circuit’s past decision in *Smith v. Smith* (4th Cir. 1975).

The appellate court concluded that School District Seven’s released time/credit policy was an example of accommodation and not endorsement. The released time program takes place off-campus; prohibits any use of staff or funds for its execution; responsibility for evaluating released time courses lay with accredited private schools not public schools; grades for students are handled like grades of any student who wishes too transfer from an accredited private school; public school staff do not individually assess the quality of the religious course; leaves the monitoring of the courses to private schools; accommodates the desires of parents and students to participate in private religious education; and, citing the Supreme Court’s decision in *Zelman v. Simmons-Harris* (2002), the Fourth Circuit concluded with two summary points. First, “the acceptance of transfer credits (including religious credits) by public schools sensibly *accommodates* the ‘genuine choice

among options public and private, secular, and religious.” As with the South Carolina General Assembly, said the Court, School District Seven’s purpose “properly accommodates religion without establishing it, in accordance with the First Amendment.”

Decision: The lower court is affirmed.

Policy Implications

Recognizing that *Moss* (2012) is but one case and only involves the Fourth Circuit, in my view it nonetheless has broad policy implications—implications that stretch beyond the narrow focus of religious instruction in a South Carolina released time program.

In many communities more parents and students are resorting to a variety of sources (some with the involvement of faith based groups) for completing course credit—many of which do not involve public school system on-campus classrooms. Also growing are “on-line courses,” “home schooling,” “parent choice,” “charter schools,” “virtual schools” and the popularity of private and parochial schools (especially Roman Catholic and other established religiously-based schools in urban areas). Thus, more pressure is being placed on local public school officials to (1) reexamine policies that deal with transfer credit, and (2) revisit graduation requirements. In my view many policies and procedures already may be outdated as requests for transfer credit grow in number.

What can be learned from the *Moss* (1212) case? What implications for policy can be generalized from the Fourth Circuit’s opinion and decision?

In 2012-2013 local school system policies must make it clear that:

The Board recognizes the independent right of parents to choose from state statutory options for educating their children to fulfill the state’s compulsory attendance obligation.

All requests for transfer credit (academic and elective) from all sources (public and private) to a student’s school system cumulative record must have prior parental approval and will be subject to review and ultimate approval by appropriate school system personnel.

To ensure proper academic standards all transfer credit requests will be subject to evaluation based on established criteria including but not limited to: accreditation status of the source of credit; course syllabi; stated educational objectives of the course; number of hours of instruction; curriculum materials used in the course; methods of student assessment; and whether the course is taught by a certified teacher.

Official verification of student attendance in courses submitted for transfer credit consideration must accompany the initial request for course evaluation and acceptance.

All grades received by students in courses submitted for transfer consideration must be entered on an official transfer transcript and forwarded to appropriate public school system personnel.

All transfer credit final decisions will be sent in writing to parents.

While local public school officials legally possess broad discretion to determine the ultimate acceptability of courses submitted in transfer from all sources (public, private, on-line, etc.), the independent interests of students and the free choice of parents in fulfilling their legal obligations to educate their children also must be respectfully accommodated. However, the Fourth Circuit's opinion and decision in *Moss* (2012) suggest that all transfer credit decisions made by public school personnel must be (1) based on purely secular pedagogical criteria consistently applied to all requests for transfer credit, and (2) religiously neutral (*i.e.*, free from judgments made on religious content or denominational affiliation.).

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Note: The views expressed in this commentary are those of the author.