United States District Court
for the
District of South Carolina
Spartanburg Division

Robert Moss, et al., Plaintiffs	)	
v.	)	Civil Action No. 7:09-cv-1586:HMH
Spartanburg County School District No. 7, a South Carolina body politic and corporate Defendant	)	

RESPONSE OF PLAINTIFFS TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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CITATIONS

Pl. Mem. Supp. - Memorandum in Support of Motion for Summary Judgment, Filed November 19, 2010, dkt. 71-1.

Def. Mem. Supp. - Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment, filed November 19, 2010, dkt. 72-1.

ERRATUM

Pl. Mem. Supp., at 22, n. 10, referred to an Opinion of the Attorney General of Oregon. 1989 Ore. AG Lexis 32 *7. Plaintiffs mistakenly failed to append a copy. *See,* Local Rule 7.05(A) (4) DSC. A copy is appended as Exhibit 1 hereto. Counsel apologizes to Court and counsel for this oversight.

STATEMENT OF UNDISPUTED FACTS

Plaintiffs incorporate by reference the Statement of Undisputed Facts from *Pl. Mem. Supp.*, at pp. 1-18. Plaintiff's several objections to defendant's "Undisputed Facts Supporting Summary Judgment," *Def. Mem. Supp.*, pp. 1-13, will be made at the point in the following Argument to which the asserted fact relates.

ARGUMENT

1(a). The individual plaintiffs have standing.

Defendant argues that the individual plaintiffs have not shown injury-in-fact. *Def. Mem. Supp.* at 1, 14-17. No issue is raised as to the requirements of traceability or redressability, *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S. Ct. 1230, 119 L. Ed. 2d 351 (1962) (injury-in-fact, traceability and redressability are the "irreducible constitutional minimum" of standing.).

Plaintiff Robert Moss is the father of Plaintiff Melissa Moss. She attended defendant's high school at the commencement of this action. Plaintiff Ellen Tillett was then and still is the mother of a child who attends defendant's high school. *Pl. Mem. Supp.* Ex. 1 (Robert Moss Affid.), dkt. 71-2, p. 2 ¶ 2; *Pl. Mem. Supp.* Ex. 2 (Melissa Moss Affid.), dkt. 71-3, p. 1, ¶ 2; *Pl. Mem. Supp.* Ex. 3 (Tillett Affidavit) (dkt. 71-4), p. 1, ¶ 2; Ex. 2 hereto (Tillett Dep. vol. 1), at 12:18-25.

These facts alone are sufficient to confer standing on these plaintiffs. *Zorach v. Clauson,* 343 U.S. 306, 309 n. 4, 72 S. Ct. 679, 96 L. Ed. 954 (1952) ("No problem of this Court's jurisdiction is posed in this case since . . . appellants here are parents of children currently attending schools subject to the released time program."); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State,* 454 U.S. 464, 486 n. 22, 102 S. Ct. 752, 70 L. Ed. 2d 844 700 (1982), *quoting Abington School District v. Schempp*, 374 U.S. 203, 224 n. 9, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) ("It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain . . . The parties here are school children and their parents, who are directly affected by the practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.").

The individual plaintiffs also have standing because they have come into direct contact with an unwelcome religious exercise or display. *Suhre v. Haywood County,* 131 F. 3d 1083 (4th Cir. 1997).

Plaintiff Robert Moss, a non-Christian, received a letter from SCBEST informing him that "[defendant] recently granted SCBEST approval" to offer released time religious education at which students would learn "how a Christian should think through various contemporary issues." Ex. 3 hereto (Robert Moss dep.), pp. 16:24-17:4 and Dep. Ex. 157 attached thereto). This letter was not sent by defendant, though defendant supplied the names and addresses of parents to SCBEST. Defendant initially composed a reply to this letter, correcting what defendant saw as its errors, but at the request of SCBEST did not send this letter. *Pl. Mem. Supp.*, at 8, 9-10. Plaintiff Robert Moss never received any correction of this message, if erroneous it was. *Pl. Mem. Supp.* (Robert Moss Affid.), Ex. 1, ¶ 3(e). He attended defendant's March 2007 meeting and registered his disapproval of released time religious instruction. *Id.*, ¶ 3(d). He later met with defendant's Chair and Superintendent to discuss the matter, but the meeting left him feeling stigmatized as an outsider. *Id.* Both the existence of the policy and this meeting were emotionally distressing to him. *Id.* Prior to the enactment of the Policy Robert Moss and his wife had volunteered at Spartanburg High School, but afterwards they felt less comfortable doing so. Ex. 3 hereto (Robert Moss dep.), at 170:15-171:10. *See also id.,* at 14:15-19; 16:22-17:4; 17:20-23; 18:5-19:4; 20:3-12; 29:13-21; 32:13-22; 35:5-36:7; 40:19-42:14; 43:25-45:21; 46:6-24; 47:19-48:2; 49:21-51:7; 56:8-19; 61:17-22; 65:5-67:11; 70:25-71:5; 84:14-16; 96:20-97:10; 103:19-104:9; 107:23-110:17; 112:25-114:1; 162:18-166:6; 168:8-172:21; 173:12-174:3; and Dep. Exs. 158, 187, 188 and 189, attached thereto).

The SCBEST letter was not sent to Plaintiff Tillett because her child was not then a rising high school student. It was shown to her by plaintiff Robert Moss when her child entered high school in the autumn of 2008, Ex. 2 hereto (Tillett dep. vol. 1), at 12:18-25, 28:24-29:5,[1] and caused her emotional distress. *Pl. Mem. Supp.* Ex. 3 (Tillett Affid.) (dkt. 71-4), at p. 2 ¶ 5. She also finds released time for religious instruction to be unwelcome and emotionally distressing, especially its grant of academic credit for religious instruction. *Id.,* at p. 2 ¶ 4. Defendant's policy and its implementation of it show "lack of respect and lack of understanding for individuals of different faiths." *Id.,* at p. 2 ¶ 3. Her child is subject to receiving a lower class rank and possibly failing to qualify for an otherwise available emolument, such as a scholarship, because grades for religious instruction are factored into the GPA of SCBEST students. *Id.,* at p. 2 ¶ 4; *Pl. Mem. Supp.,* pp. 17-18. As she put one of her objections at her deposition:

> a lot of it is really devoted towards a very narrow . . . pursuit of a very specific idea of one's relationship with Christ and I don't believe that . . . belongs in a high school curriculum. I believe that belongs in the churches and in the families as much as they want to do it. (Ex. 2 hereto (Tillett dep. vol. 1), at 37:22-38:10).

Plaintiff Melissa Moss, a non-Christian, felt like an outsider at defendant's high school because of the several Christian exercises conducted there, because of her family's receipt of the SCBEST letter, and because SCBEST students are awarded an academic grade. *Pl. Mem. Supp.*,

[1] Defendant alleges that "[t]he Complaint falsely alleges that Plaintiff Ellen Tillett received, and was damaged by receiving, the SCBEST letter. Plaintiff's now admit that Plaintiff Tillett did not receive the SCBEST letter . . . and furthermore did not read it thoroughly until Robert Moss's deposition. Ex. B-25 (Tillett v. 1 dep.) at 29:2-4." *Def. Mem. Supp.*, p. 7, n. 5. The Complaint, dkt. 1, at ¶ 9, alleges that Plaintiff Tillett received this letter before the Policy was passed. This allegation was a mistake of counsel, which was not realized until after the deadline for amendments had passed. But, plaintiff Tillett had never admitted that she "did not receive the SCBEST letter." She testified at her deposition that she met with Bob Moss in the autumn on 2008, when her son entered high school, to discuss released time, and "at some point" thereafter and before her deposition Bob Moss showed her the letter. Ex. 2 hereto (Tillett Dep. vol. 1), at 11:22-13:3, 27:23-29:5). To be shown a letter is to receive it.

Ex. 2 (Melissa Moss Affid.), at ¶¶ 3, 5, 6, 7. Receiving the letter made her feel "uncomfortable," Ex. 4 hereto (Melissa Moss dep.), at 12:19-25, and "made [her] feel like because the school was endorsing this kind of thing that certain people who wouldn't take this course were kind of like outsiders." *Id.,* at 13:1-6. Defendant's Policy "makes the non-Christians feel like outsiders more, and it's not a good atmosphere to go to a high school in." *Id.,* at 23:23-24:9; *see also id.,* at 37:14-38:10;). She came to feel "more distant" from a friend when she found out that he was taking the SCBEST course." *Id.,* at 82:11-83:19.

Emotional distress because of an offense to "the spiritual, value-laden beliefs of the plaintiffs" is a sufficient injury-in-fact for standing. *Suhre v. Haywood County,* 131 F. 3d at 1086*; ACLU v. Rabun County,* 698 F. 2d 1098, 1102 (11th Cir. 1983). Melissa Moss's emotional discomfort at going to a school that had released time for religious instruction is every bit as real as was Mr. Suhre's emotional reaction to the Ten Commandments. SCBEST is a visible occurrence in her environment every day as the students walk across the parking lot to the church. It is a present emotional danger, a risk to her relationships with her peers, a subject to be carefully negotiated.

Defendant argues that exposure to a written policy, as opposed to exposure to a religious artifact, cannot amount to the direct contact necessary for standing. "Indeed, it makes little sense to speak of 'offensive contact' with a written policy, as opposed to, say, a Christmas display or a roadside cross." *Def. Mem. Supp.*, pp. 14-15.

This argument ignores that plaintiffs were held to have standing to challenge a written policy in *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290 n.1, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000), and indeed had standing to challenge a written regulation about released time itself in

Zorach v. Clauson, 343 U.S. 306, 72 S. Ct. 679, 96L. Ed. 2d (1952). Defendant's argument also ignores that plaintiffs are challenging the implementation of the Policy.

Neither of the cases that defendant cites are apposite. In *Newdow v. Lefevre*, 598 F. 3d 638 (9th Cir. 2010); plaintiff challenged the constitutionality of the national motto and the statutes which require its inscription on coins and currency. The court held that he had standing to challenge the statutes because his repeated unwelcome encounters with the coins and currency that they authorized were a "spiritual harm" that shows injury-in-fact. 598 F. 3d at 642, *quoting Vasquez v. L.A. County*, 487 F. 3d 1246, 1253 (9th Cir. 2007). The individual plaintiffs here have suffered this same type injury. The court then held that Newdow lacked standing to challenge the motto itself because "[w]ithout [the implementing statutes] the motto would not appear on coins and currency, and Newdow would lack the 'unwelcome direct contact' with the motto that gives rise to his injury-in-fact." 598 F. 3d at 643. In this regard Newdow suffered only a generalized grievance from a distant wrong, much like the hypothetical resident of Omaha mentioned in *Suhre*, 131 F. 3d at 1086, who was not harmed in a sufficiently particularized way by a religious display in the North Carolina mountains.

In *Doe v. Tangipahoa Parish School Board*, 494 F. 3d 494 (5th Cir. 2007) (en banc)), the plaintiff was held to lack standing to challenge invocations at school board meetings because there was no evidence that "[he] or his sons were exposed to the invocations." 494 F. 3d at 497. Plaintiffs here have been directly exposed to defendant's Policy and its implementation.

1(b). Plaintiff FFRF has organizational standing.

Defendant contends that *Friends of the Earth v. Laidlaw Environmental Svcs.,* 528 U.S. 167, 180 (2000), establishes the rule that standing is to be determined as of the beginning of the action, and that therefore FFRF lacks standing since no individual plaintiff was a member of FFRF at the commencement of this action.[2] There is no such rule. In *Laidlaw* the court stated that "we have an obligation to assure ourselves that FOE has Article III standing at the outset of the litigation." *Id.* In grammatical isolation this statement could mean either of two things: that it is a general rule that standing must always exist at the beginning of the case, or that in the particular case before the court the commencement of the action was the procedurally proper time at which to determine standing. *i.e.,* at the outset of *this* litigation.

The court gave no citation or reasoning for its statement, which defendant takes as the announcement of a new constitutional rule. The absence of citation or discussion powerfully indicates that the Court was describing its task in the case before it, not announcing a new constitutional rule in a case in which it was not presented. Nothing turned on whether the one or the other reading was possible. No amended complaints are mentioned as having been filed. The Court gives no guidance for how its alleged new constitutional rule would apply in case of such an amendment. FFRF's Second Amended Complaint relates back to the date of the original complaint. Rule 15(c)(1)(B), *Fed. R. Civ. P.* The Federal Rules of Civil Procedure do not make constitutional law, but the Supreme Court expectably discuss the concept of relation back if it were creating a constitutional rule that would have had a large impact on the Civil Rule about

[2] The Second Amended Complaint, dkt. 27 ¶ 14, alleged that one individual plaintiff was a member of FFRF. Defendant mentioned this change in the allegations in its Reply on the motion to dismiss, dkt. 32, pp 5-6, but did not argue that standing was to be determined as of the commencement of the action.

relation back. The Supreme Court does not make offhand determinations of constitutional doctrine.

Alternatively, the Court should pretermit the issue of FFRF's standing. All plaintiffs are jointly represented and have presented joint arguments. "Nothing is gained or lost" by FFRF's continuing presence as a party. *Doe v. Bolton*, 410 U.S. 179, 189, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973) ("[W]e need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence of the [other appellants]"); *Jackson County, N.C. v. FERC,* 589 F. 2d 1284, 1288-89 (D.C. Cir. 2009) (Henderson, J.) (When the parties "make the same arguments in joint briefs," it suffices that one party has standing), *citing Comcast Corp. v. FCC*, 579 F. 3d 1, 6 (D.C. Cir. 2009); *Railway Labor Executives' Ass'n v. United States,* 987 F.2d 806, 810 (D.C. Cir. 1993) ("It is a longstanding principle that courts should avoid passing on constitutional issues unless resolution of these issues is necessary to the disposition of the case."). This rule is an application of the general rule that courts should avoid constitutional questions[3] whenever possible. *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed 101 (1944) ("If there is one doctrine more deeply rooted in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); c*f., Suhre,* 131 F. 3d at 1085 n* (declining to consider the sufficiency of a second form of standing for plaintiff after one form had been found sufficient); *Duke Pwr. Co. v. Carolina Envt'l Study Group*, 438 U.S. 59, 72 n. 16, 98 S. Ct. 2620, 576 L. Ed. 2d 595 (1978) (same, re subject matter jurisdiction).

[3] Whether injury-in-fact exists is a constitutional question. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S. Ct. 1230, 119 L. Ed. 2d 351 (1962)

As long as Plaintiff Tillett remains a member of FFRF, it may move for permissive intervention under *Fed. R. Civ. P.* 24(b)(1)(B). Intervention has been allowed even after judgment, so that for example a party "can prosecute an appeal that the existing party has determined not to take." 7C Wright, Miller & Kane, *Federal Practice and Procedure 3d: Civil* § 1916, at pp. 571-576 (2007) (collecting cases at n. 24). Judicial economy will be served by pretermitting the question of FFRF's standing.

2(a).

Defendant's grant of academic credit violates the Establishment Clause because it appears that its predominant purpose is to prefer religion in general and Christianity in particular.

Defendant asserts four purposes:

(A) Accommodating religion, as shown by its having modeled its Policy on the RTCA (*Def. Mem. Supp.*, pp. 19, 20-21);

(B) Remedying the impracticability of released time that was occasioned by the 1997 increase from 20 to 24 in the number of units required for graduation (*Def. Mem. Supp.*, pp. 20-21);

(C) Responding to citizens who had expressed an interest in having released time (*Def. Mem. Supp.*, pp. 20-21); and

(D) As the Policy states, a desire to accommodate all religions (*Def. Mem. Supp.*, p. 21).

None of these purposes are a sufficient secular purpose.

(A). The RTCA.

The Preamble to the RTCA states:

> (5) The purpose of this act is to incorporate a constitutionally acceptable method of allowing school districts to award the state's public high school students elective Carnegie unit credits for classes in religious instruction taken during the

> school day in released time programs, because the absence of an ability to award such credits has essentially eliminated the school districts' ability to accommodate parents' and students' desires to participate in released time programs.

This indicates a purpose to advance elective credit released time. Released time religious education has been known to be constitutional since *Zorach,* decided in 1952. *Zorach* had fully accommodated "parents' and students' desires to participate in released time programs." Adding elective credit to it accommodates *elective credit* released time. The statute's conclusion of "accommodation" assumes the conclusion that elective credit released time is constitutional.[4]

(B). The 1997 increase in credits required for graduation (*Def. Mem. Supp*., pp. 20-21).

There is no record support for defendant's proposition that the 1997 increase in number of units required for graduation prompted the enactment of the 2007 Policy. SCBEST started offering released time for defendant in 1997, the very year that the change in credit requirements occurred. *Pl. Mem. Supp.*, Ex. 5 (Martin dep.) (dkt. 71-6), at 22:13-21. It was later discontinued "for lack of interest," *id.,* at 22:22-23. Superintendent White testified: "I can safely say that the drop in enrollment coincided with an increase in the number of units required . . . and that could have had an impact." Ex. 5 hereto, pp. 10:15-11:5. This testimony cannot be squared with the objective fact that SCBEST undertook the course in the very year of the change. There is no competent evidence of when or why the drop in enrollment occurred.

The RTCA does not recite that remedying a drop in enrollment was among its purposes. According to the South Carolina School Board Association 2006 Policy and Legislative Update, *Def. Mem. Supp.* Ex. B-11, at p. 49:

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[4] The same is true of the circumstance that the RTCA deletes the previously obtaining requirement that a students make up school work missed while attending released time. *Compare* RTCA *with* S.C. Code Sec. 59-1-480(B).

> In recent years . . . South Carolina has increased the number of units required to graduate to 24. Released time Credit Act *proponents* believed that this change impacted on participation in released time programs and began pushing the idea legislatively of allowing graduation credits. (Emphasis added.).

Remediating the impact of the change in number of credits is not mentioned as a statutory purpose.

Defendant invokes a newspaper article and a quote within it from a "Columbia citizen," *Def. Mem. Supp.*, pp. 2, 3, in support of its position, but this article is not admissible because no witness has testified that it is accurate.[5]

(C). Citizen expression of interest in released time (*Def. Mem. Supp.,* pp. 20-21).

There is testimony that defendant's purpose is to "accommodat[e] the desire of some Spartanburg High School students and parents to have the option to attend a released time course in religious instruction" and that "[defendant] has acknowledged that Spartanburg High School students and parents have expressed interest in having the option to attend a released time course in religious instruction taught by SCBEST." *Def. Mem. Supp.*, Ex. B-15, at 8. There is nothing in the record to indicate that they voiced any expression of interest in gaining *elective credit* for released time religious instruction. Their interest could have been only in reinstituting the formerly obtaining non-credit released time.

[5] Defendant's citation to this article is "Ex. B-2 (Graves dep.) at dep. Ex. 176." *Def. Mem. Supp.,* p. 2. No page within the deposition at which the article was identified is cited. The article was never proffered to Graves at his deposition. *See,* Ex. 6 hereto (Graves dep. Index of words). The deposition index has no entry for "Columbia," for "176," for "afford" (a word within the quotation), or for "participants" (a word within defendant's quotation from the article, p. 3). Defendant's counsel has made an Affidavit that the article cited is a true and correct copy of what it purports to be. *Def. Mem. Supp.*, Ex. B, ¶ 2. Plaintiffs do not doubt that this is a fact, but there is no testimony that the facts that the article asserts are accurate.

(D). A desire to accommodate all religions (*Def. Mem. Supp.*, p. 21).

Plaintiffs incorporate by reference their argument at *Pl. Mem. Supp.,* pp. 24-26. Defendant's direct aid to SCBEST and its close cooperation with them, and defendant's last-minute change to the Policy,[6] show that its purpose was to favor Christianity of the Oakbrook persuasion.

2(b)

Defendant's grant of academic credit violates the Establishment Clause because it appears that its primary effect is to aid religion.

Plaintiffs incorporate by reference their argument at *Pl. Mem. Supp.*, pp. 21-24.

Plaintiffs argued at *Pl. Mem. Supp.*, p. 21, text at n. 7, that defendant directly aided SCBEST by supplying the names and addresses of incoming students. Defendant says that "it appears" that SCBEST obtained this information by a Freedom of Information Act request. *Def. Mem. Supp.*, p. 8. Defendant cites four record sources for this fact but none support it.

- "Ex. B-10 (SCBEST dep.), at dep. Ex. 110." This document, appended to Ex. 7 hereto, is Drew Martin's notes of a January 2007 meeting with the SCBEST Executive Committee. It reads: "We are hoping to get FYI." Martin testified that by "FYI" he meant "FOIA." Ex. 7 hereto (Martin Dep.), at 133:23-25. He did not testify that any FOIA request was made.

- "Ex. B-21 (Grayson Hartgrove dep.) at 38:16-39:21." Hartgrove testified that it was his intent to ask the District to adopt a FOIA policy, but he does not remember any discussion about that matter with Superintendent Tobin; that to him FOIA meant "that parents have an

[6] To the list of sources that recommended the "may award" language of the RTCA, rather than the "will award" language of the Policy, may now be added the South Carolina School Board Association. *Def. Mem. Supp.*, p. 20, *see* id., Ex. 11, at p. 53.

option at the beginning of the year of allowing information to come to them on outside organizations or not;" and that he does not know if a FOIA policy was adopted. *Id.* He does not testify that a FOIA request for names and addresses was made. He appears rather to be discussing 20 U.S.C 1232g. *See, Pl. Mem. Supp.*, n. 11, at p. 21.

- "Ex. B-16 (District 30(b) (6) dep.) at 28:4-11." This testimony does not mention FOIA.
- "Ex. B-18 (Tobin Dep.) 13:11-13, 14:3-16." This testimony does not mention FOIA.

Defendant argues, *Def. Mem. Supp.*, pp. 25-26, that no objective observer could conclude that it has delegated governmental power to SCBEST. Defendant says that it is clear that it did not control the SCBEST program because it "correct[ed] erroneous statements in the initial letter from SCBEST." *Def. Mem. Supp.*, p. 25; *see id.,* p. 8. Defendant did make corrections of what it says were mistakes in the letter, but only on an internal draft which was never sent to parents. *Pl. Mem. Supp.*, pp. 9-10; *see, Pl. Mem. Supp.,* Ex.1 (Robert Moss Affid.), at ¶ 3(e).[7] Defendant further contends that Rodney Graves "explained in a newspaper article later that month that no students could sign up to take a released time course until the District developed implementation guidelines. Ex. B-2 (Graves dep.) at dep. Ex. 177, p.2." *Def. Mem. Supp.*, p. 8. This article, Ex. 8 hereto, is not admissible in evidence. It was never proffered to Graves at his deposition. *See,* Ex. 6 hereto (portions of index of Graves deposition) (no mention of "177").[8]

Defendant states several times that it treats transfer grades for religious instruction the same as it treated the transfer course in German that plaintiff Melissa Moss took at Wofford.

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[7] The "WE WERE WRONG" letter prepared by SCBEST, *see Def. Mem. Supp.*, p. 8, was also not sent. Ex. 7 hereto (Martin Dep.), at 120:6-9.

[8] If the Court does consider this letter, plaintiffs point out that it states, at p. 2, that "there have been no students enrolled [in the SCBEST course] for at least the past two years," indicating that the SCBEST course previously was conducted from 1997 until about 2005.

Def. Mem. Supp., at 10, 11, 26. This is irrelevant. Instruction in German is not religious instruction.[9]

Defendant asks the Court to rule against plaintiffs because otherwise "all private school transfer courses would be subject to constitutional scrutiny." *Def. Mem. Supp.*, p. 26. There is no evidence in the record that any school district in the United States other than defendant accepts religious instruction courses for elective credit.

2(c)

Defendant's grant of academic credit violates the Establishment Clause because it allows a religious organization to exercise governmental power.

Defendant relies on *Lanner v. Wimmer,* 662 F. 2d 1349 (10th Cir. 1981), to show lack of excessive entanglement. *Lanner* appears to be the only case that has discussed granting academic credit for released time studies at a religious institution.

Lanner involved two issues: (1) whether certain public school practices implementing released time were constitutional, *id.,* at 1357-1360; and (2) whether a policy statement of the Utah Board of Education was constitutional, *id.,* at 1360-1363.

As to the first issue, the court applied the "least entangling administrative alternatives" test, *id.,* at 1358 (relied on by plaintiffs at *Pl. Mem. Supp.*, pp. 23-24) to declare unconstitutional one among several challenged practices of a school district. This aspect of the case is not pertinent to the issue of whether public schools may grant elective credit for religious instruction.

[9] Defendant indicates on the transcript in both cases only that the grade is for a "transfer elective." *Def. Mem. Supp.,* p. 11. This fails to follow the requirement of the Uniform Grading Policy, *Def. Mem. Supp.,* Ex. B-5, p. 55-03-3, that "[t]ranscripts will specify the course title and the level or type of course the student has taken (e.g., English 1, Algebra 2 honors, A, P. U.S. History)."

As to the second issue, a policy statement of the Utah Board of Education provided:

> Credits for work taken in release time classes should be recognized by public schools only upon an official transcript of credits from the institution conducting such classes and upon evaluation on the same basis that similar credits from established private high schools are evaluated (the State Board has authorized high schools to recognize not to exceed two units of Bible history for work taken in private seminaries or schools. Such credit may be counted as elective but may not fill any requirements in the fields of social sciences, English or literature.) No credit is to be given for courses devoted mainly to denominational instruction. (662 F. 2d at 1360).

The court analyzed four types of "credit" to which the policy statement could conceivably refer: (1) "graduation" or "elective" credit, *id.,* the type credit at issue in the case at bar; (2) "custodial" credit, 662 F. 2d at 1362, for stisfaction of mandatory school attendance requirements; (3) "extracurricular activities credit," *id.;* and (4) credit toward a public school's eligibility for financial aid. *Id.*

The district court had enjoined the granting of elective credit. The circuit court affirmed, 662 F. 2d at 1361-62, 1363, but only on the ground that the last sentence of the Board of Education policy statement excessively entangled the government in monitoring the religious content of released time courses by using a religious test. 662 F. 2d at 1360-62. In effect the circuit court struck the last sentence of the policy statement. This left it providing that public schools could accept released time credits for "Bible history," a term not further explained but appearing to mean the sort of course contemplated by S.C. Code Sec. 59-29-230, or the study of the Bible "for its literary and historic qualities." *Abington School Dist. v. Schempp,* 374 U.S. 203, 225, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

The holdings of *Lanner* were unremarkable.

The circuit court then issued a lengthy *dictum*, not necessary to decision of the case.

> The state can, however, required that released-time courses for which credit is granted fulfill certain secular criteria. A state's requirement that church-sponsored schools meet

> certain secular standards if attendance at them is to satisfy state compulsory education laws does not unconstitutionally involve the state in religious institutions, even though it does implicate some entanglement. The state can constitutionally "insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." *Board of Education v. Allen,* 392 U.S. 236, 245-46, 88 S. Ct. 1923, 1927-28, 20 L. Ed. 2d 1060 (1968); *See also Committee for Public Education and Religious Liberty v. Regan,* 444 U.S. 646, 653-54, 100 S. Ct. 840, 846-47, 63 L. Ed. 2d 94 (1980); *Wolman v. Walter,* 433 U.S. 229, 240, 97 S. Ct. 2593, 2601, 53 L. Ed. 2d 714 (1977). This de minimis entanglement could also be used to determine what courses are properly transferable for "credit" when a private religious school student transfers to a public school. *In like manner, a school with a released-time program could require that released-time courses meet certain secular standards before credit is awarded for their completion. School authorities may inquire into the training of teachers and whether a particular course covered a subject for which "credit" could be granted*. Such inquiry in analogous to the state's constitutional perusal of full-time private schools. These inquiries, however, could not be designed simply to ferret our religious courses. (emphasis added.).

Lanner v. Wimmer, supra, at 1361.

The view of the court that the government may inquire into the training of religious instruction teachers, and that credit may be given for released time religious instruction as long as the government does not involve itself in matters of religious doctrine, erroneously conflates public school scrutiny of how secular subjects are taught at religious schools with how religious subjects are taught there. A rule about state control of *secular* instruction at private schools is not a rule about state power to control *religious* instruction at private schools. These are constitutionally different matters. The State has an interest in the secular education of its children, and therefore can regulate how and by whom secular subjects are taught at religious schools. *Board of Educ. v. Allen*. The State has no interest, however, in how religious instruction is given at religious schools or who gives it. This is state involvement in religious doctrine and intrudes upon religious liberty.

In *Pierce v. Society of Sisters*, 268 U.S. 510 (1926), the Court held that a State could not compel children to attend public schools because parents had a constitutional liberty[10] to direct their children's education and upbringing. But, the State does have an interest in seeing that its children get a secular education, and to that end can regulate private schools as to hours of attendance, teacher qualifications, methods of instruction and student academic achievement in secular courses. *Board of Education v. Allen*, *supra,* 392 U.S. at 245-46, expressed the line between state secular education and private education, including private religious education, as follows:

> In the leading case of *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the Court held that, although it would not question Oregon's power to compel school attendance or require that that the attendance be at an institution meeting State-imposed requirements as to quality and nature of curriculum, Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this holding was the view that the State's interest in education would be sufficiently served by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since *Pierce,* a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v. Society of Sisters:* if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their *secular* educational function. 392 U.S. at 245-46 (footnotes omitted, emphasis added.)

[10] The appellants in *Pierce* were a society of nuns and a private non-religious school. Therefore the case did not turn on the Establishment Clause or Free Exercise Clause, but on the Fourteenth Amendment Due Process clause, which applies generally to all private schools, religious and non-religious alike. *Board of Educ. v. Allen, supra, 392* U.S. 236 n. 7, indicated that the same result would follow under the religion clauses by remarking that *Everson v. Board of Education*, 330 U.S. 1 (1947), stood for the proposition that parents may send their children "to a religious, rather than a public, school if the school meets the *secular* educational requirements which the state has power to impose." (emphasis added).

The government has no valid interest in how a private school performs its religious functions. *Id.; Larkin v. Grendel's Den,* 495 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982). Giving an elective credit for religious instruction or "inquir[ing] into the training of teachers," *Lanner v. Wimmer, supra,* at 1361, sends a message of approval of what is being taught and of the student's mastery of it. *Lanner* fails to anticipate the teaching of *Larkin* that "the choice has been made that government is to be entirely excluded from the area of religious instruction." *Larkin v. Grendel's Den, supra,* 459 U.S. at 126. It also fails to anticipate that entanglement must be assayed from the perspective of an objective observer - to whom state supervision of religious instruction would appear to endorse what is being taught and who is teaching it.[11]

Defendant knew that SCBEST was teaching a Christian course. *Pl. Mem. Supp.*, p. 6, 11.[12] Defendant now admits that "[b]y permitting the Oakbrook SCBEST arrangement, the School District has ensured high academic standards . . ." *Def. Mem. Supp.*, pp. 29-30. This is an admission that defendant is implementing its Policy so that a religious instruction course will have high academic standards. This is an admission that defendant supervises religious content.

CONCLUSION

Upon the reasoning and authority cited, the Court should deny defndant's motion for summary judgment.

Respectfully submitted, December 6, 2010.

s/ Aaron J. Kozloski
D.S.C. Bar. No. 9510

[11] This concept was first mentioned in *Wallace v. Jaffree,* 472 U.S. 38, 76, 105 S. Ct. 2479, 86 L. Ed. 2d 29(1985) (O'Connor, J., concurring in part and concurring in judgment).

[12] Defendant would accept an elective credit for a private school course entitled Laboratory For Intercessory Prayer. Ex. 5 hereto (White dep.), pp. 102:14-17.

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