January 29, 2007

The Honorable Mike Fair
Chairman, Corrections & Penology Committee
The Senate of South Carolina
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Fair:

In a letter to this office you raised questions regarding the recently enacted "Released Time Credit Act" codified as S.C. Code Ann. § 59-39-112. Such provision states that:

> (A) A school district board of trustees may award high school students no more than two elective Carnegie units for the completion of released time classes in religious instruction as specified in Section 59-1-460 if:
>
> (1) for the purpose of awarding elective Carnegie units, the released time classes in religious instruction are evaluated on the basis of purely secular criteria that are substantially the same criteria used to evaluate similar classes at established private high schools for the purpose of determining whether a student transferring to a public high school from a private high school will be awarded elective Carnegie units for such classes. However, any criteria that released time classes must be taken at an accredited private school is not applicable for the purpose of awarding Carnegie unit credits for released time classes; and
>
> (2) the decision to award Carnegie units is neutral as to, and does not involve any test for, religious content or denominational affiliation.
>
> (B) For the purpose of subsection (A)(1), secular criteria may include, but are not limited to, the following:
>
> (1) number of hours of classroom instruction time;
> (2) review of the course syllabus which reflects the course requirements and materials used;
> (3) methods of assessment used in the course; and
> (4) whether the course was taught by a certified teacher.

The preamble to such legislation states that

> [t]he 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.

You have questioned whether the "Released Time Credit Act" is legal. You also questioned whether this particular legislation provides local school districts a legal alternative to either deny credit or use the transfer credit policy.

> S.C. Code Ann. § 59-1-460 cited in the recent legislation states that
>
> (A) The school district board of trustees may adopt a policy that authorizes a student to be excused from school to attend a class in religious instruction conducted by a private entity if:
>
> (1) the student's parent or guardian gives written consent;
>
> (2) the sponsoring entity maintains attendance records and makes them available to the public school the student attends;
>
> (3) transportation to and from the place of instruction, including transportation for students with disabilities, is the complete responsibility of the sponsoring entity, parent, or guardian;
>
> (4) the sponsoring entity makes provisions for and assumes liability for the student who is excused; and
>
> (5) no public funds are expended and no public school personnel are involved in providing the religious instruction.
>
> (B) It is the responsibility of a participating student to make up any missed schoolwork. However, no student may be released from a core academic subject class to attend a religious instruction class. While in attendance in a religious instruction class pursuant to this section, a student is not considered to be absent from school.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...."

That amendment is made applicable to the states by the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940). Therefore, any released-time program providing religious instruction to students which is adopted by a board of education is subject to the provisions of the First Amendment. It has been determined that a statute or governmental policy does not violate the First Amendment if it (1) has a legislative purpose that is secular, (2) has a primary effect that neither advances nor inhibits religion, and (3) does not create an excessive entanglement of government with religion. See: Lemon v. Kurtzman, 403 U.S. 602 (1971).

It is generally recognized that any released-time program where religious instruction is provided to students upon public school property will generally be considered unconstitutional. Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948). However, in Zorach v. Clauson, 343 U.S. 306 (1952), the United States Supreme Court upheld a released-time program established by the New York City schools where, in circumstances in which parents provided a written request, students were released from school during the school day in order to leave the school buildings and grounds and travel to a religious center for religious instruction or devotional exercises. Such instruction was at the expense of the religious body. Students not released remained in their classrooms and the schools received attendance reports from the churches that conducted the classes. It was determined by the court that such practice did not violate the First Amendment. Similarly, in Smith v. Smith, 523 F.2d 121 (1975), cert. denied, 423 U.S. 1073 (1976), the Fourth Circuit Court of Appeals upheld a Harrisonburg, Virginia released-time program where students at a public school were released during school hours for religious instruction conducted off campus by a nonprofit organization supported by a council of churches.

This office in an opinion dated March 13, 1996 citing Zorach and Smith concluded that

> ...as a general matter, a released-time program that permits public school students to be excused from attendance during regular school hours for the purpose of receiving religious instruction off school property does not violate the proscriptions of the First Amendment's religious clauses.

Another opinion of this office dated September 5, 1995 determined that Zorach appeared "...to permit a school district to adopt a policy of excusing a student from school for purposes of religious instruction."

In your first question you asked whether the "Released Time Credit Act" is legal. As explained in the preamble to such provision, "[t]he purpose of this act is to incorporate a constitutionally acceptable method of allowing school districts to award...elective Carnegie unit credits for classes in religious instruction...." As set forth by Section 59-39-112(A)(1) and (2), with respect to any decision to award Carnegie credits, any decision regarding a particular class is to be made on "purely secular criteria". It is further stated that any decision with regard to such, "...does not involve any test for religious content or denominational affiliation."

In Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981), the court recognized that consistent with Zorach, public schools could permit the release of students during public school hours for attendance at religious classes which were taught by religious teachers on private property but not on public school premises. However, certain aspects of the program before the court were determined to violate the First Amendment.

As to the question of awarding credit for these courses, reference was made to a State Board of Education statement that required that no credit be given to courses "devoted mainly to denominational instruction." The court noted that

> (t)he constitutional problem with the administration of "elective credit" when such credit is granted to some released-time courses but not to others based upon a religious test is that it requires the public school officials to entangle themselves excessively in church-sponsored institutions by examining and monitoring the content of courses offered there to insure that they are not "mainly denominational."

662 F.2d at 1361. The court recognized that

> (t)he state can, however, require 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."...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....If the school officials desire to recognize released-time classes generally as satisfying some elective hours, they are at liberty to do so if their policy is neutrally stated and administered. Recognizing attendance at church-sponsored released-time courses as satisfying graduation requirements advances religion no more than recognizing attendance at released-time courses or full-time church-sponsored schools as satisfying state compulsory attendance laws.

Ibid. The court noted, however, that

> (i)t is when, as here, the program 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 that the entanglement exceeds permissible accommodation and begins to offend the establishment clause.

Ibid. The court concluded that in the factual situation before the court, the trial court had properly enjoined the practice of granting "credit" as satisfying elective courses when the program required a judgment as to whether the courses were "mainly denominational" in content. 662 F.2d at 1361-1362.

As set forth above, pursuant to Section 59-39-112(A)(1) and (2), with respect to any decision to award Carnegie credits, any decision regarding a particular class is to be made on "purely secular criteria". It is further stated that the decision with regard to such, "...does not involve any test for religious content or denominational affiliation." Consistent with Lanner, supra, in the opinion of this office, as long as any decision to award Carnegie credits is made consistent with such secular requirement, the provisions of the "Released Time Credit Act" may be upheld and may be legally utilized in awarding these credits. There would, however, apparently be a problem if any decision with regard to awarding these credits would involve, as set forth in the Act, an examination based upon religious content or denominational affiliation.

You also questioned whether the "Released Time Credit Act" provides local school districts with a legal alternative to either deny credit or use the transfer credit policy. As set forth by subsection (A) of Section 59-39-112, "[a] school district board of trustees may award high school students" Carnegie unit credit for released time classes. Also, Section 59-1-460(A) referenced above provides that "[t]he school district board of trustees may adopt a policy that authorizes a student to be excused from school to attend a class in religious instruction conducted by a private entity...." Generally, the use of the term "may" indicates discretion. See: Ops. Atty. Gen. dated December 22, 1986 and November 22, 1983. Reference is also made in subsection (A)(2) of Section 59-39-112 to "the decision to award" Carnegie unit credits. Therefore, these provisions argue in favor of discretion within individual districts as to awarding credits for released time classes for religious instruction.

An opinion of this office dated August 29, 1995 recognized that, generally, school districts have the authority to adopt policies concerning absences from school. I would note, however, that Section 59-1-460(B), enacted since that opinion was issued, specifically states that "[w]hile in attendance in a religious instruction class pursuant to this section, a student is not considered to be absent from school." Therefore, it appears that the a school district's authority to adopt policies regarding absences would not carry over to attendance at religious instruction classes.

Nevertheless, in an opinion of this office dated August 17, 1995 it was determined that "...a school district where a student attends school should first determine whether releasing a student for...(religious purposes)...would be consistent with its policy and, if not, whether that policy should be changed." Similarly, an opinion of this office dated February 16, 1983 indicated that "...the board of trustees of a school district is responsible for the management and control of the district, subject only to the supervision and orders of the county board of education if there is a county

board...(and)...has the power to make rules and regulations and to adopt policies." An opinion of this office dated September 5, 1995 dealt with the specific question of whether a school district is authorized to permit a student to be released for religious instruction during certain school class hours. That opinion similarly concluded that "...the extent of time for the release and the procedures for obtaining the release would be a matter for the district to determine...if the district chose to adopt such a policy."

Another opinion of this office dated March 13, 1996 noted that Section 59-19-10 of the Code bestows upon school trustees the authority for the "management and control" of each school district. Furthermore, Section 59-19-90 (7) authorizes school districts to "[m]anage and control local educational interests of its district...." That opinion referenced another prior opinion of this office, Op. Atty. Gen. dated October 5, 1979 which indicated that "boards of trustees of the school districts have broad powers over district affairs..." The 1996 opinion concluded that "...a school district may, if it so chooses, adopt reasonable policies and procedures for released time for students."

Consistent with these prior opinions, it appears that the matter of denying credit or using the transfer credit policy with regard to released time credits would be a matter for resolution by individual districts. Consistent with the above, it appears, therefore, that it would be discretionary with a particular school board of trustees as to whether or not to award Carnegie unit credit for released time classes. Of course, any such decision must be made on purely secular criteria. See: Lanner, supra.

If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
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