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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 13, 1996

The Honorable Joe Wilson
Senator, District No. 23
211 Gressette Building
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Senator Wilson:

You have requested an opinion regarding the authority of a school district to adopt a religious instruction released-time policy for its students. Specifically, you have inquired whether there is "anything in S.C. Code Ann. § 59-1-440 that should be construed as precluding a local school district's Board of Trustees from authorizing or permitting an appropriately structured and administered released-time religious education program in their respective school district[.]" As discussed below, it is my opinion that school districts in South Carolina may adopt policies that permit students to be excused from school for the purpose of receiving religious instruction off school property.

This Office has previously recognized that school districts in South Carolina may adopt policies concerning absences from school. Op. Atty. Gen. (June 17, 1986). In addition, State Board of Education Reg. 43-274 (S.C. Code Ann. Vol. 24) defines lawful absences so as to provide that "... students may be excused from attendance in school for recognized religious holidays of their faith [and] ... students may be excused from attendance in school in accordance with local board policies." (Emphasis added.) Of course, any religious instruction released-time policy adopted by a local school board would be subject to the First Amendment to the United States Constitution, which provides in pertinent part, that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The religious liberty guarantees expressed by the Free Exercise and Establishment Clauses have been held to be applicable to the individual states by virtue of the Fourteenth Amendment to the United States

Constitution. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Moreover, according to currently prevailing decisions of the United States Supreme Court, a particular state law or governmental policy challenged under the Establishment Clause will be upheld as constitutionally valid if it has a (1) secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and, (3) does not result in an excessive entanglement of government with religion. Lynch v. Donnelly, 465 U.S. 668 (1984); Lemon v. Kurtzman, 403 U.S. 602 (1971).

Among the religion-education precedents, two released-time cases have been heard by the Supreme Court. In McCollum v. Board of Education, 333 U.S. 203 (1948), the Court invalidated a Champaign, Illinois program whereby religious instructors took over the public school classrooms during regular school hours and nonparticipating students were required to go elsewhere in the building during religion classes. On the other hand, in Zorach v. Clauson, 343 U.S. 306 (1952), the Court upheld a New York City School's released-time program where, upon the parents' written request, students were released from school during the school day so that they could leave the school buildings and grounds and go to a religious center for religious instruction or devotional exercises. Under this scheme those students not released remained in the classrooms, and the schools received attendance reports from the churches conducting the classes.

Somewhat more recently in the case of Smith v. Smith, 523 F.2d 121 (1975), cert. denied, 423 U.S. 1073 (1976), the Fourth Circuit Court of Appeals applied Lemon's three-prong test for evaluating Establishment Clause challenges and upheld the Harrisonburg, Virginia released-time program whereby public school students were released during school hours for religious instruction conducted off school premises by a nonprofit organization that was supported by a council of churches. As applied to the Harrisonburg program, the court determined that not only was the case indistinguishable from Zorach, but that the released-time program had a secular purpose in accommodating wishes of students' parents; did not excessively entangle state with religion in that public school classrooms were not turned over to religious instruction; and, had a primary effect that did not necessarily advance or inhibit religion. Thus, 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 religion clauses.

With respect to your question regarding S.C. Code Ann. § 59-1-440, that section provides, in part, as follows:

> [t]he instructional day for secondary students must be at least six hours a day or its equivalent weekly, excluding lunch.

> The school day for elementary students must be at least six hours a day, or its equivalent weekly, including lunch ... .

Nothing in Section 59-1-440 suggests that the General Assembly intended to prohibit or in any way limit the authority of the local school district to permit released time to students for religious instruction. Moreover, Section 59-19-10 of the Code bestows upon school trustees the authority for the "management and control" of each school district. Further, Section 59-19-90 (60) authorizes school districts to "[m]anage and control local educational interests of its district ...". As we stated in Op. Atty. Gen., October 5, 1979, "boards of trustees of the school districts have broad powers over district affairs ...". Pursuant to similar statutory authority, the Attorney General of Nevada has concluded that released time for students is authorized. 1977 Nev. Atty. Gen. No. 77-211 (Feb. 14, 1977). In view of this wide discretion in each district to manage its own schools therein, the absence of any intent by the Legislature to speak to the issue of released time and the fact that religious worship is a fundamental right under the First Amendment, it is my opinion that a school district may, if it so chooses, adopt reasonable policies and procedures for released time for students.

This letter is an informal opinion only. It has been written by a designated Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Zeb Williams

Zeb C. Williams, III
Deputy Attorney General

ZCW,III/an