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	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Index

TABLE OF AUTHORITIES

Constitutional Provisions:

Cases:

LIST OF EXHIBITS

1. Affidavit of Plaintiff Robert Moss
2. Affidavit of Plaintiff Melissa Moss
3. Affidavit of Plaintiff Ellen Tillett
4. Affidavit of Annie Laurie Gaylor, Co-President of Plaintiff Freedom From Religion Foundation, Inc.
5. Deposition of Andrew Charles Martin
6. Deposition of Grayson Hartgrove
7. Deposition Exhibit 105
8. Deposition of Nancy Seay (Excerpts)
9. Deposition Exhibit 11
10. Deposition of Steven G. Smith (Excerpts)
11. Deposition Exhibit 7
12. Deposition Exhibit 11 (Partial)
13. Deposition of John E. Wolfe (Excerpts)
14. Deposition of Suzanne "Nan" McDaniel
15. Deposition of Thomas D. White, Jr., Ph. D.
16. Deposition Exhibit 180
17. Deposition Exhibit 181
18. Deposition of Conrad "Chip" Hurst
19. Deposition of Walter L. Tobin
20. Defendant's Admission No. 7
21. Deposition Exhibit 93
22. Declaration of George Daly
23. Declaration of Martin Aigner
24. Deposition Exhibit 153
25. Defendant's Admission No. 40
26. Deposition Exhibit 67
27. Deposition Exhibit 173
28. Deposition Exhibit 66
29. Deposition Exhibit 157
30. Deposition Exhibit 69
31. Deposition Exhibit 162
32. Deposition of Rodney Graves (Excerpts)
33. Deposition Exhibit 152
34. Deposition Exhibit 155
35. Deposition Exhibit 153
36. Deposition Exhibit 158
37. Deposition Exhibit 159
38. Deposition Exhibit 62
39. Deposition Exhibit 25
40. Deposition Exhibit 187A
41. Deposition Exhibit 68
42. SPBG-00050
43. Interrogatory Ans. No. 5
44. Deposition Exhibit 75
45. Deposition Exhibit 162
46. Deposition Exhibit 73
47. Deposition Exhibit 75
48. Deposition Exhibit 161
49. Deposition Exhibit 124A
50. Deposition Exhibit 72
51. Deposition Exhibit 71
52. Interrogatory Answer 19

I. STATEMENT OF THE CASE

Plaintiffs challenge the application of defendants' Released Time for Religious Instruction Policy as violating the Establishment Clause and the Equal Protection Clause of the United States Constitution. This Court has subject matter jurisdiction pursuant to 28 U.S.C. 1331 and 1343(a)(3),(4). This is an action pursuant to 42 U.S.C. 1983. Plaintiffs seek declaratory relief that defendant's practice of granting academic credit for released time religious instruction is unconstitutional, and nominal damages.

This case was filed on June 16, 2009. Dkt. 1. On December 17, 2009 the Court denied defendant's motion to dismiss plaintiffs' Establishment Clause claim and granted it as to their Equal Protection claim. Dkt. 39. The Establishment Clause claim is now before the Court on plaintiffs' motion for summary judgment.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Standing

Plaintiff Robert Moss is the parent of plaintiff Melissa Moss, who graduated from defendant's high school in May 2010. In March 2007 he received a letter from Spartanburg County Bible Education In School Time ("SCBEST"), announcing that it had been selected by defendant to provide released time religious education, that elective credit would be awarded for its course, and that the course would teach students how they ought to live as Christians. Ex. 29. Moss was opposed to religious instruction by public schools, especially for elective credit, because he felt that it unconstitutionally endorsed religion, and unfairly stigmatized him and other non-Christians. He and his wife appeared at the next meeting of the school board and opposed the policy. Later they met with the Board Chair and the Superintendent. This meeting

left Moss further convinced that defendant was endorsing Christianity by its provision of released time religious education. Affidavit of Plaintiff Robert Moss, Ex. 1.

Plaintiff Melissa Moss, his daughter, graduated from defendant's high school in 2010 and now attends college. She also was offended by receiving the letter at her home. She had often felt distressed that she was treated differently at school because she was not a Christian. (She was one of only two students of her religion at the school.) The existence of the released time program and the giving of an academic credit for it further contributed to her feeling of distress at being an outsider at the school. During her senior year she elected to park in a more expensive lot, in part so as to avoid the discomfort of passing See You At The Pole, a Christian assembly held every few weeks at the school flagpole before school starts. Affidavit of Plaintiff Melissa Moss, Ex. 2.

Plaintiff Ellen Tillett is the mother of a present Senior at defendant's high school. She also was offended by the letter from SCBEST. She is offended by defendant's support for religion because it conveys a message of intolerance and narrow-mindedness in what should be an open learning environment. The granting of academic credit for religious instruction is particularly offensive to her. Affidavit of Plaintiff Ellen Tillett, Ex. 3.

Plaintiff Freedom From Religion Foundation, Inc. is a national organization that works to defend the constitutional principle of separation of church and state, as well as to educate the public about the views of nontheists. It has members in South Carolina and one of the plaintiffs is a member. Affidavit of Annie Laurie Gaylor, Ex. 4.

B. The merits

1. The development of the released time policy

These are the principal witnesses about defendant's released time religious instruction.

-Grayson Hartgrove, Executive Director of SCBEST until June 30, 2007.

-Andrew "Drew" Martin, Incoming Executive Director of SCBEST from 2006 until June 30, 2007, thereafter Executive Director.

-Conrad "Chip" Hurst, Chair of defendant's Board of Trustees.

-Dr. Walter Tobin, defendant's Superintendent during the academic year 2006-2007.

-Dr. Thomas White, Jr., defendant's Superintendent following Dr. Tobin, and defendant's 30(b)(6) witness.

-Dr. Ernest Dupre, defendant's Assistant Superintendent for Instruction.

-Nan McDaniel, defendant's Director of Secondary Education until June 30, 2007.

-Rodney Graves, Principal of Spartanburg High School until June 30, 2007, thereafter Director of Secondary Education.

-John Wolfe, Defendant's Guidance Director now and for many years.

-Steve Smith, Head of Oakbrook Preparatory School until 2009.

-Nancy Seay, Head of Oakbrook after Smith, and Oakbrook's 30(b)(6) witness.

Spartanburg High School is the only high school under defendant's jurisdiction. SCBEST is a religious organization which provided released time religious education for defendant at Spartanburg High from 1997 until it discontinued its program, for lack of interest, at some time before 2006. Ex. 5 (Martin Dep.) 12:4-14:6, 22:13-23. SCBEST has also offered programs, not for credit, at defendant's junior high and middle schools.

South Carolina Code Sec. 59-1-460 (2002) allows released time religious instruction but not elective credit therefor. South Carolina Code Sec. 59-39-112 (2006) ("Release Time Credit Act") provides that a school district "may award high school students no more than two elective Carnegie units for released time classes in religious instruction." A Carnegie unit is a credit for 120 hours of class attendance. S.C. Reg. R 43-172(1)(A)(8)(2009 Cum. Supp.).

Both before and after the passage of the Released Time Credit Act, Grayson Hartgrove favored the granting of elective credit for released time by transfer through a private Christian school rather than directly by a public school. Drew Martin also favored this approach. In June 2006, about the time that the Released Time Credit Act was passed, Hartgrove met with Chairman Hurst regarding resuming released time religious education at Spartanburg High. Hurst told Hartgrove that he also would much prefer to have the credit transferred to defendant, and through Oakbrook Preparatory School ("Oakbrook"), a local Christian interdenominational private school. Ex. 5 (Martin Dep.) 31:4-15, 128:2-129:23; Ex. 6 (Hartgrove Dep.) 12:16-15:7; Ex. 7; Ex. 8 (Seay Dep.) 31:3-6.[1]

In October 2006 SCBEST entered into a contract with Oakbrook. Ex. 11; Ex. 8 (Seay Dep.) 20:19-21. The contract stated that "Spartanburg School District #7 will provide that students can transfer elective course credit." Ex. 11, p. 1 ¶ 3. Defendant is not a formal party to this agreement but this provision expressed Chairman Hurst's preference. SCBEST and Oakbrook further agreed that "Oakbrook shall . . . acknowledge the . . . grading of each SCBEST student . . . and transfer that information" to defendant. Ex. 11, p. 2 ¶ III. Since then Oakbrook has transferred the SCBEST grades to defendant on Oakbrook letterhead, denominating them as

[1] Oakbrook is accredited by the South Carolina Independent Schools Association ("SCISA"), whose accreditation standards appear at Ex. 9. Ex. 8 (Seay Dep.) 28:17-29:13; Ex. 10 (Smith Dep.) 31:4-6.

grades for "Christian Education/SCBEST." Ex. 8 (Seay Dep.) 9:12-19; 15:8-13; Ex. 12, p. 2. Defendant knows that these grades come from SCBEST. Ex. 13 (Wolfe Dep.) 18:8-19:2; 36:18-37:3; 44:11-45:23; Ex. 14 (McDaniel Dep.) 30:2-10. Defendant accepts these grades and enters them on student transcripts and factors them into student GPAs. Ex. 15 (White Dep.) 56:20-58:13; 64:17-65:7.

Oakbrook has not informed its accrediting agency of its relationship with SCBEST. Ex. 10 (Smith Dep.) 18:22-19:7; Ex. 8 (Seay Dep.) 30:13-31:2. Drew Martin is the SCBEST teacher. He has no official relationship with Oakbrook. Ex. 8 (Seay Dep.) 20:3-8. He is not on the Oakbrook faculty. Ex. 10 (Smith Dep.) 9:11-17. Oakbrook has never observed any SCBEST classes. Ex. 10 (Smith Dep.) 16:11-20). Oakbrook has nothing to do with discipline at SCBEST. Ex. 8 (Seay Dep.) 24:6-8. The SCBEST course is not listed in the Oakbrook catalogue Ex. 10 (Smith Dep.) 21:16-18. It is not mentioned on the Oakbrook website. (oakbrookprep.org, last visited 11-9-10).

A week after the contract with Oakbrook had been signed Troy Bridges, a Director of SCBEST, wrote to Chairman Hurst and extolled the virtues of released time. ("You will be amazed to see how the lives of public school students are changed through Bible Education in School Time.") Bridges requested of Hurst that defendant adopt a "Bible Education in School Time policy" and enclosed a Recommended School Board Policy for released time. Ex. 16; Ex. 17; Ex. 18 (Hurst Dep.) 38:12-39:12.

Dr. Tobin learned from SCBEST that the arrangement with Oakbrook "would be a way that we would offer the course through Oakbrook as an accredited school, and that we would release the time, and Mr. Martin would teach the course and it would be taught through Oakbrook." Ex. 19 (Tobin Dep.) 14:23-15:18; Ex. 15 (White Dep.) 56:20-57:11. Dr. Tobin's

understanding of the reason for this arrangement was that Oakbrook "was an accredited school, and . . . we don't accept credits – transfer credits unless the school is accredited," whereas if the transferee school is unaccredited "there has to be some verification process." Ex. 19 (Tobin Dep.) 15:19-16:19. SCBEST is not an accredited school. Ex. 20, Admission No. 7. Dr. Tobin testified that he did not know whether SCBEST was accredited or not, but agreed that "if it had been accredited there wouldn't have been any need to go through Oakbrook." Ex. 19 (Tobin Dep.) 16:20-17:6. Defendant knows that the course is not taught at Oakbrook (which is ten or more miles distant from Spartanburg High, Ex. 10 (Smith Dep.) 7:14-20, but is taught by SCBEST every day of the semester at an Episcopal Church next door to Spartanburg High. Ex. 15 (White Dep.) 100:5-10.

Defendant accepts any and all grades on a transcript from an accredited school, including overtly religious courses. Ex. 15 (White Dep. 101:13-102:13.)

On January 4, 2007, Drew Martin met with defendant's Instructional Services Committee to discuss released time. In attendance were Chairman Hurst, Mr. Tillotson (Board Member and Committee Chair), Dr. Tobin and Dr. Dupre. Ex. 5 (Martin Dep.) 25:15-18; 27:21-24. Martin described the SCBEST course to them and gave out his "Basic Commitments" document. Ex. 5 (Martin Dep.) 28:15-21; 29:5-13; 64:4-8; Ex. 21. This document explains at length that SCBEST is a religious organization whose "curriculum is deliberately structured to help the students develop a Christian world view." Ex. 21, p. 4. The SCBEST arrangement with Oakbrook and the need for the Board to develop a policy were discussed. Ex. 19 (Tobin Dep.) 18:4-19:6; 22:16-23:7; Ex. 5 (Martin Dep.) 63:22-64:8. Martin later also told Superintendent White and the Guidance Director the nature of the SCBEST course. Ex. 5 (Martin Dep.) 64:9-13; 64:16-20.

On January 9, 2007, five representatives of SCBEST attended defendant's regular monthly meeting. Mr. Tillotson had them stand and stated their positions with SCBEST. One of them was then the instructor for the SCBEST course at one of defendant's junior high schools. Tillotson said, "We appreciate the contribution that you are making." Ex. 22; Ex. 23. These proceedings then occurred:

> The motion from committee is district 7 will offer the Spartanburg High students elective credit for off-campus religious education and will adopt South Carolina state law S-148[2] Release Time for High School Credit as its model for high school credit. These classes will be provided through . . . SCBEST . . . Additionally district 7 will adopt a release time policy. We bring that as a motion from committee.

The motion passed unanimously.[3]

Thereafter SCBEST and defendant continued to discuss the transfer of credit while the Policy was in the course of its development. In Dr. Tobin's view the policy about released time was developed "in concert" with SCBEST. Ex. 19 (Tobin Dep.) 8:21-11:21. SCBEST "dialogued with the school board and Dr. Tobin about granting the transfer credit for our program." Ex. 26; Ex. 5 (Martin Dep.) 95:6-15. A comprehensive scenario prepared by SCBEST was a part of defendant's development of the policy. Exhibit 27; Ex. 19 (Tobin Dep.) 54:22-55:6. It said:

> . . . Its (sic) August 2007 and Parents now have the option to release their children from Spartanburg High for a semester to take an elective Bible class. The qualified teacher is an employee of SCBEST and had been approved by an accredited private Christian school, Oakbrook Preparatory School (OPS). OPS will review and approve the educational objectives, curriculum and teachers for SCBEST. Teachers must meet or exceed OPS current requirements and qualifications. Oakbrook Preparatory School will provide coursework oversight, will monitor attendance, test, and exams and upon completion of satisfactory work by the student will act as a fiduciary agent for SCBEST and transfer one half Carnegie unit of credit for an elective class into Spartanburg High.

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[2] The Release Time Credit Act was, before its passage, denominated Senate Bill 148.

[3] The official minutes, to the same effect, are at Ex. 24. *See,* Ex. 25 Admission No. 40.

A "sample policy" was enclosed. Ex. 27, p. 1¶ 5. Hartgrove additionally gave defendant a copy of a draft released time policy of another Spartanburg school district. Ex. 28; Ex. 5 (Martin Dep.) 94:24-95:2; Ex. 19 (Tobin Dep.) 27:3-5.

The Director of Secondary Education understood that Oakbrook and SCBEST were a "package deal." Ex. 14 (McDaniel Dep.) 10:17-11:3.

In February 2007 SCBEST prepared a letter to the parents of all rising tenth, eleventh and twelfth grade students at Spartanburg High about their proposed course offering. Ex. 29; Ex. 5 (Martin Dep.) 25:23-25; 26:8-27:6. Dr. Tobin testified that "we talked about how we would contact – how they would contact and how we would contact parents about it." Ex. 19 (Tobin Dep.) 12:7-13:10. SCBEST requested the names and addresses of the parents from defendant. Defendant supplied them. SCBEST mailed the letter in late February 2007. Ex. 5 (Martin Dep.) 27:3-6; 42:12-43:7; Ex. 19 (Tobin Dep.) 13:15-21, 31:15-32:25, 45:11-46:12; Ex. 15 (White Dep.) 28:5-29:18. Dr. Tobin "wanted to make parents aware and students aware that the course would be offered." Ex. 19 (Tobin Dep.) 11:24-12:6; 30:8-31:11.[4]

The proposed Policy had a first reading in February 2007. Ex. 33, p. 2.D; Ex. 25. It provided that defendant "may award . . . no more than two elective Carnegie unit credits" for released time religious instruction. Ex. 14 (McDaniel Dep.) 14:17-15:13; Ex. 34.

[4] SCBEST made copies of the addresses and later used them to send another promotional letter to parents in July 2007. (The course will "give [your child] an opportunity to develop a personal faith commitment."). Ex. 30; Ex. 5 (Martin Dep.) 77:12-22, 98:16-20. SCBEST continued to request lists of parents' names and addresses from defendant until at least January 2009. Ex. 31; Ex. 32 (Graves Dep.) 99:24-100:1, 118:3-119:13.

On March 6, 2007, defendant enacted its Policy "Released Time for Religious Education." Ex. 35, p. 2.B; Ex.25. It provided that "[t]he district will accept no more than two elective Carnegie unit credits" for released time religious instruction."

Plaintiff Robert Moss and his wife had received the SCBEST letter (Ex. 29) and because of it came to the board meeting. They read to the Board excerpts from the letter about SCBEST's religious mission and maintained that defendant was endorsing religion by passing its Policy. Exhibit 1, ¶ 3(d). Defendant was also unhappy with the SCBEST letter, for a different reason. The SCBEST letter said that defendant has "recently granted SCBEST approval to begin offering this class for elective credit." Ex. 29. This statement accords with the January motion. ("These classes will be provided through . . . SCBEST." Ex. 22.) It accords with the policy as read at the February board meeting, which had provided that the district "may award" credits. It accords with the Released time Credit Act, *supra,* which says that a school district "may award" credits. At the March 6 meeting, however, the Policy was altered to read that the district "will accept" Carnegie units and was passed as altered. Ex. 35, p. 2.B. The reason for this last-minute change was that defendant decided that the "may award" language did not reflect that it was accepting a transfer credit rather than directly awarding a credit. Ex. 14 (McDaniel Dep.) 8:19-9:25; 14:17-15:13. The change in language meant that the transfer credit had to come through an accredited school. Ex. 14 (McDaniel Dep.) 32:9-18.

Defendant then started drafting a "Dear Parents" letter aimed at correcting the SCBEST letter. Ex. 36; Ex. 32 (Graves Dep.) 107:24-108:11; Ex. 37; Ex. 19 (Tobin Dep.) 43:13-22. One draft version was faxed from Dr. Tobin's office. Ex. 38; Ex. 15 (White Dep.) 52:18-53:20). It does not appear to whom it was faxed, but within three days SCBEST requested of Dr. Tobin that he not send the letter and Dr. Tobin agreed not to send it. Ex. 39; Ex. 5 (Martin Dep.)

78:17-21; Ex. 19 (Tobin Dep.) 43:13-44:2. The proposed letter said that the SCBEST letter was "not accurate" and otherwise contradicted several of its assertions. In SCBEST's view, had the defendant sent this letter out to parents it "wouldn't have been a positive thing" for SCBEST. Ex. 5 (Martin Dep.) 80:7-81:3. This left uncorrected in the minds of the parents what defendant saw as misstatements in the SCBEST letter.

During the days after the March 6 meeting when defendant and SCBEST were at odds about the SCBEST letter, they were cooperating about another letter. After hearing or learning of the Moss remarks at the March 7 meeting, Grayson Hartgrove of SCBEST drafted a letter defending the constitutionality of the Policy, for Dr. Tobin to sign and send to the Mosses. Dr. Tobin and Chairman Hurst had met with the Mosses not long after the Policy was passed. (Ex. 1 ¶ 4(d). Hartgrove's draft reached Dr. Tobin, who forwarded it to Chairman Hurst "for your information as you formulate your letter" to the Mosses following the meeting with them. Ex. 40[5]; Ex. 19 (Tobin Dep.) 55:20-57:15.

Thereafter SCBEST and Defendant continued to discuss how the SCBEST credit would be received by defendant. Drew Martin wrote to Chairman Hurst in June 2007 and referred to their conversation two months earlier in which Hurst "mentioned that [he was] uncertain of what we needed to do to insure that the credit from Oakbrook would actually be able to transfer." Ex. 41; Ex. 5 (Martin Dep.) 96:3-5. In answer to Hurst's questions Martin related a conversation that he (Martin) had had a week earlier.

> . . . [the Director of Secondary Education] . . . informed me that the District will allow credit for the class based solely on Oakbrook's approval of the class. Both she and . . . [the Guidance Director] have told me that this is the normative practice on any transfer credit from private schools. The only time further verification is required is if there is a

[5] Exhibit 40 is a more legible copy of the Exhibit 187 to which Dr. Tobin refers. Ex. 13 (Wolfe Dep.) 5:1-6:12.

> reason to suspect the quality of the class. For example, if a student transferred in a credit for Algebra I, but they were incapable of doing the work of Algebra II, then the validity of the private school transfer credit would be called into question.[6]

Before the 2007-2008 school year started defendant approved SCBEST to offer released time religious education and approved that the SCBEST grades come to defendant through Oakbrook and be entered on student transcripts and factored into student GPAs. Ex. 13 (Wolfe Dep.) 18:8-19:2; 28:15-24; 30:17-33:14; 36:18-37:3; 44:11-45:23; Ex. 19 (Tobin Dep.) 59:6-60:4; Ex. 15 (White Dep.) 56:20-58:13; 64:17-65:4. The Guidance Director did not recall, in his 36 years at Spartanburg High, another instance of a grade from an unaccredited school coming to defendant through an accredited school. Ex. 13 (Wolfe Dep.) 8:8-14; 20:18-21:19.

The March 2007 Policy (Ex. 42; Ex. 43) provides that defendant "will evaluate the classes on the basis of secular criteria." This evaluation is done by Oakbrook. Ex. 15 (White Dep.) 72:2-10. Defendant was informed during the formulation of the Policy that Oakbrook, a Christian school, would oversee the SCBEST curriculum, which defendant knew to be a Christian curriculum. Ex. 27; Ex. 19 (Tobin Dep.) 54:22-55:6. Oakbrook reviewed the SCBEST course to determine if it was "a course that we would have at our school." Ex. 8 (Seay Dep.) 15:14-16:16. Oakbrook approved the arrangement with SCBEST because "we were attempting to do something to support the Christian community." Ex. 10 (Smith Dep.) 28:4-11.

2. <u>The implementation of the Policy</u>

After the Policy was passed and the SCBEST classes commenced, defendant and SCBEST continued to interact about a variety of subjects. SCBEST made promotional visits to defendant's campuses and solicited students at registration. Defendant enforced discipline for

[6] The Director of Secondary Education and the Guidance Director agreed that this was a correct summary of the conversation. Ex. 13 (Wolfe Dep.) 29:24-30:24; Ex. 14 (McDaniel Dep.) 17:16-22.

student misbehavior at SCBEST. Superintendent White became personally invested in the success of SCBEST.

Promotional visits to defendant's campuses.

SCBEST has visited homerooms at defendant's Whitlock Junior High. The SCBEST teacher "made the students aware of the course." Ex. 5 (Martin Dep.) 112:25-113:7; Ex. 43. One of the SCBEST visits to Whitlock occurred in September 2009. Defendant has taken no action to prevent a recurrence of this matter. Ex. 15 (White Dep.) 88:10-90:2. Earlier, at a meeting in April 2009 between Martin, Troy Bridges, the Assistant Superintendent, the Director of Secondary Education and three Junior High Principals, Martin –

> also raised the issue of student recruitment to see what they thought could or should be done by the school to make students aware of the class. Both [the Principals] felt that most of the students are already aware of the class. The basic consensus was that we should[7] continue doing what we're doing, including going into homerooms, as long as no one questions it.

Ex. 44, p. 2 ¶ 3; Ex. 5 (Martin Dep.) 110:6-15; 112:25 - 116:16. The sense that Martin got from the discussion was that "no one had complained about it, keep it as it is." Martin Dep. 116:15-16.

SCBEST presence at registration

Each August Spartanburg High has a registration at which students' schedules become available and parents are invited to visit. SCBEST has had a table at this event every year. Ex. 5 (Martin Dep.) 59:23-62:8; Ex. 32 (Graves Dep.) 72:3-73:25; Ex. 13 (Wolfe Dep.)13:5-13. At one registration Martin set up a display board on the designated SCBEST table and "had my

[7] Martin testified that these notes fairly and accurately stated the events at the meeting, except that he remembered that the basic consensus at the meeting was that SCBEST "could" continue as before regarding homeroom visits. Ex. 5 (Martin Dep.) 110:9-15, 115:16-22.

students from last semester come" and "as [other] students were walking by just kind of told them briefly what it was, and if they were interested they gave them a flier." Ex. 5 (Martin Dep.) 60:12-62:1. On January 7, 2009 the Superintendent, Assistant Superintendent, Director of Secondary Education, Spartanburg High Principal and Guidance Director met and decided that SCBEST could continue coming to the registration. Ex. 45; Ex. 32 (Graves Dep.) 116:9-117:3.

Forms for requesting assignment to SCBEST are kept in defendant's Guidance Office. Ex. 13 (Wolfe Dep.) 9:6-14.

Discipline by defendant for misbehavior at SCBEST.

Defendant has on occasion enforced discipline for student misbehavior during SCBEST classes. Despite much discussion about the matter defendant does not have a clear or a written policy about when it will do so in the future.

On one occasion a student was removed from an SCBEST junior high school class for "typical teenage stuff, students cutting up, not listening . . ." Ex. 5 (Martin Dep.) 106:24-108:10. Martin did not consider this a major discipline problem. Ex. 5 (Martin Dep.) 54:24-55:19. SCBEST returned the student to defendant before the end of the class. The Assistant Principal had a counseling session with the student. Ex. 15 (White Dep.) 80:21-81:23. Previously Martin had had the understanding that there was a precedent in place that "the school would accept the SCBEST discipline referrals just as if they had come from a Spartanburg high school teacher." Ex. 5 (Martin Dep.) 108:11-23; Ex. 46, p. 2. Martin spoke with the Principal on this occasion about discipline and came away with the understanding that defendant "left it up to the specific grade level principals as somewhat of a judgment call" Ex. 5 (Martin Dep. 55:15-19.

Martin also related that two students had gotten into a fight on the SCBEST bus.[8] He thought that defendant had disciplined them for that behavior. Ex. 5 (Martin Dep.) 56:14-18. Martin was unclear whether the rule was that defendant would accept discipline referrals in all cases or only in "egregious" cases. Ex. 5 (Martin Dep.) 108:11-109:9.

The "typical teenage stuff" incident related above led to Martin's April 8, 2009 letter to Superintendent White. Ex. 5 (Martin Dep.) 106:22, 108:9; Exhibit 46. Martin wrote that the Principal [Fitzpatrick] had "agreed to deal with the situation because we had already brought the student back to campus," but further said that he "was given to believe that they had nowhere to put the student since the infraction occurred off campus." Ex. 46, ¶ 3.

Two weeks after Martin's letter three representatives of SCBEST met with the Assistant Superintendent, the Director of Secondary Education, and three Principals. It was agreed that defendant would handle "major discipline problems" and that "[i]f it became necessary to write them up then the grade level principal will make the decision as to how severe the discipline is, based on the school's discipline policy." Ex. 47, p. 1 ¶ 9, 11; Ex. 5 (Martin Dep.) 110:6-15. Defendant declined "to put anything in writing on the discipline issue, other than amending the information given to new principals to include a synopsis of the agreement we reached today." Ex. 47, p. 2 ¶ 4. There is no record that this synopsis was ever prepared. Again, as was the case with homeroom visitation, no clear policy was formulated. Martin's earlier letter to White had said that "[i]f you think it would be helpful for our teachers to receive some training in the discipline policies of the district, I would be happy to look into that possibility." Ex. 46, p. 2, ¶ 1. At the meeting two weeks later SCBEST was invited "to attend the seminar

[8] SCBEST students at schools other than Spartanburg High School are bussed by SCBEST to its teaching location.

[defendant] offer[s] on classroom management." Ex. 47, p. 2 ¶ 2. This seminar is for new teachers and involves "going over the discipline code, effective ways to manage a classroom," and like matters. Ex. 32 (Graves Dep.) 124:6.

Defendant's Director of Secondary Education testified that the discipline policy as to SCBEST was that the defendant would handle "a major ordeal." Ex. 32 (Graves Dep.) 122:1-8.

Defendant and SCBEST remain entangled about the matter of discipline.

Granting an extra study hall to SCBEST students

When the SCBEST course was not for credit, before 2007, participating students would be released from study hall. After it became an elective credit course students were additionally allowed to be released during an elective class period. Ex. 32 (Graves Dep.)11:17-13:20; 15:13-17:6; 87:3-12; 112:7-114:4; 115:14-116:2; Ex. 49.

The relationship between Martin and Superintendent White

Drew Martin and Superintendent White appear to have formed a close relationship. In June 2008 Martin wrote White and inquired whether SCBEST had to reapply for the coming school year. White replied:

> Drew, Good to hear from you. Hope you are doing well. Maybe we can have coffee one morning this summer and catch up. You can tell me about the successes of the Released Time program and how we might can make it better.
>
> No need to reapply. I checked the policy and there is no mention of it.
>
> Thanks for all you do.
>
> Thomas White Ex. 50, p. 2.

They had coffee later that month. Ex.-50, p. 1. That same day Martin wrote White and reminded him to schedule a meeting with the high school Principal and the Guidance Director to

discuss the registration process for the SCBEST course. *Id.* White promptly arranged the meeting.

The next day Martin wrote again and raised the issue of whether the Principal and Guidance Director who were to attend the meeting might think he was "going above their heads" by dealing directly with White, the Superintendent. He asked White to explain to them how their meeting had come about. White replied:

> You got it. I called the meeting with you and I asked all the questions because I am interested in growing this program.
>
> Thanks, Thomas (*Id.*)

In late September 2008 Martin again wrote White and mentioned that "My wife said that she saw you yesterday at See You At The Pole." Martin again suggested a meeting with the Principal and the Guidance Director about scheduling SCBEST classes. Ex. 51, p. 2. In November Martin again wrote White and suggested that he send him a letter on the issue with copies to the other proposed participants (now including the Assistant Superintendent). *Id.* White replied:

> Drew, Good to hear from you. Looking forward to our meeting. Regarding the letter, I wouldn't do it. Generally speaking (which is dangerous), anytime you can handle something with a conversation rather than a letter (especially a letter with other folks copied) you should do so. (That applies to emails and text messages as well). . . .
>
> Have a great weekend.
> Thomas White

Ex. 51; Ex. 15 (White Dep.) 44:19-47:15, 109:2-13; Ex. 5 (Martin Dep.) 101:14-106:11.

The communications between White and Martin about the study hall issue illustrate how their relationship worked. In November 2008, Martin wrote to White:

Dr. Pruitt [Assistant Superintendent] and I spoke last week and tentatively planned to meet on Friday the 21st . . . There are a few issues I want to address at that meeting, but as I

mentioned this summer the main issue is the question of whether or not a student participating in my class should have any effect on their study hall schedule . . .

Ex. 51.

The meeting occurred as scheduled and was attended by Supt. White, Dr. Pruitt, the Guidance Counselor, the Director of Secondary Education, Drew Martin and another SCBEST representative. Ex. 48; Ex. 32 (Graves Dep.) 112:25-113:12; Ex. 13 (Wolfe Dep.) 40:7-41:6. On December 9 Martin wrote White "to see if any decisions have been made in response to the meeting we had a few weeks ago. I am particularly concerned about the issue of them having to have a study hall in order to register." Ex. 51, p. 1. White responded:

I don't want to over commit right now, but I'm fairly certain that the senior study hall issue will be resolved to your liking."

Id.

In April 2009 Martin started his letter to White with the hope that White was "enjoying holy week." Ex. 46; Martin 106:22-107:3.

3. Other matters

Grade Point Average and Emoluments

The SCBEST grade is factored into the student's GPA. GPA is an important consideration in college admissions. Ex. 8 (Seay Dep.) 26:16-17. The giving of a grade is a "very important" function for defendant. Ex. 15 (White Dep.) 69:24-70:1. Numerous scholarships require that the applicant have a certain GPA or higher. Ex. 32 (Graves Dep.) 68:20-69:2. *See, e.g.*, S.C. Code Sec. 59-149-50(A) (LIFE scholarship depends on GPA). GPA is a qualifier for defendant's Honor Roll (which is featured at graduation), Beta Club, Valedictorian, and Salutatorian. Ex. 15 (White Dep.) 57:19-58:13; 64:10-16; 69:16-20; Ex. 32

(Graves Dep.) 68:5-70:9. An SCBEST student who makes a high grade could qualify for Valedictorian in lieu of a student who took no religious instruction courses.

Religious observances at Spartanburg High School

Defendant's schools feature numerous symbolic celebrations of Christianity. In 2009-2010 at the assemblies for Veterans' Day and for Black History Month there was a speaker who mentioned Christian themes and supported Christianity. At Graduation a student delivered a Christian prayer. At Senior Recognition Day a speaker mentioned Christianity a couple of times. In previous years the assemblies usually included Christian prayers or positive references to Christianity. Melissa Moss Affidavit ¶ 5.

Available private schools

In Spartanburg County there are 5 Christian and 1 nonsectarian[9] private schools offering tenth, eleventh and twelfth grades (Source: Nat'l Center for Educ. Statistics, U.S. Department of Education, Private School Universe Survey 2008-09. http:::nces.ed.gov:surveys:pss, last visited 11-3-2010.) In South Carolina in 2008 the population was 10% Catholic, 73% other Christians, 2% other religions, 10% no religion, and 4% don't know:refused to answer. http:::b27.cc.trincoll.edu:weblogs:AmericanReligionSurvey-ARIS:reports:part3c_geog.html (last visited 11-4-2010).

[9] Spartanburg Day School.

III. ARGUMENT

1.

The individual plaintiffs have standing because they are parents and children subject to released time and because they are emotionally harmed by it. The plaintiff Freedom From Religion Foundation, Inc. has organizational standing.

Plaintiffs rely upon the Court's previous Opinion & Order, dkt. 57, at 5-8, and upon *Suhre v. Haywood County*, 131 F. 3d 1083 (4th Cir. 1997).

2.

Defendant's grant of academic credit violates the Establishment Clause because it appears that its primary effect is to aid religion, its predominant purpose is to prefer religion in general and Christianity in particular, and it allows a religious organization to exercise governmental power.

In *McCollum v. Board of Education*, 333 U.S. 203, 209, 68 S. Ct. 461, 92 L. Ed. 649 (1948), the Court held that a public school program that allowed outside religious instruction in public school classrooms and involved "close cooperation" between administrators and clergy violated the Establishment Clause. Four years later in *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 1954 (1952), the Court held that allowing students to be released to attend off-campus religious exercises, not subject to school control except as to truancy, did not violate the Establishment Clause. Two decades later the Court formulated the venerable tripartite Establishment Clause test still used today. *Lemon v. Kurtzman*, 403 U.S. 602, 97 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

Lemon poses three tests for Establishment Clause cases: whether there is a secular purpose for defendant's actions; whether their principal or primary effect is to advance or inhibit religion;

and whether defendant is excessively entangled with religion. *See, Lambeth v. Bd. of Comm'rs*, 407 F. 3d 266, 269 (4th Cir. 2005), *cert. denied* 546 U.S. 1015 (2005). Governmental action must pass all three tests to be constitutional. *Id.* In *Allegheny County v. ACLU*, 492 U.S. 573, 592-94, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989), the Court glossed the *Lemon* "primary effect" test to include an "endorsement" test which prohibits government from "appearing to take a position on questions of religious belief." *Lambeth, supra*, 407 F. 3d at 269. The third *Lemon* test, excessive entanglement, is now also an aspect of the second test. *Agostini v. Felton*, 521 U.S. 203, 233, 117 S. Ct. 1997, 138 L. Ed 2d 391 (1997). Each test is to be applied from the perspective of an objective observer aware of the history and implementation of the matter at issue. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308, 120 S. Ct. 2266, 147 L. Ed 2d 295 (2000).

In *Smith v. Smith*, 391 F. Supp. 443, 450 (W.D. Va. 1975), the Court was presented, post-*Lemon*, with a case substantially indistinguishable from *Zorach.* The Court held that *Zorach* did not control and that released time violated the "principal or primary effect" test of *Lemon.* On appeal the Court of Appeals agreed, in the abstract. "If we were to decide this case solely by direct application of the tripartite test . . . we would be inclined to agree with the district court's overall conclusion that the release-time program is invalid" under the primary or principal effect *Lemon* test. *Smith v. Smith*, 523 F. 2d 121, 124 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073, 96 S. Ct. 856, 47 L. Ed. 2d 83 (1976). But, after the district court's decision and before decision in the court of appeals, the Supreme Court had decided *Meek v. Pittenger*, 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975), in which it expressly cited *Zorach* as viable authority. 523 F. 2d at 124. The Circuit Court concluded from this citation that *Zorach* was still good law, and that off-campus release time programs of the *Zorach* variety therefore must have only an indirect and

not a primary effect of advancing religion. Finding the case before it indistinguishable on the facts from *Zorach,* and because of *Meek* finding *Zorach* to be controlling law, the Fourth Circuit reversed.

The Court marked the essential distinction between *McCollum* and *Zorach* as being that in *McCollum* "the force of the public school was used to promote . . .instruction" by the religious teacher being put into the position of authority held by the regular teacher. 523 F. 2d 123-24 n. 6, *quoting Zorach*, 343 U.S. at 315, and *citing Abington School Dist. v. Schempp*, 374 U.S. 203, 230, 83 S. Ct. 1560, 10 L. Ed 2d 844 (1963), at 262-63 (Brennan, J., concurring).

A.

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

Defendant directly aided SCBEST in many ways. It supplied SCBEST with the names and addresses of parents of incoming students.[10] This was not publicly available information.[11] Defendant thought that SCBEST's February 2007 letter was not accurate and needed rebuttal and drafted a reply, but did not send it because SCBEST requested that it not do so.[12] SCBEST has been allowed to make presentations in homerooms.[13] *See, Doe v. Shenandoah Cty. Sch. Bd.*, 737 F. Supp. 913 (W.D. Va. 1990)(allowing in-class recruiting distinguishes case from *Zorach*).

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[10] *See* text *supra*, p. 8.

[11] This action violated 20 U.S.C. 1232g(a)(5)(A). Defendant is subject to this statute because it receives federal funds. 20 U.S.C. 1232g(a)(3); "Report to the Community," www.spartanburg7.org:about:records (last visited Nov. 9, 2010). "Directory information" includes student names and addresses. 20 U.S.C. 1232g(a)(5)(A). Public release of directory information requires that it be designated as such by the school and parents given a reasonable time to withhold consent to its release. 20 U.S.C. 1232g(a)(5)(B). Defendant has not designated any directory information. Ex. 52. Defendant is of course entitled to communicate with parents, but by allowing SCBEST to do so in its stead, it treats SCBEST as its proxy.

[12] *See* text *supra*, pp. 9-10.

[13] *See* text *supra*, p. 12.

SCBEST has been allowed to make promotional presentations at registration.[14] On two occasions defendant enforced discipline for misbehavior during released time.[15]

Defendant also closely cooperated with SCBEST throughout the development and implementation of released time. The Policy was developed "in concert" with SCBEST.[16] SCBEST's religious point of view was welcome to defendant. An SCBEST Director wrote Chairman Hurst about how Bible education improved children's lives.[17] Bridges and Hartgrove supplied several proposed policies to defendant.[18] SCBEST was publicly thanked for its "contribution."[19] Dr. Tobin forwarded Hartgrove's draft letter on to Hurst for his use.[20] There were a multitude of meetings between SCBEST and defendant, with defendant often represented by three or more administrators. Chairman Hurst and Dr. Tobin allowed SCBEST to be closely involved in this process. Defendant invited SCBEST to attend defendant's classroom management seminar.[21] Forms for requesting assignment to release time are kept in defendant's Guidance Office.[22]

Dr. White took Drew Martin under his wing and guided him through the administrative process. He asked Martin how defendant could "make it [the SCBEST program] better."[23] He told Martin that he communicated directly with him rather than going through channels because

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[14] *See* text *supra*, pp. 12-13.
[15] *See* text *supra*, pp. 13-14.
[16] *See* text *supra*, p. 7.
[17] *See* text *supra*, p. 5.
[18] *See* text *supra*, pp. 5, 7-8.
[19] *See* text *supra*, p. 7.
[20] *See* text *supra*, p. 10.
[21] *See* text *supra*, pp. 14-15.
[22] *See* text *supra*, p. 13. The Oregon Attorney General has ruled that this violates the religious neutrality requirements of the Oregon Constitution. 1989 Ore. AG Lexis 32 *7.
[23] *See* text *supra*, p. 15.

"I am interested in growing this program."[24] White made himself into an advocate for SCBEST, setting up meetings at Martin's request.[25] Martin expressed the hope that White was "enjoying holy week." [26]

This case is similar in its religious effect to *Larkin v. Grendel's Den*, 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982). Just as defendant here has given a religious organization uncontrolled power over granting academic credit, in *Larkin* churches were given uncontrolled power over liquor licenses. The Court held that this violated the effect prong of *Lemon* because the churches were given standardless power which could be exercised for religious reasons, 459 U.S. at 125, and because "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." 459 U.S. at 125-25. That analysis fits this case like a hand in a glove. When churches control academic credits, Church and State are symbolically joined in exercising governmental power over education. SCBEST can give an A+ for a good reason, a bad reason, or no reason at all. There is nothing to stop it from giving an A+ for religious piety.

Defendant's course of conduct, objectively considered, is an endorsement of religion. None of the aid given to SCBEST removes any burden on religious exercise; it only gives governmental power to a religious organization. "Close cooperation in practice between the school authorities and the religious council," which the record here shows, is forbidden by *McCollum v. Bd. Educ., supra,* 333 U.S. at 209. A school district must use "the least entangling administrative alternative" in dealing with religious released time programs. *Lanner v. Wimmer*, 662 F. 2d 1349, 1358 (10th Cir. 1981). Giving out protected addresses, not sending letters that

[24] *See* text *supra*, p. 16.
[25] *See* text *supra*, pp. 16-17.
[26] *See* text *supra*, p. 17.

might diminish SCBEST's reputation, allowing homeroom presentations, enforcing discipline, having the attitude of wanting to grow a religious program, offering to have the religious organization attend school seminars, is far removed from "the least entangling administrative alternative." It objectively indicates a primary effect of advancing religion. The government is allowing a religious entity to give public school grades. As Drew Martin testified about the SCBEST course, "it's an elective now." (Martin Dep. 67:6-68:4; Ex. 20).

B.

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.

Purpose is a state of mind, *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985), usually to be gathered from the circumstances. *NCCLU v. Constangy*, 947 F. 2d 1145, 1149-50 (4th Cir. 1991). Whether the government's purpose is secular or religious is to be determined from the point of view of the objective observer, familiar with the history and implementation of the practice. *McCreary County v. ACLU*, 545 U.S. 844, 862, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005). Secular purpose must "predominate," it "must be the primary purpose," to be sufficient, *id.*, at 865, *citing Edwards v. Aguillard*, 482 U.S. 578, 590, 594, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987) ("primary purpose"), and *Stone v. Graham*, 449 U.S. 39, 41,101 S. Ct. 192, 66 L. Ed. 2d 199 (1980)("pre-eminent purpose") The test formerly obtaining in the Fourth Circuit, that religious purpose is shown only if the governmental action is "entirely motivated by a purpose to advance religion," *Mellen v. Bunting*, 372 F. 3d 355, 372 (4th Cir. 2003), is not good law after *McCreary County*.

The direct aid that defendant gave to SCBEST – giving out protected addresses, not sending letters that would have embarrassed SCBEST, and the like – shows a purpose to aid

religion. The same is true of the close cooperation, particularly the religiously stoked favoritism of Superintendent White for SCBEST. For years now SCBEST has had the ear of defendant's Chair and then Superintendent, with high-level administrators holding multiple meetings to deal with its concerns. SCBEST and defendant have been anything but separate. SCBEST is a favorite project of Superintendent White.

The last-minute change to the Policy so as to authorize only transfer credits shows a further purpose: to prevent dissident and non-Christian religious groups from offering released time. The Released Time Credit Act allowed direct elective credit to be awarded to any religious organization. The January motion passed by defendant allowed direct credit to SCBEST. The Policy as read in February allowed direct credit. But, defendant enacted a Policy that allowed only transfer credit through an accredited school. The March 2007 change in language from "may award" to "will accept" meant, according to the Director of Secondary Education who made it, that the transfer credit had to come through an accredited school. Ex. 14 (McDaniel Dep.) 32:9-18. The Guidance Director did not recall, in his 36 years at Spartanburg High, another instance of a grade from an unaccredited school coming to defendant through an accredited school. Ex. 13 (Wolfe Dep.) 8:8-14; 20:18-21:19. In Spartanburg County, where there are five Christian and 1 private schools, other religions are effectively shut out from offering released time, for lack of a sponsor. Oakbrook reviewed the SCBEST course to determine if it was "a course that we would have at our school." Ex. 8 (Seay Dep.) 15:14-16:16. Oakbrook approved the arrangement with SCBEST because "we were attempting to do something to support the Christian community." Ex. 10 (Smith Dep.) 28:4-11. They would not have done so for a religion not doctrinally acceptable to them.

Defendant knew that the Transfer Regulation[27] was not a problem for accredited Oakbrook but it would be a problem for unaccredited SCBEST. Paragraph 3 of the Transfer Regulations would require that defendant examine the content of a religious course coming from an unaccredited school.[28] The requirement that all released time credits come through an accredited school disadvantages religions for which there is no welcoming religious school available.

The predominant purpose of the last-minute change to allow only transfer credits was to disfavor non-Christian and dissident release-time courses, by requiring in practice that credits be transferred only from accredited schools. The objective facts of the Transfer Regulations, SCBEST's unaccredited status, and the acceptance of the grade through Christian Oakbrook objectively demonstrate sectarian favoritism. Defendant can justify this discrimination between sects and religions only by showing a compelling interest. *Larson v. Valente*, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982).

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[27] The Transfer Regulation of the South Carolina Department of Education, R 43-273, provides in part:

> "Grades 9-12:
> Transfer of Students . . .
> 2. Units earned by a student in an accredited high school of this state or in a school of another state which is accredited under the regulations of the board of education of that state, or the appropriate regional accrediting agency . . . will be accepted under the same value which would apply to students in the school to which they transferred.
>
> 3. If a student transfers from a school, which is not accredited, he or she shall be given tests to evaluate prior academic work and/or be given a tentative assignment in classes for a probationary period."

[28] Application of paragraph 3 of the Transfer Regulations to SCBEST would offend the Establishment Clause because defendant may not give tests to evaluate religious instruction and may not offer a course in religious instruction. *School Dist of Abington Twp. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); Cf.,* S.C. Code Sec. 59-29-230, "Old and New Testament era courses."

C.

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

Defendant's donation to a religious institution of its governmental power to give a public school academic grade excessively entangles it with religion. In *Larkin v. Grendel's Den, supra*, 459 U.S. 116 (1982), the Court held that the statute at issue there also offended the entanglement prong of the *Lemon* test. The Court first quoted from *Lemon, supra*, 403 U.S. at 625:

> Under our system, the choice has been made that government is to be entirely excluded from the area of religious instruction and *churches excluded from the affairs of government.*

459 U.S. at 126 (emphasis in original). The Court then adverted to the "core rationale" of the Establishment Clause, going back a century and a half to South Carolina law:

> The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority. *Watson v. Jones*, 13 Wall. 679, 730, 20 L. Ed. 666 (1872), *quoting Harmon v. Dreher*, 1 Speers Eq. 87, 120 (S.C. App. 1843).

459 U.S. at 126. This meant that "[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to . . . religious institutions." *Id.* Applying this core rationale to implementation of the statute, its delegation was held unconstitutional because it

> substitute[d] the unilateral and absolute power of the church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications.

459 U.S. at 127.

Giving a high school grade is a discretionary governmental function. It involves evaluation and judgment. One grade can be the difference between getting and not getting a high school diploma or being accepted by a desired college. Defendant has given SCBEST complete

power over what grade is to be given. This power is unconstitutional whether exercised to grade up for "develop[ing] a Christian world view" (Ex. 21, p. 4), which is the SCBEST stated objective, or to grade down for losing one's faith mid-semester. The Policy allows both.

The principle that governmental power may not be donated to a religious institution[29] is an aspect of the broader principle that governmental power may not be donated to any private institution or person. Our guiding aphorism is that we have a government of laws, not men. When as here governmental power is donated entirely to private hands there is no legal process that can review its abuse and we have a government of men. Donating governmental power to religious institutions is not accommodation of religion, it is abdication of civic responsibility.

This brings us full circle to *Smith v. Smith, supra,* 523 F.2d 121, in which the Fourth Circuit so accurately foresaw the principle of *Larkin* when it observed that it was the donation of governmental power to a religious institution that explained the difference in result between *McCollum* and *Zorach.*

Giving academic credit for released time religious instruction endorses religion.

IV. CONCLUSION

Upon the reasoning and authority cited, Plaintiff's Motion For Summary Judgment should be granted.

Respectfully submitted, November 19, 2010.

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

[29] In *Allegheny County v. ACLU*, 492 U.S. 573, 590-91,109 S. Ct. 3086, 106 L. Ed 2d 472 (1989), the Court characterized *Larkin* as holding that "government may not . . . delegate a governmental power to a religious institution."

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