No. 11-1448

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT MOSS, individually and as general guardian of his minor child; ELLEN TILLETT, individually and as general guardian of her minor child; FREEDOM FROM RELIGION FOUNDATION, INC; MELISSA MOSS

Plaintiffs-Appellants

v.

SPARTANBURG COUNTY SCHOOL DISTRICT SEVEN, a South Carolina body politic and corporate

Defendant-Appellee

On Appeal from the United States District Court for the
District of South Carolina, Spartanburg Division

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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ARGUMENT

1.

Whether the individual plaintiffs have standing.

Zorach

Zorach v Clauson, 343 U.S. 306, 309 n. 4 (1952), held that parents whose children attended a school with a released time program had standing to challenge that program. Defendant argues that *Zorach* does not control the case at bar because the injury-in-fact there was that students had to "kill time on campus while others attended an off-campus religious class." Defendant's Brief, at 26. This is an untenable reading of *Zorach*. All that *Zorach* says about what other students did during released time is that they "stay[ed] in the classrooms." 343 U.S. at 308. "Kill time" was an assertion of the *Zorach* appellants, 343 U.S. at 309, and was not otherwise mentioned by the Court. Additionally parents, not students, were the parties. *Id* . Parents do not go to class. Killing time in class was irrelevant to their standing.

Virginia *amici* argue that the citation in footnote 4 of *Zorach*[1] to *Doremus v. Board of Education,* 342 U.S. 429 (1952), confines the holding of the footnote to

[1] "No problem of this Court's jurisdiction is posed in this case since, unlike *Doremus v. Board of Education,* 342 U.S. 429, appellants here are parents of children currently attending schools subject to the released time program."

mootness. Brief Amicus Curiae of the Commonwealth of Virginia *et al*, at 5. *Doremus* dismissed a school Bible-reading challenge for mootness, 342 U.S. at 433, and for lack of taxpayer standing, 342 U.S. at 434. The parents in *Zorach* were, as in *Doremus,* taxpayers. The commonality of Article III jurisdictional questions in the two cases indicates that footnote four is using the word "jurisdiction" to include both standing and mootness.

In *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534 (1986), four dissenting Justices supported this reading of footnote four. They would have ruled that standing had been shown in *Bender* because "[a]s this Court has repeatedly held, parents have standing to challenge conditions in public schools that their children attend. *See . . . Zorach."* 475 U.S. at 551 (Burger, C.J., dissenting, joined by White and Rehnquist, JJ.); *id.,* at 555 (Powell, J., dissenting) ("I agree with the Chief Justice that respondent . . . has standing."). The Court did not disagree. 475 U.S. at 546, 547 (Article III requires a showing of "status as an aggrieved parent.")[2]

[2] In *Bender* the respondent had been a defendant in the district court. The dissent did not claim that he had alleged sufficient facts to support his standing, but would have held that a litigant in his situation need not show such facts until his standing was challenged, which had not been done. 475 U.S. at 551-52. The Court disagreed with this rule and therefore held that standing had not been shown.

Direct effect

The plaintiff students have been directly injured by SCBEST grades. SCBEST has "a couple of times" awarded a grade of 103 to one of defendant's students (which Oakbrook then reported to defendant as 100). App. 412:11-15 (Smith dep.). Each year that Melissa Moss and plaintiff Tillett's child have been at Spartanburg High, each has received one or more grades of less than 100.[3]

All plaintiffs have suffered emotional distress from the existence and the application of the Policy. Plaintiff Robert Moss was outraged when he learned that defendant would offer academic credit. His meeting with defendant's Chair left him feeling stigmatized as a Jewish outsider. He has since avoided going to defendant's premises. Plaintiff Tillett was offended by academic credit for released time because it could affect her child's class rank for religious reasons and because it donated governmental power to a religious organization. Plaintiff Melissa Moss felt like an outsider at school because SCBEST students received

[3] For '08-'09 Plaintiff Tillett's child made a 90 in "Language Arts IIA (CP)," and the next year made a 93 in "Computer apps." App. 708. Plaintiff Melissa Moss received a 96 in "German IID" her sophomore year, a 96 in "Symphony Orchestra A" her junior year, and a 99 in "Aer/Walk-Jog" her senior year. App. 709.

At Dorman High School, another high school in Spartanburg County for which SCBEST provides released time, for Fall 2009 the grades were 100, 100, 100, 100, 99, 99, 99, 97, 92, 91, 89 and 75. App. 604 (dep. ex. 11); App. 390:12-19; 398:3-399:1 (Seay dep.).

academic credit. All Plaintiffs altered their behavior on account of the Policy. Plaintiffs' Brief, at 3-5. The implementation of released time led plaintiff Tillett's child to realize that defendant had a "Christians are better" stance. App. 205:2; *see* App.201:14-205:6 (Tillett dep.).

It is settled law in this Circuit that these intangible *injuries* "suffice to make an Establishment Clause claim justiciable." *Suhre v. Haywood County,* 131 F. 3d 1083, 1086 (4th Cir. 1997). Plaintiff students are situated identically to the Schempp children with respect to injury. *See, Abington Twp. v. Schempp,* 174 U.S. 203, 224 n. 9 ("The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed..") In each case children have been subjected to a public school religious program in which they could decline to participate.

Establishment Clause *injuries* must also, as for all types of injuries sufficient for standing, be "*direct." Suhre,* 131 F. 3d at 1086 (emphasis added). Without this directness they are only "generalized grievance against unconstitutional government conduct." *Id.* Plaintiffs' injuries are "direct" because they are inflicted on them in their local school.

Defendant argues, *citing In re: Navy Chaplaincy,* 534 F. 3d 756 (D.C. Cir.), *cert. den.,* 129 S. Ct. 1918 (2009), that plaintiffs lack standing because they have

suffered injury from a governmental "message" and not from a religious display or exercise. Defendant's Brief, at 30.

In *Navy Chaplaincy*, Protestant chaplains complained that the Navy discriminated in favor of Catholic chaplains by recalling them to service more frequently than other chaplains were recalled. Plaintiffs conceded, however that the Navy had not discriminated against them personally. 534 F. 3d at 760. They claimed injury from the message sent by the Navy's discrimination against others. *Navy Chaplaincy* concluded that the Protestant chaplains had constructed a theory which would vastly expand standing, that anyone complaining of an action that did not harm him directly could still claim harm from the message sent by the action. 534 F. 3d at 764. A different case is presented here. Plaintiffs have alleged injury not from a remote message but from a Policy and its immediate application to them. *See,* App. 18, 31 (prayer for relief).

Navy Chaplaincy held that the injury from the message was not sufficient because the Protestant chaplains were only "concerned bystanders," *id., quoting Allen v. Wright,* 468 U.S. 737, 756 (1984), and therefore did not "identify . . . personal injury suffered by them as a consequence of the alleged constitutional error . . . *Valley Forge v. Americans United,* 454 U.S. [464, 485-86 (1982).] *Navy Chaplaincy,* 534 F. 3d at 764. Instead they had only a "mere abstract objection to

unconstitutional conduct," *id., quoting Suhre,* 131 F. 3d at 1086. They were too remote from the cause of the injury to be *directly* affected by it.

In *Suhre*, *id.,* in the discussion cited by *Navy Chaplaincy,* this court held that Mr. Suhre had sufficient "direct contact," with the Establishment Clause violation that he alleged. This court interpreted *Valley Forge* to have denied standing because plaintiffs there had "absolutely no personal contact with the alleged establishment of religion." *Id.* Thus the injury from the Ten Commandments would not be sufficiently direct for "a citizen of Omaha," *Id.* Plaintiffs, by contrast, are directly, not remotely, injured. They are injured by action of their local school board. *Suhre* is square precedent in their favor.

Navy Chaplaincy rejected the applicability of prayer and religious display cases on standing because the Protestant chaplains were too remote from the source of the message to have been directly injured by it. It does not disagree with *Suhre* but instead finds it distinguishable.[4]

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[4] Virginia *amici* argue that plaintiffs have not been "directly injured by the religious accommodation which defendant has granted to persons not before the Court." Br. at 4. This suggests that it is the SCBEST students, not plaintiffs, whose injuries are relevant. This suggestion is refuted by *Abington Twp. v. Schempp, supra,* which did not even discuss injury to the non-objecting students. Virginia *amici* cite *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F. 3d 814 (10th Cir, 1999) and *Destefano v. Emergency Housing Group, Inc.,* 247 F. 3d 397 (2nd Cir. 2001), in support of their theory. *Bear Lodge* involved a governmental Plan which forecast that "rock climbers will be asked to voluntarily refrain from

2.

Whether granting academic credit for released time religious instruction violates the Establishment Clause by having the effect of advancing or endorsing religion.

Zorach did not involve academic credit and did not approve academic credit. It authorized only the *scheduling* of released time, whereas granting academic credit alters the legal relationship between student and school, a circumstance not presented by *Zorach*. Plaintiffs' Brief, 25-27.

Zorach states its holding at the end of its opinion.

> "In the *McCollum* [*v. Board of Education*, 333 U.S. 203 (1948)] case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools *do no more than accommodate their schedules* to a program of outside religious instruction. We cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no *adjustments of their schedules* to accommodate the religious needs of the people."

343 U.S. at 315 (emphases added, footnote omitted).[5] Defendant argues that *Zorach* "upheld the released time program because the classes were held offsite

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climbing on the Devil's Tower during the culturally significant [to American Indians] month of July." 175 F. 3d at 819. The court unsurprisingly held that the climbers had not yet suffered injury. In *Destefano* the injury also had not yet occurred. These are ripeness cases, not standing cases.

[5] *See also Smith v. Smith,* 523 F. 2d 121, 123-24 (4th Cir.), *cert. den.,* 423 U.S. 1073 (1976) (" [I]n *Zorach,* the schools *only* adjusted" their schedules. (emphasis added)).

and no school district funds were expended on the released time program. *See [Zorach]* 343 U.S. at 308-09." Defendant's Brief, at 35-36. The portion of the opinion which defendant cites is a statement of facts that distinguishes *Zorach* from *McCollum.* It is not the holding of the case.

Granting academic credit for released time religious instruction is unconstitutional because it "place[s] the religious instructor . . . in precisely the position of authority held by the regular teacher of secular subjects . . .", *Smith v. Smith,* 523 F. 2d 121, 123 n. 6, *citing Abington Twp. v. Schempp,* 374 U.S. 203, 230 (1963) (Brennan, J., concurring).[6]

Traditional released time is an accommodation because it relieves the student of the burden of missing a religious exercise. The school adjusts its schedule but otherwise does not reward the student. Granting academic credit for released time religious instruction rewards the student. It changes the legal relationship between the student and the public school. A passing grade is legal progress toward a high school diploma. Plaintiffs know of no case that allows the government to relieve a burden by governmental action that confers a legal benefit.

Defendant argues that the SCBEST students are burdened because a 1997 increase in required credit hours had the effect of making it more difficult to

[6] A grade is "an indication of "the teacher's assessment of the student's mastery of the material in the course." App. 242:11-15 (White dep.).

schedule released time. Defendant's Brief, at 5-6. There is scant record testimony of this effect.[7] To the contrary, defendant has stated on the record that it does not know why the classes ceased or whether academic credit had the effect of making released time more attractive to students. Superintendent White, defendant's 30(b)(6) witness, testified that defendant had no official position on why the SCBEST classes ceased, App. 216:16-20 (White dep.); and that defendant did not believe that allowing academic credit would make students more likely to select released time, *id.,* 217:13-22 (White dep.). Spartanburg High has seven daily academic periods. App. 565:8-12; 566:3-4 (Graves dep.). The graduation requirement of 24 credits leaves one free period a day.

[7] Defendant's Brief cites two statements in a newspaper article for its proof of this effect. Defendant's Brief, at 6; App 688. The first statement is from a grandfather in Columbia whose grandson attended released time at some unspecified time. He said lack of credit was "part of the problem." The second statement is that an SCBEST representative said that the program "lost its high school participants after the State increased graduation requirements in 1997." It expresses contemporaneity but not causative effect. Rodney Graves testified that released time had stopped because "Just, apparently [there] weren't students signing up or asking to take the course." App. 544:9-13 (Graves dep.). Drew Martin of SCBEST testified that "lack of interest" was the explanation for the cessation of released time classes at Spartanburg High School prior to 2006. App. 304:13-23 (Martin dep.). Troy Bridges testified, however, that "the number of students decreased in around 2000 because of the number of courses required by the State for graduation. App. 379:16-18 (Bridges dep.).

Defendant presents the Preamble to the RTCA[8] (Addendum II) as proof that academic credit had "remedied the problem" of the change in credits required for graduation. Defendant's Brief, at 6. The Preamble[9] speaks of an "absence of an ability to award [elective] credits," but does not identify any source of this absence. It does not say that the 1997 increase caused it.

Defendant argues that academic credit for religious instruction is allowable because it is also granted for secular courses taken off school premises. Defendant does not "privilege religion over non-religion." Defendant's Brief, at 57. But this is not a discrimination against religion case, it is an endorsement case. Granting credit for off-campus German does not endorse religion. The Constitution does not require separation of State and German.

Larkin v. Grendel's Den, 459 U.S. 116, 125 (1982), held that either a standardless delegation of an important governmental power to a religious

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[8] Plaintiffs agree with Amicus South Carolina that this action seeks no relief as to the RTCA. Brief of Amicus Curiae State of South Carolina, at 1-2. The district court denied defendant's motion to add South Carolina as a party on the grounds that plaintiffs did not seek relief as to the statute and that the State had not sought to intervene. App. 13, 15.

[9] "(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." (Addendum II)

organization, or a symbolic benefit to religion,[10] violated the *Lemon* "effect" test. The standardless power to give a public school academic grade that is donated to SCBEST[11] allows it to pass a student for piety or fail her for blasphemy. Plaintiffs' Brief, 27-33. Defendant argues in response that its standardless delegation is cured because "the accreditation process [for Oakbrook] imposes significant limits" on what SCBEST may teach and how it may grade. Defendant's Brief, at 60.[12] This argument is not supported by the record.[13] Oakbrook never informed its accrediting agency of its relationship with SCBEST. App. 401:13-402:2 (Seay dep.); 419:13-16 (Smith dep.).

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[10] Defendant does not discuss symbolic benefit.

[11] Defendant receives the grades without evaluating them. App. 446:8-447:2 (Wolfe dep.) ("We do not evaluate the grade from Oakbrook"); App. 478:1-10 (McDaniel dep.); App. 273:13-16 (White dep.) (" . . if the grade is coming from an accredited school, then it's [acceptance of the grade] pretty much automatic."). App.253: 23-24 (White dep.) ("We don't evaluate those classes, those courses.") Oakbrook does not change the grades submitted to it by SCBEST. App. 392:8-13 (Seat dep.). "The grades would b given, of course, by the [SCBEST] teacher." App. 410:21-22 (Smith dep.).

[12] *Larkin* treats standardlessness as a *Lemon* "effect" requirement. Defendant discusses it under its "entanglement" response.

[13] Defendant also asserts that Oakbrook's accrediting agency "evaluates all Oakbrook's classes – including its religious instruction classes – under 'objective secular criteria'." Defendant's Brief, at 61. There is no record evidence that Oakbrook offers religious instruction classes, and the accreditation standards do not mention "objective secular criteria." *See,* App. 608-11.

Defendant argues further that its delegation is not standardless because Oakbrook reviewed and approved the SCBEST course.[14] Defendant's Brief, at 60. Oakbrook reviews the SCBEST course for conformity with Oakbrook's preferred religious doctrine. Oakbrook assures, by consultation with SCBEST, App. 391:14-392:16 (Seat dep.), that SCBEST is teaching "a course that we would have at our school," App. 392:10-16 (Seay dep.). Oakbrook is "an interdenominational Christian school," App. 402:5-6 (Seay dep.), and "wanted it to be clear that it [the SCBEST course] was an interdenominational religious studies course." App. 410:15-17 (Smith dep.). It reviews the SCBEST course for "the knowledge to be gained in terms of faith." App. 392:5-7. It reviews for conformity with Oakbrook's preferred religious doctrine. The effect of defendant's[15] unwritten requirement of an intermediary accredited school is that young, spirit-filled Christian churches without denomination and Jewish and Muslim organizations desirous of providing released time must first find out about the unwritten requirement, and then find a compatible school with which to partner. In Spartanburg County there are only six private schools offering tenth, eleventh and

[14] The released time classes were not held at Oakbrook and the teacher was not an Oakbrook employee. App. 406:14-20; 407:8-9 (Smith dep.).

[15] The Policy (Addendum I) makes no mention of this requirement, but defendant "accepts credit only from accredited private schools." Defendant's Brief, at 60.

twelfth grades. Five are Christian and one is secular. App. 946 at 951. It does not appear how many of these schools are accredited.[16] Defendant has created a requirement that is neutral on its face but as applied in this case requires adherence to mainstream Christianity. The objective observer will know that application of its unwritten requirement has resulted in doctrinal evaluation by Oakbrook. [17]

Defendant relies on *Lanner v. Wimmer*, 662 F. 2d 1349 (10th Cir. 1981), for the proposition that granting released time academic credit on the basis of secular criteria allows public schools to accept transfer credit for religious instruction classes at private schools. Defendant's Brief, at 46.[18] *Lanner* is a distinctly

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[16] Defendant offers no guidelines as to which schools other than Oakbrook would be acceptable to it.

[17] Defendant asserts that it "had no involvement in developing or approving the relationship between Oakbrook and SCBEST." Defendant's Brief, at 9. This is not correct. Four months before Oakbrook and SCBEST made their contract, SCBEST met with defendant's Chair, who agreed with SCBEST that he would prefer to have the credit come through Oakbrook. App. 365:2-366:23 (Martin dep.). The contract itself then recited that defendant "will provide that students can transfer elective course credit . . .", App. 602 ¶ 3. Defendant was not a party to the contract but Oakbrook and SCBEST were powerless to provide academic credit, the purpose of the contract, without the cooperation of defendant. Defendant's Director of Secondary Education testified that in implementing the Policy defendant wanted to be "clear in all of our dealings with Oakbrook and SCBEST about how things should work under the Policy." App. 479:11-23 (McDaniel dep.) (emphasis added).

[18] Plaintiffs have previously explained how *Lanner* misapplies *Board of Education v. Allen,* 392 U.S. 236 (1968). Plaintiffs' Brief, at 44-46.

different case from the case at bar. Defendant's Policy explicitly allows credit for "religious instruction." (Addendum I). *Lanner* dealt with a regulation that allowed released time credit for "Bible history," a secular course, but denied credit for denominational courses. 662 F. 2d at 1360. Thus "credit [was] granted to some released-time courses but not to others based on a religious test," 662 F. 2d at 1361. Defendant's Policy grants credit to all released time religious instruction inquiry into denominational matters.

Defendant attempts to make transfer of credit from private schools, rather than released time, the centerpiece of its case. Defendant's Brief, at 46-51. Plaintiffs have not sought relief as to transfer credits. There is no record evidence that anyone other than defendant has ever accepted a transfer credit. Plaintiffs made this point at page 29 of their Opening Brief. Defendant has not pointed to any evidence to the contrary.

Transfer credits are defendant's *deus ex machina.* It argues that "public schools across the country routinely accept transfer credits awarded by private religious schools" for religious instruction. Defendant's Brief, at 47-48. It then lists eight States in support of this assertion. *Id.,* at 48. One would expect then to read how eight States so provide. Instead one finds references to regulations of

three local school districts and five States, only one of which (Albuquerque) refers to religious courses. None of these provisions expressly states that religious instruction courses transfer. In several instances other provisions of state or local law cast doubt on whether the enactments cited by defendant actually mean that religious instruction courses transfer for academic credit.[19]

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[19] Maryland (App. 962). Defendant cites only the Anne Arundel district policy. Defendant's Brief, at 48. It provides that out-of-county transfers "will be based on the grading policy of the sending school." App. 976, at "d." This provision is not specific as to whether religious instruction would transfer. In contrast, Maryland has a Service Learning graduation requirement which specifies that service-learning activities "whose chief purpose is to convert others to a particular religion of spiritual view . . . may not be counted" toward graduation requirements**.** (Addendum IV). (All provisions of the Addenda which are quoted in this Brief are italicized in the Addenda, not for emphasis but for ease of reference.)

North Carolina (App. 978). Defendant cites only the Wake County regulation. It does not specifically mention religious instruction courses.

Virginia (Addendum V). A State regulation provides that public schools will accept credits "toward graduation." Defendant's Brief, at 48. It does not mention grades. The next paragraph of the regulation provides: "Nothing in these standards shall prohibit a public school from accepting standard units of credit toward graduation awarded to students who transfer from all other schools when the courses for which the student receives credit generally match the description of or can be substituted for courses for which the receiving school gives standard credit." (Addendum V.) The implication is that religious instruction credits do not transfer, since public schools may not offer religious instruction courses.

Florida (Addendum VI), The Florida Administrative Code provides that all transfer credits, including from unaccredited schools, shall be "accepted at face value subject to validation if required by the *receiving* school's accreditation." (emphasis added). This validation is to be "based on performance at classes in the

receiving school," *id.,* ¶ 2 (emphasis added). Religious instruction classes could not be taught at the receiving (public) school. Their "face value" there is zero. The implication is that religious instruction credits do not transfer.

Georgia (App. 979). Georgia requires acceptance of "course credit" from accredited schools. Defendant's Brief, at 48. The Atlanta school district does not read this to apply to religious instruction. "Students transferring from private schools, home study programs, or other states or countries shall meet the graduation requirements that apply to the cohort of students in the grade in which they enroll." (Addendum VII.) The cohort already there could not get credit for religious instruction, since it may not be offered in a public school.

New Mexico (App. 981). Defendant cites only the regulations of the Albuquerque public schools. Defendant's Brief, at 48. They mandate acceptance of credits in "religious education." It does not appear whether this means religious instruction or only secular Bible History type courses.

Texas (App. 984). Defendant cites only to the "Texas School Directory," apparently an informational publication of the Texas Education Agency and not shown to have the force of law. Defendant's Brief, at 49. It provides that credits "can be transferred" from accredited nonpublic schools. App. 987. According to the Texas Administrative Code (Addendum VIII) credit transfers from nonpublic schools require transcript evaluation "to verify the content of courses for which a transfer student has earned credit." This raises a question as to whether religious instruction credits may be transferred.

Utah The Utah Administrative Code requires that transfer credits from accredited schools be accepted "consistent[ly] with R277-705-3." Defendant's Brief, at 49. R277-705-3.B.(1) (Addendum IX) provides: "Public schools shall accept credits and grades awarded to students from schools or providers accredited by the Northwest Accreditation Commission or approved by the board without alteration." The Northwest Accreditation Commission provides that whether to accept credits from accredited schools "for courses that are not allowable in public institutions" is a decision for the receiving school. *Id.*

To the opposite effect, Idaho has by statute expressly prohibited the award of credit for released time for "courses during release time for religious purposes." Idaho Code sec. 33-519. **(**Addendum X.)[20]

Defendant argues that the South Carolina Transfer Regulations, 43 S.C. Regs. 273, Addendum XII, oblige public schools to accept all transfer credits for religious instruction courses. Defendant's Brief, at 47. These regulations provide that "[u]nits earned by a student in an accredited high school . . . will be accepted under the same *value* which would apply to students in *the school to which they transferred* [*i.e.,* the public school]." (emphasis added). The transferee public school could give no "value" to a religious instruction course because religious instruction may not be taught in a public school.

All this hardly amounts to a record of nationwide acceptance of transfer credits for religious instruction. Instead it is a demonstration that issues not presented by the record should not be considered on appeal. Transfer credits originate in private, constitutionally protected parental decisions. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). Released time credits originate in discretionary governmental decisions. There are many possibilities, other than defendant's

[20] The California Department of Education website's Frequently Asked Questions states that "[t]he law does not require public schools to accept credit from private schools. Public schools have the responsibility to evaluate the appropriate placement for a student." Addendum XI.

policy of unquestioning acceptance, for treatment of religious instruction credit transfers. They might be (1) examined for inclusion of sufficient secular learning to satisfy public school course requirements, *cf., Assoc. of Christian Schs. Int'l. v. Stearns,* 362 Fed. Appx. 640 (9th Cir. 2010), (2) credited for attendance purposes only; or (3) credited for elective requirements but not for grades, *i.e.,* given graduation credit. Decision of the constitutionality of any of these practices should await a developed record.

Defendant has directly aided SCBEST by giving SCBEST names and addresses, [21] allowing presentations in homerooms,[22] declining to send the correction letter, inviting SCBEST to attend in-house teacher discipline training, keeping released time forms in the Guidance office,[23] handling major discipline

[21] Defendant asserts that it gave the list of names and addresses to SCBEST in response to a "freedom of information" request. Defendant's Brief, at 17. SCBEST discussed making such a request but there is no testimony that any request was made. App. 368:11-25 (Martin dep.); App. 644 (dep. ex. 110).

[22] Drew Martin testified that SCBEST visited homerooms several times, App. 359:3-8, and that in 2009 upper-level administrators authorized SCBEST to "continue what we're doing, including going into homerooms." App. 356:6-15, 360:12-362:16 (Martin dep.); App. 630 at 631 ¶ 3 (dep. ex. 75).

[23] Defendant asserts that "Guidance counselors are *trained* not to suggest the course to students . . . J.A. 460-61, 277-78" (emphasis added). Defendant's Brief, at 11. The cited record references do not support the assertion. Drew Martin testified that at an April 2009 meeting with defendant's Principals "[t]hey didn't seem to think there was anything wrong with principals or guidance counselors

matters, and by Superintendent White's especial solicitude for SCBEST. Plaintiffs' Brief, at 9-10 (names and addresses), 13 (homerooms), 11 (declining to send letter), 14 (in-house discipline training), 14 (forms in Guidance Office), 14-15 (major discipline), 16-17 (especial solicitude).[24] *Lanner v. Wimmer,* 662 F. 2d 1349 (10th Cir. 1981), supplies the rule of decision for whether these actions violate the Establishment Clause. Public school actions must be shown to serve a legitimate interest, and then "the least entangling administrative alternatives must be elected." 662 F. 2d at 1358. All of defendant's actions fail this test.

Defendant has no legitimate interest in aiding SCBEST to advertise its course, thus it had no legitimate interest in giving it names and addresses nor in allowing it to make classroom presentations. Giving out the list of names and

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making students aware of the class, as long as they didn't push it." App. 630 at 631; App. 356:6-15; App. 358"13-24.

[24] *Monell v. Department of Social Services,* 436 U.S. 658 (1978), does not prevent the admission of testimony that defendant aided SCBEST. Plaintiff's Brief, at 37-41. Defendant takes only a drive-by shot at this argument. It does not dispute plaintiff's position that all of the items of evidence recited above were taken by officials of defendant in the course of their implementation of the Policy. In *Joyner v. Forsyth County,* _____ F. 3d _____ (4th Cir. 2011), 2011 U.S. App. Lexis 15670, this court considered extensive evidence of actions by private parties taken in response to a governmental policy, without ever mentioning *Monell.* The court stated: "While [defendant] took a hands-off approach to the actual content of the prayers [offered by private parties], that content is *relevant* here." *Id.,* at *6 (emphasis added). This indicates that actions of private parties are admissible evidence in an Establishment Clause case. Perforce official actions of defendant's ranking administrators are admissible.

addresses was also an apparent violation of 20 U.S.C. 1232g. (Addendum XIII). Student names and addresses are "directory information." 20 U.S.C. 1232g(a)(5)(A). Before directory information may be disclosed the school must give public notice that allows parents to refuse to allow disclosure. 20 U.S.C. 1232g(a)(5)(B). Defendant has not complied with this requirement. App. 805, 815 (Answer to Interrogatory 17).

Defendant did have an interest in informing parents of the errors in the SCBEST letter, but at SCBEST's request opted not to do so, thus putting SCBEST's interests ahead of its own. Plaintiffs' Brief, at 11.

Inviting SCBEST to attend in-house teacher training served no interest of defendant and risked creating a burden of extra participants in the training.

Keeping release time forms in the Guidance Office serves no interest of defendant in efficiency. SCBEST can as well distribute them. *See,* 46 *Op. Atty. Gen. Ore.* 239 (1989), App. 940 at 943 (distribution of released time brochures on school premises violates Oregon Constitution because it is "inconsistent with . . . neutrality toward religion . . .".).

Defendant's handling of discipline for SCBEST intruded defendant into a matter in which it had no interest. Discipline during religious instruction and practice is a matter for Church and pupil. Students are not fully released if they

remain subject to defendant's disciplinary control. Enforcing discipline adds the "force of the public school," *Zorach v. Clauson,* 343 U.S. 306, 315 (1954), to SCBEST's disciplinary powers.

Advising SCBEST on how to deal with defendant's administration so as to "grow" its program served no legitimate governmental interest. Released time may be accommodated but not advanced. [25]

3.

Whether granting academic credit for released time religious instruction violates the Establishment Clause by excessively entangling Church and State.

Defendant argues that there is no entanglement because the government has not intruded itself into religious matters, *citing Mueller v. Allen,* 463 U.S. 388

[25] Superintendent White told SCBEST that he was "interested in growing the program" and advised it how to deal with defendant's administration. App. 626 (dep. ex. 72); App. 624 (dep. ex. 71). Defendant's brief does not mention these facts but does refer to unidentified "stray remarks by individual officials." Defendant's Brief, at 52. "Stray remarks" was once a popular concept in Title VII cases. It originated in Justice O'Connor's concurrence in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 261(1989) (O'Connor, J., concurring). She did not propose a general evidentiary rule but a rule for the type of evidence that served to shift the burden of persuasion in a Title VII case. The Supreme Court has since made clear that "stray remarks," if probative of an issue, are admissible. *Desert Palace v. Costa,* 539 U.S. 90, 100 (2003) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence," *quoting Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 508 n. 17 (1957). Superintendent White remarks are probative that defendant actively aided SCBEST.

(1983), and *Ehlers-Renzi v. Connelly School,* 224 F. 3d 283 (4th Cir.), *cert. den. 531 U.S. 1192 (2001).*[26] These cases concern an aspect of entanglement that is not presented here. The third *Lemon* test looks at the relationship between Church and State from the perspective of each. It requires both that "government . . . be entirely excluded from the area of religious instruction," and that "*churches [be] excluded from the affairs of government." Larkin v. Grendel's Den,* 459 U.S. 116, 126 (1982), *quoting Lemon v. Kurtzman,* 403 U.S. 602, 625 (1971)(emphasis by *Larkin* Court*)*. *Mueller* (a tax deduction case) and *Ehlers-Renzi* (a zoning exemption case), both were cases to be examined from the first perspective, of whether government had intruded itself into religious matters by its taxation and zoning decisions. The case at bar is to be viewed from the second perspective, of whether a religious organization has been given governmental power.[27]

Defendant argues that *Larkin* is distinguishable because it involved regulation of alcohol and the zoning power. Defendant's Brief, at 59. Therefore,

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[26] Virginia *amici* make the same argument. Br. 12-13.

[27] These two perspectives are of ancient lineage.

> 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 the 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).

Larkin v. Grendel's Den, 459 U.S. at 126.

defendant argues, since regulation of alcohol is a power reserved to the States, and since zoning is "traditionally a governmental task," *Larkin,* 459 U.S. at 121, the power to give public school academic credit, not being a traditional State power, may be donated to SCBEST. *Larkin* refutes these arguments. As for liquor, "[t]he State may not exercise its power under the Twenty-First Amendment in a way which impinges upon the Establishment Clause . . .". *Larkin,* n. 5. As for zoning, *Larkin* was not "simply a legislative exercise of the zoning power" but instead was a delegation of that power to a religious institution. 459 U.S. at 122. Accordingly the Court's discussion of the second and third *Lemon* tests did not mention liquor or zoning or traditional powers nor hint that they were relevant to the case. 459 U.S. at 122-27.

Defendant's final argument is that judgment for plaintiffs will require defendant to inquire into whether courses presented for transfer credit are religious or secular. Defendant's Brief, at 61-63. But transfer credits are not an issue in this case, because defendant has made no record about them. And so defendant ends by arguing about transfer credits, which it wishes were the issue in the case, instead of about academic credit for released time under the Policy, which is the issue.

Respectfully submitted, September 6, 2011.

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Attorney for plaintiffs

ADDENDUM I (Defendant's Policy)

RELEASED TIME FOR RELIGIOUS INSTRUCTION. *Code* JHCB

Issued 3/07.

Purpose: To establish the basic structure for released time for students for religious instruction.

The board will release students in grades seven through twelve from school, at the written request of their parent/legal guardian, for the purpose of religious instruction for a portion of the day. The school will consider this part of the school day.

The Board will not allow the student to miss required instructional time for the purpose of religious instruction. Any absences for this purpose must be during a student's non-instructional or elective periods of the school day. When approving the release of students for religious instruction, the board assumes no responsibility for the program or liability for the students involved. Its attitude will be one of cooperation with the various sponsoring groups of the school district.

The sponsoring group or the student's parent/legal guardian is completely responsible for transportation to and from the place of instruction. The district assumes no responsibility or liability for such transportation. Religious instruction must take place away from school property and at a regularly designated location.

District officials will insure that no public funds will be expended to support a released time program and that district staff and faculty will not promote or discourage participation by district students in a released time program.

Elective credit

The district will accept no more than two elective Carnegie unit credits for religious instruction taken during the school day in accordance with this policy. The district will evaluate the classes on the basis of purely

secular criteria prior to accepting credit. The district will accept off campus transfer of credit for release time classes with prior approval.

Adopted 3/07

ADDENDUM II (The RTCA)

South Carolina Code Sec. 59-39-112[28]

[Preamble] Whereas, the South Carolina General Assembly finds that:

(1) The free exercise of religion is an inherent, fundamental, and inalienable right secured by the First Amendment to the United States Constitution.

(2) The free exercise of religion is important to the intellectual, moral, ethical and civic development of students in South Carolina, and that any such exercise must be conducted in a constitutionally appropriate manner.

(3) The United States Supreme Court, in its decision, *Zorach v. Clausen*, 343 U.S. 306 (1952), upheld the constitutionality of released time programs for religious instruction during the school day if the programs take place away from school grounds, school officials do not promote attendance at religious classes, and solicitation of students to attend is not done at the expense of public schools.

(4) The federal Constitution and state law allow the state's school districts to offer religious released time education for the benefit of the state's public school students.

(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

[28] The Preamble and the severability of this statute clause are not codified.

districts' ability to accommodate parents' and students' desires to participate in released time programs.

Now, therefore, Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. This Act may be cited as the "South Carolina Released Time Credit Act".

SECTION 2. [End of preamble]

SECTION 59-39-112. Elective credit for released time classes in religious instruction.

(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 elective 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.

Severability clause

SECTION 3. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality of validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more other, subsections, paragraphs, subparagraphs, sentences, clauses, phrases or words thereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

ADDENDUM III

South Carolina Code Section 59-29-230. Old and New Testament era courses.

(A)(1) A school district board of trustees may authorize, to be taught in the district's high schools, an elective course concerning the history and literature of the Old Testament era and an elective course concerning the history and literature of the New Testament era.

(2) Each course offered must be taught in an objective manner with no attempt to influence the students as to either the truth or falsity of the materials presented.

(3) Students must be awarded the same number of Carnegie units that are awarded to other classes of similar duration.

(4) A particular version of the Old or New Testament to be used in either course may be recommended by the board of trustees; provided, that the teacher of the course and students enrolled in the course may use any version of the Old and New Testaments.

(B) The board of trustees of a district that offers a course pursuant to this section must:

(1) maintain supervision and control of the course;

(2) hire any new teachers that it determines are required to teach the course in the same manner all other teachers are hired;

(3) assure that all teachers teaching the course are certified by the State; and

(4) make no inquiry into the religious beliefs, or the lack of religious beliefs, held by a teacher when determining which teacher shall teach the class.

(C) The State Board of Education shall develop and adopt academic standards and appropriate instructional materials that must be used by high schools offering a course pursuant to this section. These academic standards and instructional materials must ensure that the courses do not disparage or encourage a commitment to a set of religious beliefs.

(D) The academic standards and appropriate instructional materials developed and adopted by the board must:

(1) be designed to help students gain a greater appreciation of the Old Testament and the New Testament as great works of literature, art, and music; assist students in gaining greater insight into the many historical events recorded in the Old Testament and the New Testament; and provide students with a greater awareness of the many social customs that the Old Testament and the New Testament have significantly influenced; and

(2) provide that the Old Testament is the primary text for the course exploring the history and literature of the Old Testament era and that the New Testament is the primary text for the course exploring the history and literature of the New Testament era.

(E) The academic standards developed and adopted may provide that students may be assigned period-appropriate secular historical and literary works to supplement the primary text.

ADDENDUM IV (Maryland)

Source:http://www.msde.maryland.gov/NR/rdonlyres/898C42FD-442C-4D7F-9953-84D647F85067/28300/HS_Grad_Q_A_05032011_.pdf

TITLE 13A. STATE BOARD OF EDUCATION

SUBTITLE 03. GENERAL INSTRUCTIONAL PROGRAMS

CHAPTER 02. GRADUATION REQUIREMENTS FOR PUBLIC HIGH SCHOOLS IN MARYLAND

COMAR 13A.03.02.05 (2011)

.05 Other Provisions for Earning Credit.

A. In addition to earning credits during the regular school day and year, credits may be earned, at the discretion of the local school system, through the means specified in §§ B--J of this regulation.

. . .

F. Work Study Programs, Job Entry Training Programs, or Experience Outside the School.

(1) Consistent with local school system policy and procedure, actual time spent in work study, job entry training, or other experience may be counted for credit when identified as an integrated part of a planned study program.. . .

* * * * *

Source: http://www.msde.maryland.gov/NR/rdonlyres/30DAC98C-CCB6-45F6-8EC9-B568A850421C/7980/SSLGuide_PDF1026.pdf

Required Service-Learning program

Religious Practice (guidelines of the service learning program)

• Any service-learning activity *whose chief purpose is to convert others to a particular religious or spiritual view* and/or which denigrates the religious or spiritual views of others *may not be counted toward the service-learning graduation requirement*.

ADDENDUM V (Virginia)

VIRGINIA ADMINISTRATIVE
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*** THIS DOCUMENT IS CURRENT THROUGH 27:14
VA. R. MARCH 14, 2011 ***
*** INCLUDES FAST-TRACK REGULATIONS CURRENT
THROUGH 27:17 VA. R. APRIL 25, 2011 ***

TITLE 8.
EDUCATIO
N
AGENCY NO. 20. STATE
BOARD OF EDUCATION
CHAPTER 131. REGULATIONS ESTABLISHING STANDARDS FOR
ACCREDITING PUBLIC SCHOOLS IN
VIRGINIA
PART III. STUDENT
ACHIEVEMENT

*8 VAC **20-***
131-60
(2011)

8 VAC **20-131-60.** Transfer students

A. The provisions of this section pertain generally to students who transfer into Virginia high schools. Students transferring in grades K-8 from Virginia public schools or nonpublic schools accredited by one of the approved accrediting constituent members of the Virginia Council for Private Education shall be given recognition for all grade-level work completed. The academic record of students transferring from all other schools shall be evaluated to determine appropriate grade placement in accordance with policies adopted by

the local school board. The State
Testing Identifier (STI) for students who transfer into a Virginia public school from another Virginia public school shall be retained by the receiving school.

B. For the purposes of this section, the term "beginning" means within the first 20 hours of instruction per course. The term "during" means after the first 20 hours of instruction per course.

C. Standard or verified units of credit earned by a student in a Virginia public school shall be transferable without limitation regardless of the accreditation status of the Virginia public school in which the credits were earned. Virginia public schools shall accept standard and verified units of credit from other Virginia public schools, Virginia's virtual learning program, Virtual Virginia, and state-operated programs. Standard units of credit also shall be accepted for courses satisfactorily completed in accredited colleges and universities when prior written approval of the principal has been granted or the student has been given credit by the previous school attended.

D. A secondary school shall accept credits *toward graduation* received from Virginia nonpublic schools accredited by one of the approved accrediting constituent members of the Virginia Council for Private Education (VCPE). The Board of Education will maintain contact with the VCPE and may periodically review its accrediting procedures and policies as part of its policies under this section.

Nothing in these standards shall prohibit a public school from accepting standard units of credit toward graduation awarded to students who transfer from all other schools when the courses for which the student receives credit generally match the description of or can be substituted for courses for which the receiving school gives standard credit, and the school from which the child transfers certifies that the courses for which credit is given meet the requirements of 8 VAC 20-131-110 A.

Students transferring into a Virginia public school shall be required to meet the requirements prescribed in 8 VAC 20-131-50 to receive a Standard, Standard Technical, Advanced Studies, Advanced Technical or Modified Standard Diploma, except as provided by subsection G of this section. To receive a Special Diploma

or Certificate of Program Completion, a student must meet the requirements prescribed by the Standards of Quality.

E. The academic record of a student transferring from other Virginia public schools shall be sent directly to the school receiving the student upon request of the receiving school in accordance with the provisions of the 8 VAC 20-150, Management of the Student's Scholastic Record in the Public Schools of Virginia. The State Testing Identifier (STI) for students who transfer into a Virginia public school from another Virginia public school shall be retained by the receiving school.

F. The academic record of a student transferring into Virginia public schools from other than a Virginia public school shall be evaluated to determine the number of standard units of credit that have been earned, including credit from schools outside the United States, and the number of verified units of credit needed to graduate in accordance with subsection G of this section. Standard units of credit also shall be accepted for courses satisfactorily completed in accredited colleges and universities when the student has been given credit by the previous school attended.

Students transferring above the tenth grade from schools or other education programs that do not require or give credit for health and physical education shall not be required to take these courses to meet graduation requirements.

G. Students entering a Virginia public high school for the first time after the tenth grade shall earn as many credits as possible toward the graduation requirements prescribed in 8 VAC 20-131-50. However, schools may substitute courses required in other states in the same content area if the student is unable to meet the specific content requirements of 8 VAC 20-131-50 without taking a heavier than normal course load in any semester, by taking summer school, or by taking courses after the time when he otherwise would have graduated. In any event, no such student shall earn fewer than the following number of verified units, nor shall such students be required to take SOL tests or additional tests as defined in 8 VAC 20-131-110 for verified units of credit in courses previously completed at another school or program of study, unless necessary to meet the requirements listed in subdivisions 1 and 2 of this subsection:

1. For a Standard Diploma or Standard Technical Diploma:

a. Students entering a Virginia high school for the first time during the ninth grade or at the beginning of the tenth grade shall earn credit as prescribed in 8 VAC 20-131-50;

b. Students entering a Virginia high school for the first time during the tenth grade or at the beginning of the eleventh grade shall earn a minimum of four verified units of credit: one each in English, mathematics, history, and science. Students who complete a career and technical education program sequence may substitute a certificate, occupational competency credential or license for either a science or history and social science verified credit pursuant to 8 VAC 20-131-50; and

c. Students entering a Virginia high school for the first time during the eleventh grade or at the beginning of the twelfth grade shall earn a minimum of two verified units of credit: one in English and one of the student's own choosing.

2. For an Advanced Studies Diploma or Advanced Technical Diploma:

a. Students entering a Virginia high school for the first time during the ninth grade or at the beginning of the tenth grade shall earn credit as prescribed in 8 VAC 20-131-50;

b. Students entering a Virginia high school for the first time during the tenth grade or at the beginning of the eleventh grade shall earn a minimum of six verified units of credit: two in English and one each in mathematics, history, and science and one of the student's own choosing; and

c. Students entering a Virginia high school for the first time during the eleventh grade or at the beginning of the twelfth grade shall earn a minimum of four verified units of credit: one in English and three of the student's own choosing.

H. Students entering a Virginia high school for the first time after the first semester of their eleventh grade year must meet the requirements of subdivision 1 c or 2 c of this subsection. Students transferring after 20 instructional hours per

course of their senior or twelfth grade year shall be given every opportunity to earn a Standard, Advanced Studies, or Modified Standard Diploma. If it is not possible for the student to meet the requirements for a diploma, arrangements should be made for the student's previous school to award the diploma. If these arrangements cannot be made, a waiver of the verified unit of credit requirements may be available to the student. The Department of Education may grant such waivers upon request by the local school board in accordance with guidelines prescribed by the Board of Education.

I. Any local school division receiving approval to increase its course credit requirements for a diploma may not deny either the Standard, Advanced Studies, or Modified Standard Diploma to any transfer student who has otherwise met the requirements contained in these standards if the transfer student can only meet the division's additional requirements by taking a heavier than normal course load in any semester, by taking summer school, or by taking courses after the time when he otherwise would have graduated.

J. The transcript of a student who graduates or transfers from a Virginia secondary school shall conform to the requirements of 8 VAC 20-160, Regulations Governing Secondary School Transcripts.

K. The accreditation status of a high school shall not be included on the student transcript provided to colleges, universities, or employers. The board expressly states that any student who has met the graduation requirements established in 8 VAC 20-131-50 and has received a Virginia diploma holds a diploma that should be recognized as equal to any other Virginia diploma of the same type, regardless of the accreditation status of the student's high school. It is the express policy of the board that no student shall be affected by the accreditation status of the student's school. The board shall take appropriate action, from time to time, to ensure that no student is affected by the accreditation status of the student's school.

Statutory Authority: §§ 22.1-19 and 22.1-253.13:3 of the Code of Virginia.

Historical Notes: Derived from Virginia Register Volume 14, Issue 1, eff. October 29, 1997; amended, Virginia
Register Volume 16, Issue 25, eff. September 28, 2000.Amended, Virginia

Register Volume 22, Issue 24, eff.

September 7, 2006; Volume 25, Issue 21, eff. July 31, 2009.The September 7, 2006 amendment rewrote the section. See the Virginia Register for the former text.The July 31, 2009 amendment, in subsec. A, added the fourth sentence; in subsec. C, in the first sentence, inserted ", Virginia's virtual learning program, Virtual Virginia,"; in the closing paragraph of subsec. D, inserted "Standard Technical," and inserted "Advanced Technical"; in subsec. E, added the second sentence; in par. G 1, in the introductory paragraph, inserted "or Standard Technical Diploma"; in par. G 2, in

the introductory paragraph, inserted "or Advanced Technical Diploma"; and in subsec. H, changed "G 1 c or G 2 c" to

"1 c or 2 c" and substituted "subsection" for "section".ATTORNEY GENERAL OPINIONS

A local school board must abide by the legislative mandate to allow transfer of credits earned in private school or through home instruction toward award of a high school diploma, subject to conditions prescribed by the Board of Education. A local school board may not impose requirements inconsistent with standards of accreditation promulgated by the *Board. Op.Atty.Gen. 1997 WL 857179,* Dec. 4, 1997.

NOTES:

Agency Introduction

Chapter Historical Notes, Authority & Source

Pt Historical Notes, Authority & Source

Amendment Note:

ADDENDUM VI (Florida)

TITLE 06 DEPARTMENT OF EDUCATION
DIVISION 6A STATE BOARD OF EDUCATION
CHAPTER 6A-1 FINANCE AND ADMINISTRATION

6A-1.09941, F.A.C.

6A-1.09941 State Uniform Transfer of High School Credits.

The purpose of this rule is to establish uniform procedures relating to the acceptance of transfer work and credit for students entering Florida's public schools. The procedures shall be as follows:

(1) Credits and grades earned and offered for acceptance shall be based on official transcripts and shall be accepted at *face value subject to validation if required by the receiving school's accreditation*. If validation of the official transcript is deemed necessary, or if the student does not possess an official transcript or is a home education student, credits shall be validated through performance during the first grading period as outlined in subsection (2) of this rule.

(2) Validation of credits shall be *based on performance in classes at the receiving school*. A student transferring into a school shall be placed at the appropriate sequential course level and should have a minimum grade point average of 2.0 at the end of the first grading period. Students who do not meet this requirement shall have credits validated using the Alternative Validation Procedure, as outlined in subsection (3) of this rule.

. . .

ADDENDUM VII (Georgia)

Source:
http://www.atlantapublicschools.us/cms/lib/GA01000924/Centricity/ModuleInstance/1095/Handbook_2009-1010_Final.pdf

. . .

Board Policy Graduation Requirements2008-2009+. Descriptor Code IHF(6).

. . .

Additional Requirements and Stipulations.

. . .

11. *Students transferring from private schools, home study programs, or other states or countries shall meet the graduation requirements that apply to the cohort of students in the grade in which they enroll.* The transcripts of transfer students for whom it is not possible to meet an Atlanta Public Schools graduation requirement by the end of the senior year shall be evaluated on a case-by-case basis.

. . .

ADDENDUM VIII (Texas)

TEXAS
ADMINISTRATIVE
CODE

*** This document reflects all regulations in effect
as of August 31, 2011 ***

TITLE 19. EDUCATION
PART 2. TEXAS EDUCATION
AGENCY CHAPTER 74.
CURRICULUM
REQUIREMENTS
SUBCHAPTER C. OTHER
PROVISIONS

19 TAC §
74.26
(2011)

§ 74.26. Award of Credit

(a) The award of credit for a course by a school district affirms that a student has satisfactorily met all state and local requirements. Any course for which credit is awarded must be provided according to this subsection.

(1) Credit earned toward state graduation requirements by a student in an accredited school district shall be transferable and must be accepted by any other school district in the state. A district may not prohibit a new student from attending school pending receipt of transcripts or records from the school district the student previously attended. Credit earned in a local-credit course may be transferred only with the consent of the receiving school district.

(2) A school district must ensure that the records or transcripts of an out-of-state or out-of-country transfer student (including foreign exchange students) or a transfer student from a Texas nonpublic school are evaluated and that the student is placed in appropriate classes promptly. The district may use a variety

of methods *to verify the content of courses for which a transfer student has earned credit.*

(b) Districts may offer courses designated for Grades 9-12 (refer to § 74.11 of this title (relating to High School Graduation Requirements)) in earlier grade levels. A course must be considered completed and credit must be awarded if the student has demonstrated achievement by meeting the standard requirements of the course, including demonstrated proficiency in the subject matter, regardless of the time the student has received instruction in the course or the grade level at which proficiency was attained. The academic achievement record (transcript) shall reflect that students have satisfactorily completed courses at earlier grade levels than Grades 9-12 and have been awarded state graduation credits.

(c) Credit for courses for high school graduation may be earned only if the student received a grade which is the equivalent of 70 on a scale of 100, based upon the essential knowledge and skills for each course.

(d) In accordance with local district policy, students who are able to successfully complete only one semester of a two-semester course can be awarded credit proportionately.

SOURCE: The provisions of this § 74.26 adopted to be effective September 1, 1996, 21 TexReg 4311; amended to be effective September 1, 1998, 23 TexReg 5675; amended to be effective September 1, 2001, 25 TexReg 7691

NOTES:

CROSS-REFERENCES: This Section cited in *19 TAC § 74.11*, (relating to High School Graduation Requirements); *19 TAC § 74.41*, (relating to High School Graduation Requirements).

This Chapter cited in *19 TAC § 89.24*, (relating to Diploma Requirements); *19 TAC § 89.1205*, (relating to Required Bilingual Education and English as a Second Language Programs); *19 TAC § 89.1210*, (relating to Program Content and Design).

This Subchapter cited in *19 TAC § 74.3*, (relating to Description of a Required Secondary Curriculum).

ADDENDUM IX (Utah)

EDUCATION
R277. ADMINISTRATION.
R277-410. ACCREDITATION OF SCHOOLS.

U.A.C. R277-410-4 (2011)

A. Utah public schools shall accept transfer credits from accredited secondary schools consistent with R277-705-3.*

B. Utah public schools may accept transfer credits from other credit sources consistent with R277-705-3.*

* * * * *

EDUCATION
R277. ADMINISTRATION.
R277-705. SECONDARY SCHOOL COMPLETION AND DIPLOMAS.

U.A.C. R277-705-3 (2011)*

R277-705-3. Required LEA Policy Explaining Student Credit.

A. All Utah LEAs shall have a policy, approved in an open meeting by the governing board, explaining the process and standards for acceptance and reciprocity of credits earned by students in accordance with Utah state law. Policies shall provide for specific and adequate notice to students and parents of all policy requirements and limitations.

B. LEAs shall adhere to the following standards for credits or coursework from schools, supplemental education providers accredited by the Northwest Accreditation Commission, and accredited distance learning schools:

(1) Public schools shall accept credits and grades awarded to students from schools or providers accredited by the Northwest Accreditation Commission or approved by the Board without alteration.

(2) LEA policies may establish reasonable timelines and may require adequate and timely documentation of authenticity for credits and grades submitted.

C. LEA policies shall provide various methods for students to earn credit from non-accredited sources, course work or education providers. Methods, as designated by the LEA may include:

(1) Satisfaction of coursework by demonstrated competency, as evaluated at the LEA level;

(2) Assessment as proctored and determined at the school or school level;

(3) Review of student work or projects by LEA administrators; and

(4) Satisfaction of electronic or correspondence coursework, as approved at the LEA level.

D. LEAs may require documentation of compliance with Section 53A-11-102 prior to reviewing student home school or competency work, assessment or materials.

E. LEA policies for participation in extracurricular activities, awards, recognitions, and enhanced diplomas may be determined locally consistent with the law and this rule.

F. An LEA has the final decision-making authority for the awarding of credit and grades from non-accredited sources consistent with state law, due process, and this rule.

* * * * *

http://www.northwestaccreditation.org/Frequently%20Asked%20Questions.html

It is recognized that a student may transfer to a regionally accredited public school from a regionally accredited private religious schools and seek to transfer credits *for courses that are not allowable in public institutions*. To ensure the student's transcript is an accurate record, the transcript must identify the courses and school of origin. *The receiving school is responsible for determining whether or not these courses apply toward local graduation requirements.*

. . .

ADDENDUM X (Idaho)

IDAHO CODE
STATUTES

*** Statutes current through the 2011
Regular Session ***

GENERAL LAWS
TITLE 33.
EDUCATION
CHAPTER 5.
DISTRICT
TRUSTEES

Go to the Idaho Code
Archive Directory

Idaho Code §
33-519 (2011)

§ 33-519. Release for religious instruction

Upon application of his parent or guardian, or, if the student has attained the age of eighteen (18) years, upon application of the student, a student attending a public school in grades nine (9) through twelve (12) may be excused from school for a period not exceeding five (5) periods in any week or not exceeding one hundred sixty-five (165) hours per student during any one (1) school year for religious or other purposes. Release time pursuant to this section shall be scheduled by the board of trustees upon application as provided herein and the board shall have reasonable discretion over the scheduling and timing of the release time. Release time pursuant to this section shall not reduce the minimum

graduation requirements for accredited Idaho high schools. The provisions of this section shall not be deemed to authorize the use of any public school facility for religious instruction. The board of trustees of a school district may not authorize the use of, and public school facilities, personnel or equipment may not be utilized, to maintain attendance records for the benefit of release time classes for religious instruction. *No credit shall be awarded by the school or school district for completion of courses during release time for religious purposes.* At the discretion of the board credit may be granted for other purposes.

HISTORY: *I.C., § 33-519*, as added by 1991, ch. 250, § 1, p. 618; am. 2010, ch. 180, § 1, p. 370.

NOTES: AMENDMENTS. The 2010 amendment, by ch. 180, substituted "period not exceeding five (5) periods in any week or not exceeding" for "period not exceeding (5) periods in any week and not exceeding" in the first sentence.

ADDENDUM XI (California)

Source: http://www.cde.ca.gov/sp/ps/rq/psfaq.asp#c9

Private Schools Frequently Asked Questions
Frequently asked questions and requirements regarding private schools in California.

. . . . . .

Private Schools and the Private School Affidavit

3. **I am transferring my child from a private school to a public school. The public school will not give my child full credit for all his or her courses. Can the public school refuse credits issued by private schools?**

   Yes. The law does not require public schools to accept credits from private schools. Public school districts have the responsibility to evaluate the appropriate placement for a student.

ADDENDUM XII (South Carolina Transfer Regulations)

CODE OF LAWS OF SOUTH CAROLINA ANNOTATED

*** THIS DOCUMENT IS CURRENT THROUGH STATE REGISTER ***
*** VOLUME 34, ISSUE NO. 10, EFFECTIVE OCTOBER 22, 2010 ***

CODE OF REGULATIONS
CHAPTER 43. STATE BOARD OF EDUCATION
ARTICLE 20. STUDENTS

S.C. Code Regs. ***43-273*** (2010)

43-273. Transfers and Withdrawals.

(Statutory Authority: *S.C. Code Ann. § 59-65-90* (1990)

and *20 U.S.C. § 7165* (2001)) Kindergarten; Grades 1-

6; 7-8:

Transfer of Students

Each student transferring shall be given a transfer form showing name, date of birth, grade placement, and attendance record to present to the principal of the school where he or she is enrolling. Appropriate additional data shall be

furnished by the school on request.

School must transfer a student's disciplinary record of suspensions and expulsions to the public or private school to which the student is transferring.

Grades 9-

12:

Transfer

of

Students

1. Accurate accounting records shall be developed and maintained for student transfers and withdrawals. Comprehensive transcripts shall be submitted directly to the receiving school. A permanent record of the transferred student shall be retained in the school from which the student is transferred. School must transfer a student's disciplinary record of suspensions and expulsions to the public or private school to which the student is transferring.

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 (New England Association of Colleges and Schools, Middle States Association of Colleges and Schools, Southern Association of Colleges and Schools, North Central Association of Colleges and Schools, Western Association of Colleges and Schools, and the Northwest Association of Colleges and Schools), *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.

Amended by State Register Volume 21, Issue No. 4, eff April 25, 1997; State Register Volume 27, Issue No. 12, eff

December 26, 2003.

NOTES:

Effect of Amendment

The 1997 amendment revised this regulation in its entirety.

The 2003 amendment added a sentence to the two sections of the regulation, grades K-8 and 9-12, requiring transfer of disciplinary records.

Editor's Note

ADDENDUM XIII (20 U.S.C. 1232g)

*** CURRENT THROUGH PL 112-28,

APPROVED 8/12/2011 ***

TITLE 20. EDUCATION
CHAPTER 31. GENERAL PROVISIONS
CONCERNING EDUCATION
GENERAL REQUIREMENTS AND CONDITIONS CONCERNING
OPERATION AND ADMINISTRATION OF EDUCATION
PROGRAMS: GENERAL AUTHORITY OF SECRETARY
RECORDS; PRIVACY; LIMITATION ON
WITHHOLDING FEDERAL FUNDS

**Go to the United States Code
Service Archive Directory**

***20
USCS §
1232g***

§ 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions.

(1) (A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to

inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations--

(I) respecting admission to any educational agency or institution, (II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4) (A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which--

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution. (B) The term "education records" does not include--

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5) (A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of Federally-supported education programs; recordkeeping.

(1) No funds shall be made available under any applicable program to any

educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following--

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) (i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted--

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if--

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.[;]

(F) organizations conducting studies for, or on behalf of, educational agencies

or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in *section 152 of the Internal Revenue Code of 1986*

[*26 USCS § 152*];

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons;

(J)

(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena; and

(K) the Secretary of Agriculture, or authorized representative from the Food and Nutrition Service or contractors acting on behalf of the Food and Nutrition Service, for the purposes of conducting program monitoring, evaluations, and performance measurements of State and local educational and other agencies and institutions receiving funding or

providing benefits of 1 or more programs authorized under the Richard B. Russell National School Lunch Act (*42 U.S.C. 1751* et seq.) or the Child Nutrition Act of 1966 (*42 U.S.C. 1771* et seq.) for which the results will be reported in an aggregate form that does not identify

any individual, on the conditions that--

(i) any data collected under this subparagraph shall be protected in a manner that will not permit the personal identification of students and their parents by other than the authorized representatives of the Secretary; and

(ii) any personally identifiable data shall be destroyed when the data are no longer needed for program monitoring, evaluations, and performance measurements.

Nothing in subparagraph (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless--

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided,* That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4) (A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6) (A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18, United States Code [*18 USCS § 16*]), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18 [*18 USCS § 16*], United States Code), or a nonforcible sex offense, if

the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding--

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7) (A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994 (*42 U.S.C. 14071*) concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data-gathering activities; regulations. Not later than 240 days after the date of enactment of the Improving America's Schools Act of 1994 [enacted Oct. 20, 1994], the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent. For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be

required of and accorded to the student.

(e) Informing parents or students of rights under this section. No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance. The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions. The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Certain disciplinary action information allowable. Nothing in this section shall prohibit an educational agency or institution from--

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other

schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures.

(1) In general. Nothing in this Act or the Higher Education Act of 1965 shall

be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if--

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure. Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a).

(j) Investigation and prosecution of terrorism.

(1) In general. Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to--

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18 United States Code *[18 USCS § 232b*(g)(5)(B)], or an act of domestic or international terrorism as defined in section 2331 of that *title [18 USCS § 2331*]; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval.

(A) In general. An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court

finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution. An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record-keeping. Subsection (b)(4) does not apply to education records subject to a court order under this subsection.

CERTIFICATE OF COMPLIANCE

This brief has been prepared using Microsoft Word Times New Roman 14 point type. This is a proportionally spaced serif typeface.

Exclusive of the table of contents, table of citations, Addenda, certificate of compliance and certificate of service this brief contains, according to the word count function of Microsoft Word, 5,968 words.

I understand that a material misrepresentation can result in the Court's striking this brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or copy of the word or line printout.

s/ George Daly

CERTIFICATE OF SERVICE OF REPLY BRIEF OF PLAINTIFFS

I certify that on September 6, 2011, I made service of the foregoing Reply Brief of Plaintiffs-Appellants by serving one copy on opposing counsel:

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The method of service was first class United States mail, postage prepaid.

s/ George Daly