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OPINION	:	No. 80-1005
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The Honorable Newton R. Russell, Senator, Twenty-First Senatorial District, has requested an opinion on the following questions:

1. Do parents and students have a constitutional right to engage in released-time religious education programs?

2. Is it permissible for school districts to allow material regarding released time religious education to be distributed in the schools through sending information home with the children or publishing information in P.T.A. newsletters or similar communications?

CONCLUSIONS

1. Parents and students do not have a constitutional right to engage in released-time religious education programs unless attendance at school interferes with the

free exercise of religion by unreasonably denying them the opportunity for religious education.

2. As an accommodation to parents and students, a school district may take reasonable, necessary, administrative steps to inform parents of the existence of released-rime in the district permitted by section 46014 of Education Code, and to obtain the parents' consent for students to participate in released-time programs. Such notifications to parents could be by sending information home with the children or publishing information in P.T.A. newsletters or similar communications, or otherwise. A school district, however, in doing so should take or permit only the minimum steps necessary to implement such released-time programs to insure that it maintains the requisite "neutrality" towards any one religion, or all religions, as constitutionally required. This would preclude conduct by the school district which would endorse, or appear to endorse released-time through the expenditure of tax monies, or otherwise, no matter how trivial.

ANALYSIS

Section 46014 of the Education Code[1] permits school districts, at their option, to permit released-time for religious exercises or instruction. Thus, with the consent of their parents or guardian, students are released from compulsory school attendance to engage in

[1] "Pupils, with the written consent of their parents or guardians, may be excused from school in order to participate in religious exercises or to receive moral and religious instruction at their respective places of worship or at other suitable place or places away from school property designated by the religious group, church, or denomination, which shall be in addition and supplementary to the instruction in manners and morals required elsewhere in this code. Such absence shall not be deemed absence in computing average daily attendance, if all of the following conditions are complied with:

(a) The governing board of the district of attendance, in its discretion, shall first adopt a resolution permitting pupils to be absent from school for such exercises or instruction.

(b) The governing board shall adopt regulations governing the attendance of pupils at such exercises or instruction and the reporting thereof.

(c) Each pupil so excused shall attend school at least the minimum school day for his grade for elementary schools, and as provided by the relevant provisions of the rules and regulations of the State Board of Education for secondary schools.

(d) No pupil shall be excused from school for such purpose on more than four days per school month.

It is hereby declared to be the intent of the Legislature that this section shall be permissive only."

religious instruction away from school property at a place designated by a church or religious group of their own choosing. As early as 1947, the California courts held these programs to be constitutional under Article I, section 4 of the California Constitution,[2] the First Amendment to the United States Constitution,[3] then Article IV, section 30,[4] and Article IX, section 8[5] of the California Constitution. (*Gordon v. Board of Education* (1947) 78 Cal. App. 2d 464.) The particular program upheld in the *Gordon* case, which had been established in the City of Los Angeles, included the distribution of literature to parents at the behest of an Interfaith Committee describing the plan and also requisite consent cards to be returned to the school if the student was to participate in the program. The consent cards designated the faith they were to be taught. The expense of printing and mailing the literature and cards was borne by the school district. The students were transported to the religious program upon release from school at no expense to the school system.

In the wake of *Gordon v. Board of Education*, *supra*, 78 Cal. App. 2d 464, the United States Supreme Court for the first time considered the constitutionality of released-time plans. In *McCollum v. Board of Education* (1948) 333 U.S. 203, the court considered and held unconstitutional under the First Amendment the plan of the Champaign Board of Education, Champaign County, Illinois. Under that plan the consent cards were distributed through the school system, but were paid for by the Champaign Council on Religious Education. Additionally, the religious instructors, who were under the supervision of the superintendent of schools, taught their respective religious classes, Protestant, Catholic and Jewish, in regular classrooms in the public schools. The United States Supreme Court, adhering to the doctrine of *Everson v. Board of Education* (1946) 330 U.S. 1 that the First Amendment has erected an impregnable wall between Church and State, held:

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[2] "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion. . . ."

[3] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . ."

[4] Then Article IV, section 30 prohibited appropriation or granting anything 'in aid of any religious sect, church, creed or sectarian purpose." See now, Article XVI, section 5 of the California Constitution.

[5] Article IX, section 8 provides:

> "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction therein be permitted, directly or indirectly, in any of the common schools of the State."

> "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State." (333 U.S. at p. 212.)

Interestingly, the California Court in Gordon had relied heavily upon Illinois cases, including the Illinois Supreme Court's decision in *McCollum* (see 71 N.E.2d 161), which had held their state's released-time program to be *constitutional*.

The pall on released-time plans cast by *McCollum v. Board of Education, supra*, 333 U.S. 203 was, however, short-lived. In 1952 the United States Supreme Court rendered its opinion in *Zorach v. Clauson* (1952) 343 U.S. 306. In *Zorach*, the court ruled upon the New York City released-time plan. The court initially noted that "[i]t takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the . . . case" pointing out that no one was required to attend religious instruction, nor was there any evidence of coercion to get students to attend religious instruction. (*Id*., at p. 311.) The court then went on to hold that the New York City plan did not violate the Establishment Clause of the First Amendment proceeding on the premise that the concept of separation of church and state does not require hostility towards religion. After noting matters which government may not do with respect to aiding or establishing religion, the court characterized the New York City plan thusly:

> ". . . . But it [the government] can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here." (*Id*., at p. 314.)[6]

The court then went on to attempt a reconciliation with *McCollum v. Board of Education*, as follows:

> "In the *McCollum* 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 follow the *McCollum* case. But 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

[6] We note parenthetically that the New York City plan differed from the Los Angeles plan approved in *Gordon v. Board of Education*, *supra*, 78 Cal. App. 2d 464 in that "[a]ll costs, including the application blanks, are paid by the religious organization. (343 U.S. at p. 309.)

accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion."[7] (*Id*., at p. 315, footnote omitted.)

Thus, both the United States Supreme Court and the California courts have generally sanctioned the concept of "released-time" in public schools for religious instruction. With this basic background we proceed to the questions presented in this opinion request.

1. IS THERE A CONSTITUTIONAL RIGHT TO RELEASED-TIME?

The first question presented is whether parents and students have a constitutional right to engage in released-time religious education programs. Stated otherwise, must the state grant released-time to students or, failing to do so, will the state violate the Free Exercise Clauses of the Federal and State Constitutions, or some other inherent constitutional right of the parents or students? We conclude that there is no constitutional right to released-time for religious education programs.

The question suggests two possible lines of cases from which one might argue that such a constitutional right exists. The first of these lines of cases is exemplified by the leading case of *Wisconsin v. Yoder* (1972) 406 U.S. 205 relating to the fundamental right of parents to direct the religious upbringing of their children. The second line of cases, the "accommodation" cases, is exemplified by the leading case of *Wisconsin v. Yoder* (1972) 406 U.S. 205 latter cases hold that government should accommodate a citizen's religious practices by not requiring him to choose between his religion and governmental regulations or benefits, where the practice thereof will pose no harm or threat to the public.

With respect to the first line of cases, *Wisconsin v. Yoder*, *supra*, 406 U.S. 205, held that the State of Wisconsin could not require Amish children to attend public school beyond the eighth grade against the wishes of their parents and the precepts of the Amish religious community. Such precepts required adolescents to integrate into the

[7] Another possible distinction between *McCollum* and *Zorachs* was subsequently set forth by the author of the *Zorach* opinion, Justice Douglas, in his concurring opinion in *Engle v. Vitale* (1962) U.S. 421, 439, the school-prayer case, wherein he indicated that the Champaign plan found in *McCollum* involved "indoctrination" and "proselytizing." See Note, *The Released Time Cases Revisited* (1974) 83 Yale U. 1202, 1230–1231, where the author of the note points this out and then wonders: "[i]f the Champaign plan was unconstitutional chiefly because it entailed proselytizing and indoctrination, it was not at all clear why the New York plan was not also unconstitutional—unless for some unexplained reason, the indoctrination found in *McCollum* was a result of the use of public school buildings. . . ."

community and learn informally and separate and apart from contemporary society. The court explained the basic rights raised in *Yoder* as follows:

> "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in *Pierce*, made to yield to the right of parents to provide an equivalent education in a privately operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their offspring including their education in church-operated schools. As the case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. See also *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *cf. Rowan v. Post Office Dept.*, 397 U.S. 728(1970). Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, 'prepare [them] for additional obligations.' 268 U.S., at 535." (*Id*., at pp. 213–214.)

The court then went on to define the state's duty with respect to the rights discussed as follows:

> "It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. . . ." (*Id*., at p. 214.)

In *Sherbert v. Verner*, *supra*, 374 U.S. 398, which exemplifies the second line of cases, the court held that a state could not deny unemployment insurance benefits to a member of the Seven Day Adventist Church who was discharged from her employment because she would not work on Saturday, her Sabbath, contrary to her religious beliefs and scruples. The court reasoned that

> ". . . . the [unemployment insurance] ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." (*Id*., at p. 404.)

The court then went on to conclude that no "compelling state interest" was served by the South Carolina disqualification statute, noting that

> ". . . . [i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' *Thomas v. Collins*, 323 U.S. 516, 530. . . . (*Id*., at p. 406.)

In determining whether there is or is not a constitutional right to released time for religious education, we believe that in addition to the foregoing type of cases which suggest themselves as possibly analogous, one further basic principle is essential to the analysis. That principle is found in the leading case, *Abington School Dist. v. Schempp* (1963) 374 U.S. 203, which held that a school board could not require a bible reading or the recitation of the Lord's Prayer at the beginning of each school day even if those objecting were excused from attendance or participation. In discussing the Free Exercise Clause of the First Amendment the court set forth the following test to determine whether a violation has occurred:

> The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting an invasion thereof by civil authority. Hence *it is necessary in a free exercise case for one to show the coerce effect of the enactment as it operates against him in the practice of his religion.* The distinction between the two clauses is apparent—*a violation of the Free Exercise Clause is predicated on coercion* while the Establishment Clause violation need not be so attended." (*Id*., at pp. 222–223; emphasis added.)

Applying the principles set forth in the foregoing cases, we believe that in order to establish a constitutional right to released-time for religious instruction either in the parents or in the students attending public schools, it would be necessary to show the coercive effect of some state statute or other "state action" which denies the parents the right to direct the religious training of their progeny, or which denies the parents or students

the right to the free exercise of their religion. In the context of compulsory school attendance (the state statute) one would have to demonstrate that compulsory school attendance "interferes with the practice of a legitimate religious belief" without an overriding state interest therefor (*Wisconsin v. Yoder*, *supra*, 406 U.S. at p. 214) or requires the parents or students to choose between obeying the law and practicing their religion without a "compelling state interest therefor" (*Sherbert v. Verner*, *supra*, 374 U.S. at pp. 404, 406).

We conclude that the requisite showing of "coercion," "interference" or "compelled choice" would be lacking where a state or a school district has elected not to grant released-time for religious education. An excellent exposition of the reasons for our conclusion as disclosed by our research was set forth by the Second Circuit in an analogous case, *Stein v. Oshinsky* (2d Cir. 1965) 348 F.2d 1003, cert. den., 382 U.S. 957,[8] which held that the Free Exercise Clause did not require the state to permit student-initiated prayer in the schools. The court reasoned in part:

> ". . . But '[t]he student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others,' *Abingion Tp. School District v. Schempp* . . . (concurring opinion of Mr. Justice Brennan). We are not here required to consider such cases as that of a Moslem, obliged to prostrate himself five times daily in the direction of Mecca . . . *Cf. Sherbert v. Verner*, *supra*, 374 U.S. at 399 n. 1.
>
> Determination of what is to go on in public schools is primarily for the school authorities . . . The authorities acted well within their powers in concluding that plaintiffs must content themselves with having their children say these prayers before nine or after three; their action presented no such inexorable conflict with deeply held religious belief as in *Sherbert v. Verner*. . ." (*Id*., at pp. 1001–1002.)

See also e.g., the recent case, *Brandon v. Board of Education of Guilderland* (N.D.N.Y. 1980) 487 F.Supp. 1219, 1231, also a "school prayer" case, relying in part upon the above reasoning.

Likewise, failure to grant released-time for religious education during compulsory school hours should in no way "coerce" students from participating in religious

[8] This case is cited by the Court of Appeal in *Johnson v. Huntington Beach Union High School Dist.* (1977) 68 Cal. App. 3d 1, 17 n. 18, which held that to permit a Bible study club to use public campus facilities would violate the Establishment Clause.

instruction "before nine or after three" or on weekends. In such an event, students or their parents are not left without a viable alternative in the normal course of events.[9] Thus, there would be no undue burden placed upon the right of parents to direct the religious education of their children nor upon the right of both to the free exercise thereof. (See also *Citizens for Parental Rights v. San Mazeo County Board of Education* (1975) 51 Cal. App. 3d 1, 14 fn. 13, distinguishing *Yoder* on the basis that in *Yoder* no alternative existed for the parents or children.)

Accordingly, we conclude that neither parents nor their children have a constitutional right to participate in released-time programs since the failure to grant such time would lack the requisite "coercion" to establish a violation of the Free Exercise Clause and, accordingly, would not place a burden upon the "free exercise" of their religion as interpreted by the courts.[10]

This conclusion is supported by the holding of the federal district court in *Smith v. Smith* (W.D. Va. 1975) 319 F.Supp. 443, overruled on other grounds by the Court of Appeals, and discussed at length, *infra*, under question two. The lower federal court concluded (erroneously) that released-time violated the Establishment Clause. In response to the contention that such holding infringed upon the right of other students and their parents to freely exercise their religion, the court stated:

> "It is well established that 'a violation of the Free Exercise Clause is predicated on coercion,' *Abington School District v. Schempp*, *supra*, 374 U.S. at 223, 83 S. Ct. at 1572. It is true, as defendants point out, that the public school system controls much of a student's life between ages five and eighteen; but this court cannot conclude that without a religious instruction period during school hours students or their parents are prevented or coerced in any way from pursuing their religious beliefs. The right of individuals to freely practice their religious beliefs does not encompass the right to use the government to that end. . . ." (*Id*., at p. 451.)

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[9] We assume that the local churches or religious groups would not schedule their only religious instruction during compulsory school hours to precipitate a constitutional confrontation We do not understand that the question presents such a situation.

[10] We note that the California Constitution is broader with respect to the "free exercise" of religion than is the First Amendment in that it guarantees not only the free exercise of religion, but the "free exercise" thereof "without discrimination or preference." Of course, a school district could not grant released-time to some religious groups and deny it to others. The same result inheres in the United States Constitution through the Equal Protection Clause of the Fourteenth Amendment.

2. PERMISSIBILITY OF DISTRIBUTION OF RELEASED TIME MATERIAL THROUGH SCHOOL AND STUDENT CHANNELS

The second question presented for resolution is whether school districts may allow material regarding released-time religious education to be distributed in the schools by sending information home with the children or by publishing information in P.T.A. newsletters or similar communications.

As discussed at the outset herein, the California case with respect to a released-time plan, *Gordon v. Board of Education*, *supra*, 78 Cal. App. 2d 464, upheld a plan where both the expense of printing and mailing of information concerning the existence of the plan and also of the requisite consent cards were borne by the school system. Accordingly, that case would at least sanction reasonable and necessary administrative steps taken by a public school to inform parents of their rights under the plan, and to obtain parental consent for participation in the program. This, of course, presumes such steps would reflect the requisite "neutrality" toward religion required by the Establishment Clause of the First Amendment.

Gordon v. Board of Education, *supra*, 78 Cal. App. 2d 464 was, however, decided before the United States Supreme Court decisions in *McCollum v. Board of Education*, *supra*, 333 U.S. 203 and *Zorach v. Clauson*, *supra*, 343 U.S. 306. It is to be recalled that *Zorach* was characterized by the court as involving no more than the suspension of school operations "as to those who want to repair to their religious sanctuary for worship or instruction." (343 U.S. at p. 314.) Also, the court in *Zorach* emphasized the fact that the released-time program considered therein did not involve either "religious instruction in public school classrooms [o]r the expenditure of public funds. All costs, including the application blanks, . . . [were] paid by the religious organizations." (343 U.S. at pp. 308–309.) Accordingly, it might be urged that under *Zorach* the schools could not even take the minimal steps necessary to inform the parents of a released time program or permit the distribution of consent cards through school machinery; that since such would involve the expenditure of public funds, if not directly, then indirectly; and accordingly it should be the duty of the religious organization participating in the plan. Though not entirely free from doubt, we would assume, however, that since the United States Supreme Court has approved released-time plans in general, the same court would approve as a "neutral" accommodation the minimal administration necessary to implement the plan even if taken by the public schools. Although *Zorach* may not have involved any expenditure of public funds as "direct costs," it is evident that there were at least some indirect costs or indirect expenditures of public funds from the administration of the plan, such as filing the student registration cards and receiving and filing weekly attendance reports transmitted to the schools by the religious organizations. (See 343 U.S. at p. 308, fn. 1.)

However, returning to more classic analysis, we point out that under the Establishment Clause, "[n]o tax in any amount, large or small, can be levied to support any religious activities or Institutions." (*Everson v. Board of Education* (1946) 330 U.S. 1, 16.) Furthermore, to the authors "of the First Amendment the 'establishment' of religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." (*Walz v. Tax Commission* (1970) 397 U.S. 664, 668; see also, *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612.) In *Lemon v. Kurtzman*, the court first enunciated the tripartite test to determine whether a statute violates the Establishment Clause (403 U.S. at pp. 612–613), which test was recently reiterated by the court as follows in *Committee For Public Education. etc. v. Regan* (1980) 444 U.S. 646:

> "Under the precedents of this Court a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and it does not foster an excessive government entanglement with religion." (*Id*., at p. 653.)

Even released-time plans such as those approved in *Zorach*, where church state contacts are minimal to the extreme, present analytical difficulty under this tripartite test which was developed subsequently to the *Zorach* decision. For example, in *Smith v. Smith*, *supra*, 391 F.Supp. 443, the district court disapproved a released-time plan on the belief that *Zorach* has been disapproved sub silentio by its subsequent decisions. The district court additionally disapproved such plan on its merits primarily because of the high degree of cooperation the public schools gave to the religious instructors in scheduling the schools' classes to accommodate the religious instruction carried on in nearby trailers. The court of appeals, however, overruled the district court with respect to both reasons for its decision. (*Smith v. Smith* (4th Cir. 1975) 523 F.2d 121, cert. den., 423 U.S. 1073 (1976).)

With respect to the merits of the case, the court of appeals believed that the case was indistinguishable from *Zorach*, since 'in *Zorach*, the schools only adjusted 'their schedules to accommodate the religious needs of the people.'" (523 F.2d at p. 124) and

> ". . . the primary effect of the public school's release-time program in *Zorach* must be seen as simply the innocuous diminishing of the number of children in school at a certain time of day. According to this view, public school cooperation with the religious authorities in *Zorach* and the instant case is a largely passive and administratively wise response to a plenitude of parental assertions of the right to 'direct the upbringing and education of children under their control.' . . . . (523 F.2d at p. 125.)

With respect to the District Court's belief that *Zorach* had been overruled sub silentio, the court of appeals stated:

> "If we were to decide this case solely by direct application of the tripartite test recently restated in *Meek v. Pittinger* . . . we would be inclined to agree with the district court's overall conclusion that the Harrisonburg release-time program is invalid. . . ." (*Id*., at p. 124.)

The court, however, noted that the district court's decision antedated the decision in *Meek v. Pittinger* (1975) 421 U.S. 349, and that in *Meek v. Pittinger*, "the Court expressly cited *Zorach* as viable authority." (523 F.2d at p. 124.) Interestingly, both the court of appeals and the district court believed that the first and third portions of the tripartite test were not violated (secular purpose and no undue entanglement with religion) but believed that the second part of the test had been violated on the grounds that the degree of cooperation between the schools and the religious instructors, and the proximity of the religious instruction to the public schools gave the impression of indorsement of that instruction.

Thus, the court of appeals in a nutshell believed that *Zorach* approved cooperation between the public school authorities which "is a largely passive and administratively wise response to a plenitude of parental assertions of the right to direct the upbringing and education of children under their control.'" (523 F.2d at p. 125, emphasis added).

The analytical approach of a search for "passivity" can also be seen in the most recent released-time case our research has disclosed, *Lanner v. Wimmer* (D. Utah 1978) 463 F.Supp. 867. That case involved an integrated plan of secular and religious schooling in separate buildings in close proximity to one another owned by the public school system and the Mormon Church respectively. The court found that the particular released-time plan satisfied the first two elements of the "tripartite test" (secular purpose and a primary effect which neither advances nor inhibits religion), but failed the third element, excessive entanglement with religion. This arose primarily from the granting of credit in the public school system for some of the released-time instruction, although it also found some administrative details to be constitutionally infirm. The search for what we have termed "passivity" in released-time programs is exemplified, at least to some degree, in the following portion of the Court's opinion:

> "The Plaintiffs finally assert that the various administrative features and school-seminary interrelationships are constitutionally impermissible. It is true that there is some integration between the public schools and the seminaries, although it is not as extensive or flagrant as contended. The majority of these incidents or activities were either isolated, discontinued or

> innocuous accommodations of church and state, or non-reoccurring events, none of which represent an on-going practice, such as the presence of a seminary teacher or employee at registration in spring 1976 to assist students to register for seminary, or the offering of a prayer by the junior Seminary Principal a few years ago, or the recognition of the Senior Seminary Principal on the stand and by introducing him at graduation exercises, or by allowing students to vote for student officers during a seminary class, or the appointment of a junior Seminary teacher to serve on a public school safety committee. The fact that seminary teachers may eat in the public schools, as can any member of the general public, or that seminary personnel voluntarily help out at public school events is not an establishment of religion within the meaning of *Lemon*. The process of registration and recordation of attendance is accomplished with a minimum of procedural contact and bureaucracy. The maintenance of a box in the public schools where seminary teachers pick up pertinent notices and the maintenance of an intercom and bell system in the seminary at seminary expense are matters of simple accommodation. The First Amendment is not offended by any of these activities. Their primary purpose and effect is to accommodate the wishes of the students and their parents in the most efficient manner possible. Any unconstitutional entanglements are minimal." (*Id*. at pp. 882–883.)

The court, however, then went on to describe certain administrative practices which exceeded constitutional limits such as sending student aides to the seminaries to pick up attendance slips, the policy of accepting released-time to satisfy minimum daily attendance requirements, and any receipt of state funds by the public school system for students who had been released for seminary courses.

As to the above quoted practices which the court found did not offend the First Amendment, it is not entirely clear whether the court found all these to be so because they were innocuous, or isolated or discontinued. For example, the one we would find to be the most constitutionally suspect would be that of permitting a seminary teacher or employee at registration to assist students to register for the religious instruction. This, in our view, would indicate that the school authorities endorsed the religious program and might smack also of "coercion" or "proselytizing." We believe it is significant to note that at the outset of the court's opinion, the court stated that this was a discontinued practice. Accordingly, we do not interpret the court's language, quoted above, as a constitutional endorsement of the practice. In fact, the court's earlier language, as follows, gives rise equally in our view to a contrary inference. The court stated earlier:

> ". . . Thus, registration for release-time classes regularly occurs off the public school premises, on forms supplied by the seminaries, and by personnel

employed or engaged by that institution. Although at least one member of the LDS seminary staff or faculty was present at Logan High School during registration in 1976, this incident appears to be isolated and it is not now the practice of release-time personnel to be present and assist at the public schools' registration." (*Id*., at p. 872.) We emphasize this particular matter, and our views thereon, because the requester has informed us of his particular concern as to the constitutionality of certain practices. Also, from a review of the foregoing authorities, it should be evident that analysis in released-time cases is *sui generis*. The practices are:

1. *Students* posting information on school bulletin boards regarding released-time;

2. *Students* distributing consent cards;

3. Adults from the churches being permitted on public school grounds to hand out literature concerning released-time programs; and

4. Publication of information with respect to released-time programs in P.T.A. newsletters, or the like.

As to item 3, above, we believe that such would be more than "passive" accommodation and would indicate possible endorsement of or "proselytizing" by the school authorities for particular programs, or all programs, and is not permissible under the Establishment Clause. (See e.g., *Walz v. Tax Commission*, *supra*, 397 U.S. 664, 668.) As to items 1 and 4 we would assume the requester means religious materials or notices with respect to particular released-time programs which would be posted or published at the behest of the churches, and go beyond mere notice by the school authorities of the basic program itself. We believe these also would be more than "passive" accommodations, and could be interpreted as endorsement of programs by the school authorities. Furthermore, insofar as materials were published at the behest of the churches in school bulletins, such would be an impermissible expenditure of tax monies, even though slight, in aid to religion. (See, e.g., *Everson v. Board of Education*, *supra*, 330 U.S. 1, 16.)

As to item 2, we would see nothing which would prohibit students from distributing consent cards provided by the churches off school grounds, or the nonselective distribution of nondenominational consent cards to all students by students as student aids to the public school authorities. The former, being off campus, would not smack of governmental aid or endorsement. The latter would appear to fall within the realm of reasonable accommodation as an administrative detail. However, in our opinion, students should not be permitted to selectively distribute consent cards on school property nor

should they distribute denominational consent cards on school property since such could be construed as impermissible public endorsement of released-time programs. (*Cf. Meltzer v. Board of Public Instruction of Orange Cty.* (5th Cir. 1978) 577 F.2d 311, 318–319, improper to use public school machinery to distribute Gideon Bibles to public school children.)

Although the matters we would consider constitutionally suspect may appear to some as *de minimus*, we reemphasize the fact that the released-time program approved by the United States Supreme Court involved a program where virtually *all* administrative steps were done by the churches, at church expense, and *off school property*. Accordingly, the United States Supreme Court has yet to even approve distribution of notice of released-time and consent cards by the school authorities or at their expense. Although we conclude that such would probably be approved as a reasonable and necessary accommodation to implement a plan, anything beyond that is certainly constitutionally suspect. With regard to the *de minimus* point, we quote from *Abington School District v. Schempp*, *supra*, 374 U.S. 203, 225 as follows:

> " . . . . it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'"

Accordingly, we conclude that school authorities should not take any steps or permit any activity on school property, or with school facilities or machinery, beyond that which is reasonably necessary to inform parents in the most neutral manner possible of a school district's released-time programs and to obtain the consent of parents for participation therein by their children.

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