



7-1-2011

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Casey W. Ashcroft

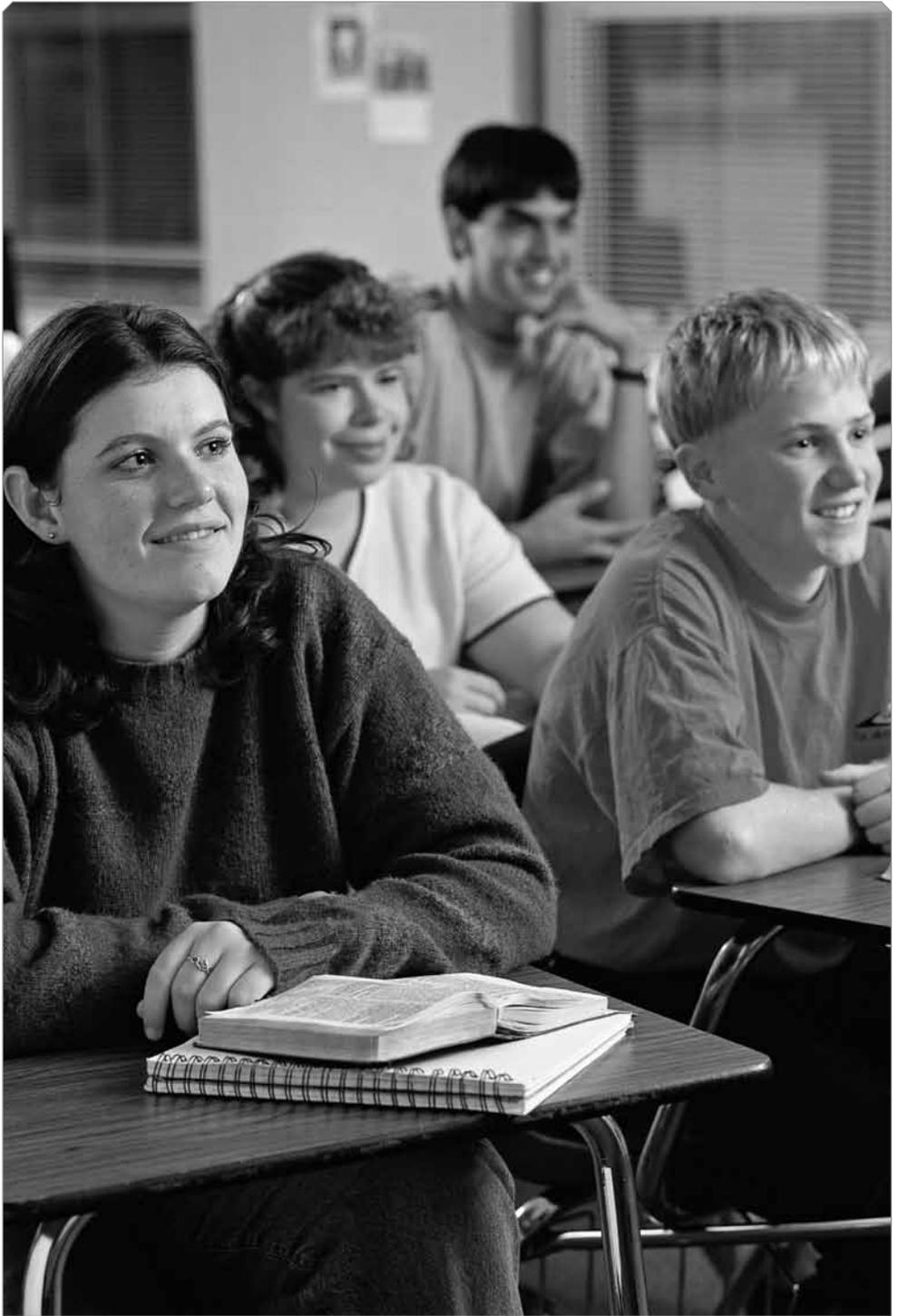
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### BYU ScholarsArchive Citation

Ashcroft, Casey W. "Regulations for Released-Time Religious Education: A Historical Perspective." *Religious Educator: Perspectives on the Restored Gospel* 12, no. 2 (2011).  
<https://scholarsarchive.byu.edu/re/vol12/iss2/12>

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In 1912, Joseph F. Merrill petitioned the superintendent of Granite School District to allow students to be excused from school for one hour each day to attend religious instruction in a separate building.

# *Regulations for Released-Time Religious Education: A Historical Perspective*

CASEY W. ASHCROFT

Casey Wayne Ashcroft ([ashcroftcw@ldschurch.org](mailto:ashcroftcw@ldschurch.org)) is an instructor at Logan Seminary in Logan, Utah.

Religion has been one of the most contentious issues in public schools,” wrote Martha McCarthy.<sup>1</sup> Topics over which religion and public schools have continually clashed in the courtroom over the years include student-led devotionals, prayers at graduation ceremonies, the reciting of the Pledge of Allegiance, prayer sessions, the displaying or distributing of religious material, religious references on signs at school-sponsored sporting events, the wearing of religious apparel, religion in curriculum (particularly creationist verses evolutionary theory in science classes), and released-time religious instruction. Whereas in the past, prudent and reasonable educators did not have to worry about litigation, that is not the case anymore. In fact, “their risk of litigation has grown as our society has turned increasingly litigious and school populations have become more diverse and challenging.”<sup>2</sup> For example, the advocate group Americans United for Separation of Church and State receives “dozens of complaints of possible church-state violations every year.”<sup>3</sup> As a result, “fear of litigation” has “made school boards and local governments reluctant to publicly defend moral principles.”<sup>4</sup>

The fear of litigation has been increased by misconceptions that educators and the public have about what is appropriate with respect to regulations and allowances in school-related church-state issues. In other words, “Americans are confused about the role of religion in schools.”<sup>5</sup> Evidence of this confusion among school teachers and administrators is examined in a 2002 study which suggests that teachers have considerable misperceptions about church-state legal parameters and base their conduct on rules of thumb instead of an understanding of the law.<sup>6</sup>

The legal parameters surrounding released-time religious instruction are not immune to this national fear and confusion. Lois F. Berlin notes, “Under the First Amendment, some activities are prohibited; others are protected.”<sup>7</sup> Therefore, it is important for educators to know which are prohibited and which are not. Understanding what is prohibited and what is protected is essential to establishing and maintaining a legal working relationship between released-time programs and public schools.

The purpose of this paper is to identify the legal regulations surrounding released-time religious instruction in an attempt to eliminate confusion, lessen litigation, and give direction with respect to this sphere of education. To accomplish this, we must first take a look at the beginning of released-time programs to situate the phenomenon in its historical context. It is then important that we analyze major litigation and court rulings that have made an impact on defining the legal parameters of released-time instruction. Lastly, it will be beneficial to list the legal guidelines that resulted from the court cases. In so doing, we see a clearer definition of separation between church and state and accommodation for private religious beliefs so as to improve relations between released-time programs and public schools.

### **Beginning of Released-Time Religious Instruction**

Released-time religious instruction was first proposed at a teachers’ conference in New York in 1905. The proposal was to allow public schools to be closed one day a week so that parents could have the option of sending their children to religious instruction outside the school building. Nearly a decade later, in 1914, William Wirt, the superintendent of Gary Schools in Indiana, implemented a released-time program. He did so because of his concern that children were not receiving enough religious and moral instruction in public school. His program consisted of local clergymen holding classes within the school for those students wanting to attend. The program grew and inspired

similar programs to begin throughout the United States under the names of release(d) time, weekday religious education, and dismissed time.<sup>8</sup>

Though most histories cite Wirt's released-time program as being the first, documentation reminds us that a released-time program had already been running in Utah since 1912. This program was started by Joseph F. Merrill, a local Church leader who later became commissioner of education and an Apostle. In establishing the program, Merrill petitioned the superintendent of Granite School District and the principal of Granite High School to allow students to be excused from school for one hour each day, with parental permission, to attend religious instruction in a building that would be constructed by the ward across the street from the school. Both the superintendent and the principal had no objections. The Granite school board and state board also approved the program. After five years of success, other local Latter-day Saint congregations started petitioning school districts for a released-time program. By 1919, thirteen Latter-day Saint released-time programs, called seminaries, were in operation in Utah, with 1,528 students. By 1925, seminaries were adjacent to all but eighteen high schools in the state.<sup>9</sup>

Since their humble beginnings in Utah and Indiana, released-time programs have grown tremendously to the present day. For example, the Church reports 115,787 students registered in released-time classes across the world,<sup>10</sup>



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while the Fellowship of Christian Released Time Ministries estimates on their website over 1,000 released-time programs in operation today in the United States, involving over 250,000 students in kindergarten through high school.<sup>11</sup>

### **Litigation and Court Rulings regarding Released-Time Instruction**

Though at first released-time programs of different religious denominations grew rapidly throughout the United States, growth began to slow in 1948 when a released-time program in Champaign, Illinois, was ruled unconstitutional in a US Supreme Court hearing. The case was *McCollum v. Board of Education No. 71*.<sup>12</sup>

In the *McCollum* case, the released-time program in question consisted of teachers representing different religious denominations entering the public school classrooms and giving religious instruction for thirty minutes once a week. Those students not participating were to go to the library to study during that time. Justice Hugo Black, speaking for the court, claimed that the use of tax-supported property for religious instruction and the close cooperation between church and state officials constituted a violation of the Establishment Clause of the First Amendment—that Congress shall make no law respecting an establishment of religion. He commented, “This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.” In citing an earlier court case, *Everson v. Board of Education* (1947), the court concluded that the “wall of separation” between church and state had been breached by the released-time program. It was stressed, however, that the decision did not “manifest a governmental hostility to religion or religious teachings” and that both religion and government can “achieve their lofty aims if each is left free from the other within its respective sphere.”<sup>13</sup>

For nearly thirty years, no federal court had found released-time programs to be unconstitutional before the *McCollum* hearing. Afterward, many thought any released-time program would be found unconstitutional. However, that sentiment only lasted until the US Supreme Court case *Zorach v. Clauson* (1952), which came four years later.<sup>14</sup>

The *Zorach* case dealt with a New York education law that permitted public schools to release students during school hours—on written requests from their parents—to leave the school and go to religious buildings for instruction or devotional exercises. Students not released stayed in the classrooms.

The churches participating reported to the school the names of students released from public schools who failed to report for religious instruction. The program involved neither religious instruction in public schools nor the expenditure of public funds, as did the released-time program in the *McCullum* case.

Justice William O. Douglas, in giving the opinion of the court, stated, “When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. . . . To hold that it may not would be to find in the Constitution a requirement that government show a callous indifference to religious groups.”<sup>15</sup> It was then held by the court that the program did not violate the First Amendment because it neither prohibited the free exercise of religion nor made a law respecting an establishment of religion. In making this decision, the court emphasized the difference between a school supporting religious instruction and merely accommodating the students’ religious needs.

Despite the outcome of the *McCullum* case, “few released-time programs have been challenged in the years since *Zorach*.”<sup>16</sup> The *Zorach* ruling by the Supreme Court “has provided a legal basis for the existence of released-time programs.”<sup>17</sup> It has become the “line of demarcation” with respect to litigation of released-time programs because it changed the parameters of the debate.<sup>18</sup> It has become a landmark case and the comparison many lower courts have used when considering the constitutionality of released-time programs. Important lower court cases that have used the *Zorach* decision to validate the legality of a released-time program are *Perry v. School District No. 81* (1959), *Holt v. Thompson* (1975), *Smith v. Smith* (1975), *Lanner v. Wimmer* (1981), *Ford v. Manuel* (1985), and *Doe v. Shenandoah County School Board* (1990).

B. Glen Epley suggests that for educational leaders to “navigate effectively and appropriately” around issues of church and state in public schools, they need to examine court cases regarding the First Amendment “as applied to public schools.”<sup>19</sup> Therefore, in following this suggestion, we will look briefly at each of these lower court cases dealing with released-time instruction, in chronological order, to further define the parameters of a legal released-time program beyond what *McCullum* and *Zorach* decided.

In *Perry v. School District No. 81* (1959), Washington State’s Supreme Court upheld a released-time program but struck down the school district’s practice of allowing teachers to explain the program to students and hand out

registration cards. In *Holt v. Thompson* (1975) Wisconsin's Supreme Court upheld the state's released-time statute as accommodating students' religious needs.<sup>20</sup>

In *Smith v. Smith* (1975), a federal district court found a released-time program in Virginia to be unconstitutional, arguing that *Zorach* was old law that was no longer valid. The program was organized and operated by a nonprofit organization for elementary school students. The students met in trailers parked on the street adjacent to the school or in churches nearby. Program organizers worked with school officials to coordinate schedules and to designate which classes the students could be drawn from for the religious instruction. The First Federal Circuit Court of Appeals reversed the lower court's ruling. In doing so, the higher court stated that *Zorach* was still "good law";<sup>21</sup> therefore, released-time programs were considered constitutional when "the schools aim only to accommodate the wishes of the students' parents." Thus the court decided the released-time program in question did not "involve more entanglement between the school administration and the religious authorities than was present in the *Zorach* program."<sup>22</sup>

In *Lanner v. Wimmer* (1981), the Tenth Circuit Court of Appeals upheld a ninth- to twelfth-grade released-time seminary program in Logan, Utah, which enjoyed a high level of coordination with the high school officials. In *Lanner*, coordination between the released-time program and the public school included (1) released-time listed as a course option on school registration forms; (2) students released for one hour each day to attend seminary; (3) the negotiation of land adjacent to the school; (4) a shared public address system to coordinate class schedules; (5) a mailbox for the released-time instructors that was placed in the public school to prevent scheduling conflicts; (6) the seminary faculty, as members of the general public, being requested from time to time to assist in public school activities, such as taking tickets at school events, handling line markers at football games, and timing events in track meets; (7) released-time personnel using school cafeterias; and (8) awarding credit for classes involving the Old and New Testaments.<sup>23</sup>

Despite opposition claiming that the high level of interaction and awarded credit was a breach of the First Amendment, the trial court found the program to be a constitutional accommodation of the spiritual needs of the students. However, the court also found that "the least entangling administrative alternatives must be elected when a released-time program is instituted."<sup>24</sup> Therefore, the court of appeals agreed that the released-time program did

not entirely violate the First Amendment but decided that “certain aspects of this program violate the establishment clause” because they involved too much entanglement between the public school and the seminary.<sup>25</sup> Aspects the court felt included too much entanglement between church and state included (1) the keeping of daily attendance by the public school of the students attending seminary, though the seminary officials were to report their attendance regularly to the school, and (2) allowance of credit for Old and New Testament courses because it required the state to become too entangled through the examination and monitoring of the religious course’s curriculum—though there was an allowance for elective credits upon state approval. All other aspects of the program were upheld as constitutional accommodation of religious beliefs and conveniences for the administration and students.

In *Ford v. Manuel* (1985), the Federal District Court of Ohio forbade released-time classes from meeting in classrooms rented from the school district—at a price of one dollar a year—and from holding those classes during hours which overlapped the public school day because such a practice allowed the program to benefit from state compulsory education laws.<sup>26</sup> The Federal District Court for the western district of Virginia also ordered in *Doe v. Shenandoah County School Board* (1990) that a released-time program stop recruiting students in public school classrooms, enrolling students whose parents had not given their consent, and holding classes in remodeled school buses parked next to the school because it gave the appearance of school sponsorship.<sup>27</sup>

### Legal Guidelines for Released-Time

“Enumerating all of the elements that will make a program constitutional or unconstitutional may not be possible”; however, the Supreme Court and lower court rulings that have been mentioned suggest some basic legal guidelines for released-time instruction.<sup>28</sup> Below is a list of guidelines, extracted from these important court decisions, which we can use today to establish and maintain legal released-time programs.

1. Released-time programs must not be created or implemented using state funds.<sup>29</sup>
2. Released-time programs cannot be held on school grounds but may be held in separately owned buildings or trailers adjacent to the school.<sup>30</sup> Buildings or trailers must avoid the appearance of school sanction;<sup>31</sup>

however, the public school is not to impose upon a church's choice of how and in what fashion they construct the released-time site.<sup>32</sup>

3. Students may only be released from the school with written permission from the student's parent or legal guardian.<sup>33</sup>
4. Recruiting students for released-time programs must be done by released-time personnel without assistance from the public school. This includes public school personnel registering students in such classes or in speaking in favor of or against them.<sup>34</sup> However, enrollment lists from the school are allowed to be requested by released-time administrators in order to contact parents about the released-time program.<sup>35</sup>
5. The released-time programs' daily attendance must be maintained by released-time administrators and not by school officials; however, the program administrators may be required to make attendance records available for the public school to ensure that released students are attending.<sup>36</sup>
6. Records of attendance, grades, and other data from the released-time programs may not be included in reports from the school to parents, with the exception of reporting a student's repeated absences from the released-time program.<sup>37</sup>
7. Elective and eligibility credit may be granted to students who participate in a released-time program, but academic credit cannot. Additionally, schools may claim custodial and funding credit for the purpose of meeting state attendance laws and receiving state-allocated funds.<sup>38</sup>
8. Student class schedules for public schools may not list released-time instruction as an option, though for the convenience of the school, the registration forms may contain a space indicating *released-time*.<sup>39</sup>
9. Public schools may not encourage participation in released-time instruction or punish students for not participating.<sup>40</sup> However, it is permissible for the school to take some action against students who are enrolled in released-time classes but do not attend.
10. Teachers of the released-time program are not to be considered part of the public school faculty or be requested by the public school to assume responsibilities at public school programs and events unless they are acting as a parent or regular citizen instead of a school official.<sup>41</sup>
11. The connection of bells, telephones, intercoms, or any other device may not be established, unless it will benefit and convenience the pub-

lic school and the released-time program bears all costs of installation and maintenance.<sup>42</sup>

12. Released-time programs may hold parent teacher conferences at the same time as the public school conferences for convenience to the parents, but should be held separately in their respective sites.<sup>43</sup>

In using these guidelines, it must be remembered that even the appearance that any element of the released-time program is connected with the school may be grounds for striking down that element of the program.<sup>44</sup> It is also important to realize that the only court decisions that are binding on all states are those of the US Supreme Court. Therefore, when a guideline relies on decisions of lower courts it “is merely an indication of how one court has viewed a particular aspect of a released time program” and not a binding law upon all states.<sup>45</sup>

## Conclusion

Religion in public schools is an “emotionally charged issue” that must be addressed.<sup>46</sup> By taking a historical perspective, we can see that while many religious activities have been prohibited in public school, a student’s choice to be released from school to attend religious instruction has been protected. Over a number of years, involving many different court decisions, released-time religious instruction has gained legitimacy in the courts. By analyzing important court cases involving released-time instruction, as we have done here, we can establish some general and basic guidelines or regulations for released-time programs. These guidelines are of extreme import for the success of a released-time program because (1) they can clear up prevailing misconceptions about religion in public schools and help administrators, teachers, and the public see clearly the line of separation between church and state with respect to released-time programs, and (2) they provide legal boundaries that empower administrators to establish positive working relationships without fear of litigation. **RE**

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## Notes

1. Martha McCarthy, “Beyond the Wall of Separation: Church-State Concerns in Public Schools,” *Phi Delta Kappan*, June 2009, 714.

2. Lois F. Berlin, “Public School Law: What Does It Mean in the Trenches?” *Phi Delta Kappan*, June 2009, 733.

3. Rob Boston, "Letters from AU's Legal Department Solve Church-State Problems in Schools without Going to Court," *Church and State* 62, no. 5 (May 2009): 5.
4. James E. Faust, "A New Civil Religion," *Ensign*, October 1992, 71.
5. Jeff Passe and Lara Willox, "Teaching Religion in America's Public Schools: A Necessary Disruption," *Social Studies* 100, no. 3 (May 2009): 102.
6. Jeffery R. Campbell, "High School Teachers' Knowledge of Legal Parameters regarding Church/State Issues" (PhD diss., University of Arizona, 2002), 2.
7. Berlin, "Public School Law," 735.
8. *Time for God: Accommodating Religious Free Exercise Through Released-Time Education* (Washington DC: The Family Research Council, 2000), 5.
9. William E. Berrett, *A Miracle in Weekday Religious Education* (Salt Lake City: Salt Lake Printing Center, 1988), 27-45.
10. *S & I Annual Report* (Salt Lake City: The Church of Jesus Christ of Latter-day Saints, 2010).
11. Fellowship of Christian Released Time Ministries website, <http://www.rtce.org/pages.asp?pageid=32778>.
12. Kelly Soderlund, "Indiana 'Release' for Religious Studies Stands Test of Time," *Education Week*, April 2, 2008, paragraph 9.
13. *McCullum v. Board of Education of School District No. 71*, 333 U.S. 203 (1948), 210-12.
14. Samuel Ericsson and others, "Religious Released Time Education: The Overlooked Open Door in Public Schools" (Oaks Park, IL: Christian Legal Society, 1996), 3.
15. *Zorach v. Clauson*, 343 U.S. 306 (1952): 313-14.
16. *Time for God*, 10.
17. *Time for God*, 6.
18. Eric E. Stones, "Release-Time for Religious Instruction: Public High School Administrators' Attitudes and Perceptions" (EdD diss., Washington State University, 2006), 23.
19. B. Glen Epley, "The Establishment Clause and Public Schools in the 21st Century," *NASSP Bulletin* 91, no. 3 (September 2007): 181-82.
20. *Time for God*, 12.
21. *Smith v. Smith*, 523 F.2d 121, 125 (4th Cir. 1975), paragraph 15.
22. *Smith v. Smith*, paragraph 12.
23. *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981).
24. *Lanner v. Wimmer*, paragraph 36.
25. *Lanner v. Wimmer*, paragraph 24.
26. *Ford v. Manuel*, 629 F.Supp. 771 (W.D. Ohio 1985).
27. *Doe v. Shenandoah*, 737 F.Supp. 913 (W.D. Va. 1990).
28. Adapted from *Time for God*, 12.
29. See *McCullum v. Board of Education*. See also *Zorach v. Clauson*.
30. See *Zorach v. Clauson*.
31. See *Doe v. Shenandoah*.
32. See *Lanner v. Wimmer*.
33. See *Doe v. Shenandoah*. See also *Zorach v. Clauson*.
34. See *Perry v. School District No. 81* (1959) as cited in *Time for God*, 12.
35. See *Smith v. Smith*.
36. See *Zorach v. Clauson*. See also *Lanner v. Wimmer*.
37. See *Lanner v. Wimmer*.

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38. See *Lanner v. Wimmer*.
  39. See *Lanner v. Wimmer*.
  40. See *Religious Expression in Public Schools: A Statement of Principles* (Washington DC: US Department of Education, 1998).
  41. See *Lanner v. Wimmer*.
  42. See *Lanner v. Wimmer*.
  43. See *Lanner v. Wimmer*.
  44. See *Lanner v. Wimmer*. See also *Doe v. Shenandoah*.
  45. Ericsson and others, *Religious Released Time Education*, 2.
  46. Berlin, "Public School Law," 735.