IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Freedom From Religion Foundation, Inc., a Wisconsin non-profit corporation, Robert Moss and Melissa Moss; and Ellen Tillett, individually and as general guardian of her minor child; Plaintiffs, v. Spartanburg County School District No. 7, Defendant.	)	Case No. 7:09-cv-1586-HMH

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

INDEX OF EXHIBITS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Discovery in this case has amply confirmed what the School District has said all along—Plaintiffs are tilting at windmills. Rather than the unconstitutional monster of Plaintiffs' fevered imaginings, the School District's released time policy is entirely unremarkable in its fidelity to *Zorach* v. *Clauson* and *Smith* v. *Smith*.

There are two reasons the case should be dismissed: standing and the merits. With respect to standing, discovery and Plaintiffs' concessions after the Court ruled on the motion to dismiss have made clear that Plaintiffs have suffered no injury and therefore lack standing.

With respect to the merits, the District's released time policy easily passes muster under controlling released time authority, including the Fourth Circuit's decision in *Smith*. First, the District's purpose in implementing the policy—accommodating students and parents who wish to receive religious instruction—is indubitably constitutional. Second, the District has carefully avoided advancing religion by maintaining an arm's-length relationship with the current released time provider and not expending school resources or staff time on the program. And far from coercing participation in released time instruction, the Policy actually results in several academic *dis*incentives for students seeking to maximize their GPAs and college credit.

The Court need not indulge Plaintiffs' demonstrably unfounded suspicions. Summary judgment should be entered for the District, and the case should be dismissed.

UNDISPUTED FACTS SUPPORTING SUMMARY JUDGMENT

I. Released time accommodations in South Carolina

In 1952, the Supreme Court established that public schools may allow students to leave campus for a portion of the school day to attend religious instruction so long as public schools nei-

ther funded nor promoted it. *Zorach* v. *Clauson,* 343 U.S. 306 (1952); *Smith* v. *Smith*, 523 F.2d 121, 123 (4th Cir. 1975). In doing so, the Court explained:

> 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. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Zorach v. *Clauson,* 343 U.S. 306 *Id.* at 314. Since then, many school districts around the country have created accommodations for released time instruction. Ex. A (more than 250,000 public school students in 32 states). South Carolina public school students began attending released time classes in 1992. Ex. B-1. Approximately 12,000 South Carolina students currently attend released time classes each week. *Id*.

In 1997, the South Carolina Legislature increased the number of course credits required for high school graduation by twenty percent.[1] The credit increase had an unintended side effect: it drastically reduced the ability of South Carolina school districts to accommodate those high school students who wished to receive released time religious instruction. The impact of the credit increase was felt by parents and students across the state. As a Columbia citizen complained, "if you can't get credit for it, then you can't afford to take the time to take the class." Ex. B-2 (Graves dep.) at dep. ex. 176.

The law's effects were felt in Spartanburg County School District No. 7 ("District") too: Spartanburg County Bible Education in School Time ("SCBEST"), a non-profit organization, has been offering released time classes to students in the District since 1997. Ex. B-3 (Bridges) at

[1] 1997 S.C. ACTS 155; S.C. CODE ANN. REGS. 43-234.

73:4-6. But it "lost its high school participants after the state started increased graduation requirements in 1997." Ex. B-2 (Graves dep.) at dep. ex. 176.

In 2006, the South Carolina Legislature took action to restore its school districts' ability to accommodate requests for released time instruction.[2] Having determined that "the absence of an ability to award [elective credit] has essentially eliminated the school districts' ability to accommodate parents' and students' desires to participate in released time programs," 2006 S.C. ACTS 322, the Legislature enacted the Released Time Credit Act ("RTCA").

The RTCA allows students to earn "no more than two elective Carnegie units[3] for the completion of released time classes in religious instruction." S.C. CODE ANN. § 59-39-112. The criteria for awarding Carnegie unit course credits, twenty-four of which are required for graduation (S.C. CODE ANN. REGS. 43-234), "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." S.C. CODE ANN. § 59-39-112. The statute also specifies that "classes in religious instruction are evaluated on the basis of purely secular criteria" and that evaluation should "not involve any test for[] religious content or denominational affiliation." *Id.* State regulations require that letter grades be assigned for all courses for which Carnegie units are granted. Ex. B-5 at 55-03-6.

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[2] The State had passed a 2002 Act reaffirming for State school districts that released time was legal, but this law did not address whether public school students could earn credit toward graduation for successfully completing such courses. See S.C. CODE ANN. § 59-1-460.

[3] The term "Carnegie Unit" was developed in 1906 by the Andrew Carnegie Foundation to measure the amount of time a student spent in class. Ex. B-4 (Carnegie Foundation FAQ); Ex. B-16 (District 30(b)(6) dep.) 58:25-59:3. South Carolina uses the term "Carnegie unit" or "unit" to measure the credits students must earn to qualify for a South Carolina high school diploma. See Ex. B-5 (S.C. Uniform Grading Policy), S.C. CODE ANN. REGS. 43-234 (listing "Requirements for Earning a South Carolina High School Diploma").

The impact of the RTCA was to add released time to a long list of elective and off-campus credit opportunities available to South Carolina public high school students. For example, students may choose to enroll in dual-credit courses with local universities, such as the advanced German course Plaintiff Melissa Moss took at Wofford College.[4] Ex. B-7 (Ps' Resp. to D's RFA) at Nos. 28-32; Ex. B-8 (Melissa Moss dep.) at 75:10-16, dep. ex. 197. These courses enable students to earn both Carnegie units and college credit. Ex. B-5 at 55-03-3 to 55-03-4. Similarly, students may choose to take International Baccalaureate (IB) or Advanced Placement (AP) classes, which may be offered as traditional courses or may be "offered online and in other non-traditional settings." *Id.* Failing students can make up credits using software-driven courses "aligned with South Carolina's Academic Standards." Ex. B-9 at 4.

II. SCBEST forms Agreement with Oakbrook and informs District of RTCA.

After the RTCA became law, the existing released time instruction provider in the District SCBEST decided that it would petition the District to adopt a new released time policy allowing elective credit. Before doing so, and on its own initiative, SCBEST entered into an Agreement with a local accredited private school, Oakbrook Preparatory School ("Oakbrook"). Ex. B-2 (Graves dep.) at dep. ex. 147; Ex. B-10 (SCBEST dep.) at 66:22-25. Under this Agreement, Oakbrook agreed to review and approve SCBEST curriculum and teachers and provide oversight for the released time course. Ex. B-2 (Graves dep.) at dep. ex. 147).

With this Agreement in place, SCBEST approached the District about allowing elective credit for released time instruction. Ex. B-10 (SCBEST dep.) at dep. ex. 109. SCBEST wrote several letters to the District and sought meetings with various personnel to explain the RTCA

[4] Wofford College is a Methodist-affiliated liberal arts college in Spartanburg, South Carolina. It is also where Plaintiff Robert Moss works as a biology professor. Ex. B-6 (Robert Moss dep.) at 11:2-5.

and propose that the District adopt a revised released time policy in light of the RTCA. Ex. B-2 (Graves dep.) at dep. ex.180, 182, 183; Ex. B-10 (SCBEST dep.) at dep. ex. 59.

III. District considers and adopts Policy.

On January 4, 2007, the District's Instructional Services Committee met and discussed whether to recommend a new released time policy. An SCBEST teacher was present to discuss its proposal for elective credit and to answer questions the Committee might have about the academic rigor of the program. Ex. B-10 (SCBEST dep.) at 25:15-18, dep. ex.108. There is no evidence that SCBEST proposed, or that the District ever considered, making SCBEST the sole released time instruction provider for the District.

At the next Board of Trustees meeting, the Instructional Services Committee proposed that the Board develop and adopt a new released time policy modeled on the RTCA.. Ex. B-2 at dep. ex. 151. The Board voted unanimously "in favor of the motion to offer the time release [sic] credit and to adopt [the RTCA]." *Id*.

The District drafted a policy based on the RTCA and a model policy that the South Carolina School Board Association ("SCSBA") released in August 2006. Ex. B-11 at 49–53. After the first reading (Ex. B-2 (Graves dep.) at dep. ex. 152), District administrators made slight changes to the Policy to clarify the School District's involvement. The District changed the word "award" to "accept" to clarify that the District to "wouldn't be providing that course," and would not be evaluating the content of any released time courses. Ex. B-12 (McDaniel dep.) at 31:20-32:18, 8:19-10:10. The District also believed that the revised language would be easy to implement "across any case that might come to the District under this Policy." *Id*. at 27:12-13, 15:6-10, 23:11-23; Compare Ex. B-11 at 53 (SCSBA model policy) with Ex. B-13 (District's released time policy). At its March 7, 2007, meeting, the Board of Trustees again read and voted unani-

mously to adopt the revised Released Time Policy ("Policy"). Ex. B-2 (Graves dep.) at dep. ex. 153.

The Policy sets forth the criteria under which the School District will release high school students to attend off-campus religious instruction courses during normal school hours. Ex. B-13. For classes that meet these criteria, and in accordance with the RTCA, high school students in the School District may earn up to two elective Carnegie unit credits. *See id.*

The Board understood and intended when it adopted the Policy that it was setting up a process, not authorizing or limiting access to any particular released time provider. Ex. B-14 (Hurst dep.) 31:5-7 ("I don't think the Board has any say . . . about which group may offer [released time] classes."); Ex. B-2 (Graves dep.) at dep. ex. 159 ("[The District's Board] did not recently grant SCBEST 'approval to begin offering this course for elective credit.'. . . [The District] and Spartanburg High School have made no decisions regarding application of the policy . . . ." (emphasis in original)); Ex. B-15 (D's Resp. to Ps' 2d set of Interrogs.) at No. 3 ("Defendant states that at no time since January 1, 2007, has it approved SCBEST's providing of released time religious education."). The Board did not seek out SCBEST, nor was it concerned with the specific content of any course SCBEST might seek to teach District students for credit. Ex. B-16 (District 30(b)6 dep.) at 39:13-40:4 ("[T]here was no particular interest in the content of that course."), 77:21-24 ("[T]here's been no Defendant evaluation of the content of that class. It's not our class."), 73:20-74:6; Ex. B-18 (Tobin dep.) at 22:5-12 ("I saw a syllabus . . . . I did not analyze it or take an in-depth look at it . . . . I skimmed it.").

IV. The Moss family receives Drew Martin's letter, protests the Policy.

At the close of the March 7 meeting, and ***after*** the District had already voted unanimously to adopt the Policy, Plaintiff Robert Moss's[5] wife, Heidi, offered comments opposing the Policy. Ex. B-2 (Graves dep.) at dep. ex. 151. In her comments Heidi Moss stated that the Policy was unconstitutional and that she was contacting the ACLU to file a lawsuit against the School District. Ex. B-6 (Robert Moss dep.) at dep. ex. 189. There is no evidence that Plaintiffs or anyone else expressed to the Board any opposition to the Policy at any time prior to the final vote.

The Mosses' comments against the Policy were driven by a letter they had received from Drew Martin, the Executive Director[6] of SCBEST, in February.[7] *Id*. at 42:1–4, dep ex. 189. The letter erroneously claimed that "[t]he District 7 School Board recently granted SCBEST approval to begin offering this class for elective credit." Ex. B-2 (Graves dep.) at dep. ex. 157. The letter directed parents and students to the SCBEST website and provided a registration card for interested families. *Id.* The Mosses presumed that the District had approved the letter before it was sent, and therefore believed that the District had approved SCBEST as a released time provider even before it adopted its Policy. Ex. B-6 (Robert Moss dep.) at 28:23-29:2 ("I initially believed that. I am not sure at this point.").

The following day, the Mosses wrote to the principal of Spartanburg High School ("SHS"), reiterating their opposition to the SCBEST program and the Policy. Ex. B-19. The Mosses

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[5] Plaintiff Robert Moss is the father of Plaintiff Melissa Moss, a District student who started tenth grade in the fall of 2007. When Plaintiffs filed their original complaint Melissa Moss was a minor and Plaintiff Robert Moss represented her interests. Melissa Moss has since turned eighteen and was added as a plaintiff in her own right.

[6] Drew Martin has also taught SCBEST's released time course for Spartanburg High School students since fall 2007.

[7] The Complaint falsely alleges that Plaintiff Ellen Tillett received, and was damaged by receiving, the SCBEST letter. Dkt. 57 ¶ 9(a), 11. Plaintiffs now admit that Plaintiff Tillett did not receive the SCBEST letter (Ex. B-7 at No. 37) and furthermore did not read it thoroughly until Robert Moss's deposition. Ex. B-25 (Tillett v.1 dep.) at 29:2-4.

threatened, "[i]f this decision isn't reversed immediately, we *will* be approaching the ACLU to sue on our behalf." *Id.*[8]

V. The District responds to the SCBEST letter and to the Mosses.

The District did not see the SCBEST letter until the Mosses brought it to its attention. Ex. B-18 (Tobin dep.) 13:4-6, 32:1-3; Ex. B-16 (District 30(b)(6) dep.) 25:7-19. And it appears that the District responded to a "freedom of information" request from SCBEST for an address list. Ex. B-10 (SCBEST dep.) at dep. ex. 110; Ex. B-21 (Grayson Hartgrove dep.) at 38:16-39:21; Ex. B-16 (District 30(b)(6) dep.) at 28:4-11; Ex. B-18 (Tobin dep.) at 13:11-13, 14:3-16. In addition, the District had no indication of what SCBEST's letter would say. Ex. B-16 (District 30(b)(6) dep.) at 24:25-25:15; Ex. B-18 (Tobin dep.) at 13:4-6.

The District saw that SCBEST's letter contained several factual errors and promptly wrote its own letter correcting them. Ex. B-2 (Graves dep.) at dep. ex. 159 ("This letter was sent without either the knowledge or approval of [SHS or the District]. The letter is not accurate with respect to the status of the SCBEST course."). SCBEST also admitted that the letter was inaccurate. Ex. B-10 (SCBEST dep.) at dep. ex. 83 ("WE WERE WRONG!"). The SHS principal at the time, Rodney Graves,[9] explained in a newspaper article later that month that no students could sign up to take a released time course until the District developed implementation guidelines. Ex. B-2 (Graves dep.) at dep. ex. 177, p.2.

Although the District had received no other complaints about the Policy, (Ex. E), it reached out to the Mosses and invited them to a meeting the Interim Superintendent Dr. Walt Tobin and

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[8] The Mosses did not wait for a response from the District, but wrote a letter to the ACLU that same day. Ex. B-20; Ex. B-2 (Graves dep.) at dep. ex. 177.

[9] Rodney Graves was the principal of SHS from July 1, 2005, until July 1, 2008, when he moved to his current position in the District's main office as its Director of Secondary Education. Ex. B-2 (Graves dep.) at 8:16-9:5.

Board Chairman, Chip Hurst. Ex. B-22 at No. 20. The Mosses shared their concerns, and the District responded. Chip Hurst explained to the Mosses, in Plaintiff Robert Moss's words, that "in accordance with the law, the Board could not examine the contents of the course, so he had no way of knowing if it was 'proselytizing.'" Ex. B-23 at Interrog. No. 17. In response to the Mosses' claim that the Policy was endorsing Christianity, the District told the Mosses that it would welcome a Jewish group teaching a released time course. *Id.*[10] The District also assured the Mosses that SCBEST has no special or preferential status with the District. *Id.*; Ex. B-14 (Hurst dep.) 18:12-19:10. This was the Mosses' last contact with the District about the Policy until they filed this lawsuit two years later.[11] Ex. B-6 (Robert Moss dep.) at 79:5-81:19.

VI. The District makes implementation decisions regarding the Policy.

From the beginning, the District has communicated thorough its actions and its directives that its focus under the Policy is on accommodating the expressed interests of District parents and students in participating in released time. Ex. B-16 (District 30(b)(6) dep.) at 93:23-94:7; Ex. B-2 (Graves dep.) at 120:21-121:1.

Around June 2007, the District's Director of Secondary Education, Nan McDaniel, spoke to SHS principal Rodney Graves and director of guidance John Wolfe to explain to them how the District would process student requests to take a released time class for credit. She informed them "that the District will allow credit for the class based solely on Oakbrook's approval of the class," and that "this is the normative practice on any transfer credit from private schools." Ex. B-10 at dep. ex. 68; Ex. B-12 at 17:13-23; Ex. B-24 (Wolfe dep.) at 30:21-25. Because Oak-

[10] In the spring of 2009, the District's current Director of Secondary Education, Rodney Graves, told Plaintiffs' counsel George Daly that the District would accept credit from a released time class taught by a Muslim group Ex. B-6 at dep. ex. 195; Ex. B-22 at No. 5, pp. 8–9 (Typescript of dep. ex. 195).

[11] Plaintiff Ellen Tillett *never* spoke to anyone at the District about the Policy before filing suit. Ex. B-25 (Tillett v.1 dep.) at 34:3-18.

brook had already agreed to oversee the SCBEST course before SCBEST approached the District, the District had no involvement in developing or approving the relationship between Oakbrook and SCBEST. Ex. B-18 (Tobin dep.) at 69:13-19 ("No, we didn't approve a . . . relationship between SCBEST and Oakbrook"; Ex. B-12 (McDaniel dep.) at 11:1-2 (District saw SCBEST and Oakbrook as "kind of a package deal.").

Beginning in August 2007, SCBEST began offering released time classes for interested students. Ex. B-10 (SCBEST dep.) at 125:1-2. Out of an SHS student population of about 1500 (Ex. B-28), on average less than 4 students have participated in SCBEST's program each semester. Ex. B-29 at 5 (20 students over 6 semesters).

The program makes only minimal claims on the School District's administrative staff. Ex. C ¶¶ 3–4. The District does not advertise the SCBEST course, and its guidance counselors are trained not to suggest the course to students. Ex. B-24 (Wolfe dep.) at 42:15-43:15; Ex. B-16 (District 30(b)(6) dep.) at 93:11-94:7. If a student expresses interest in the course and shows parental permission, the SHS guidance department works with the student to try to fit the course into her schedule. Ex. B-24 (Wolfe dep.) at 53:25-55:2; Ex. B-16 (District 30(b)(6) dep.) at 74:7-75:5, 113:5-23 .

In every regard, released time courses are treated just as any other off-campus elective, such as the dual-credit German course that Plaintiff Melissa Moss took at Wofford College her senior year. Ex. B-2 (Graves dep.) at dep. ex. 177 ("District 7 superintendent Walter L. Tobin said this class would be treated just like a transfer course from a private school."); Ex. B-18 (Tobin dep.) at 71:3-72:2; Ex. B-16 (District 30(b)(6) dep.) at 123:24-114:8. The SCBEST course does not appear in the SHS catalog (Ex. B-16 (District 30(b)(6) dep.) at 16:2-4; Ex. B-28) and, while state regulations require the grades to be factored into students' grade point averages, they are not re-

ported on SHS report cards. Ex. B-15 at 8–9; Ex. B-16 (District 30(b)(6) dep.) at 64:17-66:6; Ex. B-24 (Wolfe dep.) at 29:5-19. The students are outside the District's custodial control while off campus and the District does not monitor off-campus students' attendance (Ex. B-16 (District 30(b)(6) dep.) at 95:8-10), discipline (Ex. B-31 (Stevens dep.) at 11:15-12:3), or academic progress. At the end of the semester, SCBEST sends its students' final grades to Oakbrook, and Oakbrook sends the District an official transcript for each student who completes the course. Ex. B-24 (Wolfe dep.) at 18:16-19:2. The District transfers the grade to the student's SHS transcript, with the course listed simply as "transfer elective"—the same designation used for Plaintiff Melissa Moss's off-campus dual credit course. Compare Ex. B-31 at 5 with Ex. B-8 at dep. ex. 197.

The District accommodated some requests for students involved in SCBEST, but rejected others. Unlike students in other off-campus electives, released time students were initially forced to choose between released time and study hall.[12] Ex. B-2 (Graves dep.) at 87:5-89:16. When SCBEST brought this discrepancy to the District's attention, the District adjusted its policies to treat students taking released time the same as students taking other off-campus courses for credit. *Id*. But the District rejected SCBEST's request that the District award honors or AP credit to students taking the class because it determined that the course does not qualify for such weight. Ex. B-2 (Graves dep.) at 16:5-20. This means that students who wish to take the highest possible number of AP or honors courses must select an option other than SCBEST. Ex. B-10 (SCBEST dep.) at 87:6-11; Ex. B-8 (Melissa Moss dep.) at 71:21-24; Ex. B-6 (Robert Moss dep.) at 176:14-177:1.

[12] This practice was a carryover from when released time was not for credit. Students were not able to register for released time and study hall at the same time, because the District requires that students take courses for credit during six of the seven periods in the school day.

The District has also avoided providing SCBEST any platform for recruiting students that it does not provide to other outside programs. Ex. B-16 (District 30(b)(6) dep.) at 55:25-56:11. Likewise, since 2007 the District has not permitted SCBEST to make any announcements at SHS. Ex. B-10 (SCBEST dep.) at 62:9-63:2; Ex. B-16 (District 30(b)(6) dep.) at 68:8-14. On one occasion, a SHS student made flyers to advertise the SCBEST course and posted them in the hallways before school without the District's knowledge. See Ex. B-2 at dep. ex. 178. When school officials saw the posters, they immediately took them down, and they were gone before the school day started. Ex. B-24 (Wolfe dep.) at 14:10-15:11; Ex. B-14 at No. 12.

VII. Plaintiffs file suit.

At some point after contacting the ACLU, the individual Plaintiffs turned to Plaintiff Freedom From Religion Foundation ("FFRF") for assistance. Counsel for Plaintiffs George Daly, who has represented FFRF in a number of other Establishment Clause lawsuits, prepared for this lawsuit by coming to the District office and talking to Rodney Graves,[13] by then the District's Director of Secondary Education, and emailing Drew Martin,[14] the Executive Director of SCBEST. In both instances, Daly held himself out to be a grandfather of students interested in SCBEST or similar programs in order to elicit information from Graves and Martin. Ex. B-22 at 8–9 ("I described scenario of my daughter home-schooling 10th grade twins, excellent core education but otherwise do religious proselytizing. . . . I asked him how my gch [grandchildren] c[oul]d get credit for electives."); Ex. B-10 (SCBEST dep.) at dep. ex. 118, p. l ("What is the cost for my grandchild to attend?" "I am very excited that you are doing this.")

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[13] Ex. B-6 at dep. ex. 195 (George Daly's handwritten notes from meeting with Rodney Graves); Ex. B-22 at 8–9 (Typescript of dep. ex. 195); Ex. B-32 (emails between Plaintiffs' attorney George Daly and Rodney Graves); Ex. B-3 (Graves dep.) at 96:2-6.

[14] Ex. B-10 (SCBEST dep.) at dep. ex. 118

Plaintiffs filed this lawsuit in June 2009, seeking a declaratory judgment that the District violated the First Amendment in implementing the Policy. Dkt. No. 1, ¶ 4. Plaintiffs have not directly challenged the underlying South Carolina statutes cited in the Policy. *Id.*, ¶¶ 4, 39.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "where the record as taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Teamsters Joint Council No. 83* v. *Centra, Inc*., 947 F.2d 114, 119 (4th Cir. 1991). The obligation of the nonmoving party "is particularly strong when the nonmoving party bears the burden of proof." *Hughes* v. *Bedsole*, 48 F.3d 1376, 1381 (4th Cir. 1995) (citation omitted). A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Jeri M. Suber Credit Shelter Trust* v. *State Auto Property and Cas. Ins. Companies*, 2009 WL 4730630, 1 (D.S.C. 2009) (quoting *Beale* v. *Hardy,* 769 F.2d 213, 214 (4th Cir. 1985)). Therefore, "[m]ere unsupported speculation . . . is not enough to defeat a summary judgment motion." *Id*. (quoting *Ennis* v. *National Ass'n of Bus. & Educ. Radio, Inc.,* 53 F.3d 55, 62 (4th Cir. 1995)).

Standing is a core element of federal subject matter jurisdiction, and is therefore subject to the same standard of review that applies to a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *White Tail Park, Inc.* v. *Stroube*, 413 F.3d 451, 459 (4th Cir. 2005). The plaintiff has the burden of proving subject matter jurisdiction by a preponderance of the evidence. *United States* ex rel. *Vuyyuru* v. *Jadhav*, 555 F.2d 337 (4th Cir. 2009). In determining whether jurisdiction exists, the Court "may consider evidence outside the pleadings." *Stroube*, 413 F.3d at 459.

ARGUMENT

I. The Court lacks subject matter jurisdiction because Plaintiffs have failed to show they have standing.

A. FFRF has no standing because no member was a parent of a Spartanburg High School student when the Complaint was filed.

As an initial matter, FFRF is not a proper plaintiff because Plaintiffs have failed to show that any FFRF member had standing when the original complaint was filed.[15] The Court previously found otherwise based on based on Plaintiffs' representation that a parent plaintiff was a FFRF member,[16] but Plaintiffs have since admitted that this was not the case when the Complaint was filed. Ex. B-7 at Nos. 22-25. Plaintiffs apparently scrambled after the District brought this omission to light (Dkt. 19 at 21) and Plaintiff Tillett registered as a member ten days later, on September 10, 2009. Ex. B-26 (Tillett v.2 dep.) 6:2-8; Ex. B-33.

Plaintiffs' *post hoc* attempt to patch up their Complaint to create standing cannot be successful, because "[w]hether a plaintiff has standing is determined by considering the relevant facts as they existed at the time the action was commenced." *Republic Bank & Trust Co*. v. *Kucan*, 245 Fed. Appx. 308, 310 (4th Cir. 2007) (unpub.) (attached as Ex. D.), citing *Friends of the Earth, Inc*. v. *Laidlaw Envtl. Servs*., 528 U.S. 167, 180 (2000).

B. The individual Plaintiffs have no standing because they have failed to show that they came into "unwelcome direct contact" with the District's Policy.

The individual plaintiffs have no standing because they have failed to show that they have suffered "unwelcome direct contact" with the Policy, or that they have been "directly affected"

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[15] The Court has already held that FFRF does not have standing on its own behalf as it has not alleged that it has suffered a concrete injury. Dkt. 39, Order Dec. 17, 2009, at 8 n.2. Plaintiffs have given up taxpayer standing. Ex. B-23 at Resp. to RPD No. 9.

[16] Dkt. 39 at 8.

by the Policy in any way.[17] Lacking any direct exposure to the District's Policy, Plaintiffs' claimed injury is reduced to the mere "psychological consequence presumably produced by observation," however indirect and attenuated, "of conduct with which one disagrees," which "is not an injury sufficient to confer standing under Art. III." *Suhre* v. *Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997) (quoting *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982)). Indeed, it makes little sense to speak of "offensive contact" with a written government policy, as opposed to, say, a Christmas display or a roadside cross.

The Supreme Court has ***never*** allowed standing ***simply*** based on the existence of a law that allegedly conveys an impermissible message of endorsement. For example, in *Newdow* v. *Lefevre*, 598 F.3d 638 (9th Cir. 2010), the court held that the atheist plaintiff had standing to challenge the law requiring the Mint to place "In God We Trust" on coins, but lacked standing to challenge law merely recognizing "In God We Trust" as the national motto: "Although Newdow alleges the national motto turns Atheists into political outsiders and inflicts a stigmatic injury upon them, an 'abstract stigmatic injury' resulting from such outsider status is insufficient to confer standing.") *Id.* at 642-43 (quoting *Allen* v. *Wright*, 468 U.S. 737, 755-56 (1984)). Similarly, in *Doe* v. *Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (en banc), the court held that minor students and their parent lacked standing to bring an Establishment Clause challenge to religious invocations at school board meetings, because standing in similar cases "has not previously been based ***solely*** on injury arising from ***mere abstract knowledge*** that invocations were said. The question is whether there is proof in the record that Doe or his sons were

[17] *Suhre* v. *Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997); Dkt. 30 at 8; Dkt. 39 at 7.

exposed to, and may thus claim to have been injured by, invocations given . . . ." *Id.* at 497 (emphasis added).

Plaintiffs have failed to identify any instance where either Melissa Moss or Tillett's minor child "[came] into offensive contact with the implementation of the Policy." Ex. B-23 (Ps' Am and Supp. Resp.) pp. 15–20. Melissa Moss's only *indirect* contact with the District's Policy was when: (1) her family received the letter from SCBEST in February 2007,[18] and (2) she once briefly looked over a friend's syllabus from the SCBEST class out of curiosity. Ex. B-8 (Melissa Moss dep.) 27:17-29:24, 34:14-21. Tillett's minor child lacks even this "contact" and did not even know of the Policy until Tillett told her child about it shortly before filing the lawsuit. Ex. B-25 (Tillett v.1 dep.) 23:16-18. To the extent that this can be called an "injury," it is one Tillett inflicted on her own child. Moreover, Plaintiffs now concede that neither student suffered any academic disadvantage because of the Policy.[19]

Robert Moss and his family first learned about the Policy when they received a letter in the mail from SCBEST. But Tillett only learned of the Policy because she was friends with the Mosses, and even that conversation came "late in the process." Ex. B-25 (Tillett v.1 dep.) 11:2. The Complaint falsely alleges that Tillett was damaged by the SCBEST letter, when in fact she did not receive the letter and did not even read it through until Robert Moss's deposition, more than a year after the Complaint was filed. Dtk. 57 ¶ 11; Ex. B-25 (Tillett v.1 dep.) 29:2-4. Be-

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[18] Melissa Moss concedes that she does not know whether her feelings about the SCBEST letter can be properly attributed to the District, as she has no knowledge as to whether the District read or approved the letter before it was sent. Ex. B-8 (Melissa Moss dep.) 15:9-12. *See supra* at 7 demonstrating that Plaintiffs Tillett and Bob Moss concede that the letter is not attributable to the District.

[19] Ex. B-32. See also Ex. B-26 (Tillett v.2 dep.) 87:25–88:3; Ex. B-27 (Tillett v.3 dep.) dep. ex. 196; Ex. B-8 (Melissa Moss dep.) 67:14-23, dep. ex. 197; contra Dkt. 57 ¶ 11.

cause Plaintiffs have failed, after extensive discovery, to meet their burden of establishing basic facts essential to their standing, their claims must be dismissed.

II. The undisputed summary judgment evidence demonstrates that the School District's Policy does not violate the Establishment Clause.

To avoid summary judgment on the merits of their Establishment Clause claim, Plaintiffs must demonstrate that there is a material fact dispute about one of the three elements of the *Lemon* test: whether the released time policy has a secular purpose, whether it advances religion, or whether it entangles church and state. *Lambeth* v. *Board of Commissioners of Davidson County*, 407 F.3d 266 (4th Cir. 2005). The Fourth Circuit presumes that released time accommodations normally do not run afoul of any of the three parts of the *Lemon* test, *see Smith* v. *Smith,* 523 F.2d 121 (1975) (applying *Zorach* and *Lemon* to uphold released time accommodation).

The released time policy challenged here is no different—no reasonable jury could find that the District violated any of the *Lemon* elements. The nub of Plaintiffs' case is the proposition that assigning Carnegie units with grades for released time instruction renders an otherwise constitutional policy unconstitutional. But the undisputed facts show that nothing the District has done violates the Establishment Clause. The Court cannot overturn the Policy without also disturbing almost sixty years of Establishment Clause jurisprudence, not to mention upending the way public schools accept credits from private religious schools.

A. The District's purpose in passing and implementing its Policy has been to accommodate religion, not advance it.

Plaintiffs cannot survive summary judgment under the first *Lemon* prong, as no reasonable jury could fail to find that the Policy has a genuine secular purpose. A government fails the purpose element of the Establishment Clause test only if it "acts with the ***ostensible*** and ***predominant*** purpose of advancing religion." *ACLU of Ky.* v. *Grayson County, Ky.*, 591 F.3d 837, 844

(6th Cir. 2010) (quoting *McCreary County, Ky*. v. *ACLU of Ky*., 545 U.S. 844, 860 (2005)) (emphasis added). This is a tall order, especially as courts have held repeatedly that released time policies "aim only to accommodate the wishes of the students' parents," *Smith*, 523 F.2d at 124 (citing *Zorach*), and "the *accommodation* of religion is itself a secular purpose in that it fosters the liberties secured by the Constitution." *Brown* v. *Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001) (emphasis in original). In assessing purpose, courts "act with appropriate deference to the legislature," *id*., and "do not impute an impermissible purpose to advance religion to an elected official merely because he responds to a religiously motivated constituent request," especially where—as here—"*the record is absolutely devoid of any evidence that would suggest that any Board member's vote was religiously motivated.*" *Peck* v. *Upshur County Bd. of Educ.*, 155 F.3d 274, 281 (4th Cir. 1998) (emphasis in original).

When assessing the purpose of released time accommodations, the relevant inquiry is the *purpose of the government,* not the purpose of the religious education provider. Released time instruction may well be wholly religious in nature, but that fact is irrelevant with respect to the government's purpose. Thus the Supreme Court in *Zorach* did not attribute the Catholic schools' purpose to the state. *See Zorach* 343 U.S. at 313 (analogizing released time to absences for religious ceremonies and baptisms). The Fourth Circuit has likewise held that the motivations of third parties are not sufficient to demonstrate a violation of the purpose prong of the *Lemon* test. "We do not impute an impermissible purpose to advance religion to an elected official merely because he responds to a religiously motivated constituent request." *Peck* v. *Upshur County Bd. of Educ.*, 155 F.3d 274, 281 (4th Cir. 1998). Following this reasoning, courts have upheld released time accommodations that focused primarily on the Bible, *Lanner* v. *Wimmer*, 662 F.2d 1349, 1355 (10th Cir. 1981); which were conducted at seminaries, *id*. at 1354-55; or which were

frankly evangelical in nature. *See Pierce* v. *Sullivan W. Cent. Sch. Dist.*, 379 F.3d 56, 58 (2d Cir. 2004) (noting that classes were provided by Child Evangelism Fellowship). In such cases, courts appropriately decline invitations from plaintiffs to decide whether something is "too religious," because "[they] would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions," *Pelphrey* v. *Cobb County, Ga*., 547 F.3d 1263, 1272 (11th Cir. 2008). The relevant inquiry is thus the purpose of the School District, rather than the purposes or content of the providers of released time instruction.

As shown below, the District has testified consistently that it acted with the legitimate purpose of accommodating its citizens' religious exercise, and Plaintiffs have failed to show otherwise. Neither the District's acceptance of transfer grades for released time courses nor the existence of the SCBEST program alters this conclusion.

1. The undisputed facts show that the District had the legitimate secular purpose of accommodating the religious exercise of its citizens.

The District passed and implemented its Policy with the legitimate secular purpose of accommodating the religious exercise of its citizens. This purpose is plainly stated in both South Carolina laws authorizing released time, Dkt.19, p. 23-25; Dkt. 32 p. 6-8,[20] and Plaintiffs admit that this was the District's purpose as well. Dkt. 30, p.19 n.8 ("Defendant has adopted this purpose as its own."). Present and former District officials have testified that this has always been the primary purpose behind their decisions enacting and implementing its Policy. *See supra* at 5-6. Against this consistent and uncontroverted testimony, Plaintiffs now admit that they do not know why the members of the District's Board of Trustees voted for the Policy, or why the responsible District employees have made the decisions they have in implementing the Policy.

[20] Plaintiff Bob Moss stated that he has no reason to doubt that this stated reason was in fact the purpose of the South Carolina General Assembly in enacting the RTCA. Ex. B-6 (Robert Moss dep.) 130:8-23.

Ex. B-6 (Robert Moss dep.) at 80:18-21; Ex. B-8 at (Melissa Moss dep.) 24:20-25:2, 36:21-37:7; Ex. B-25 (Tillett v.1 dep.) at 34:16-18; Ex. B-26 (Tillett v.2 dep.) at 8:24-9:7.

The undisputed facts demonstrate that accommodation was indeed the District's purpose. The Policy does not reflect the District's desire to promote religion, but its largely passive response to other events in the state. Furthermore, the District's purpose was not to promote any one released time provider or religious perspective, but to establish an open-ended Policy that could accommodate any student's request and was thus available to all.

a) The District's Policy was a largely passive response to events.

Like other constitutional released time policies, the District's Policy was a largely passive response to other events in the state and the community. See *Smith*, 523 F.2d at 125 (released time accommodations are "a ***largely passive*** and administratively wise ***response*** to . . . parental assertions of the right to 'direct the upbringing and education of children under their control'") (emphasis added) (quoting *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–35 (1925)); see also *Lanner*, 662 F.2d at 1358 ("[P]ublic school accommodation of religious beliefs through a released-time program is a ***largely passive response*** to parental assertions of the right to 'direct the upbringing and education of children.'" (emphasis added)).

The District adopted its Policy only after South Carolina's Legislature, Governor, Attorney General, and School Board Association approved and recommended that state school boards adopt a policy giving students the opportunity to take released time for elective credit.[21] A change from the prior policy was necessary because South Carolina's credit requirements made it impracticable for students to take a released time course at the high school level. See *supra* at

[21] 2006 S.C. ACTS 322; S.C. CODE ANN. § 59-39-112; 2007 OP. S.C. ATT'Y GEN. (Jan. 29, 2007), *available at* 2007 WL 419400 (Attached as Ex. F); Ex. B-11 at 49-53.

2. This prompted both the State's new law and the District's new policy modeled on that law. 2006 S.C. ACTS 322; Dkt. 30 at 19, n.8; Dkt. B-16 (District 30(b)(6) dep.) at 10:21-11:5. The District did not take this issue up on its own, but only in response to citizens who expressed their interest in released time. Ex. B-15 at No. 10. The District's passive response demonstrates that it was not seeking to advance any improper purpose.

b) The District's purpose was not to promote any one group, but to establish an open-ended policy that was available to all.

The District's purpose was to provide a variety of options, not to promote any one religion or group.[22] Though Plaintiffs allege that the District from the start intended for its Policy to give SCBEST a unique platform, the facts show otherwise.

The language of the Policy reflects this commitment. As with any other District policy, the Board drafted this Policy so that it would be easy to implement "across any case that might come to the District under this Policy." Ex. B-12 (McDaniel dep.) at 27:12-13.

> The assumption is when you do a policy is that it isn't for an individual instance, but any instance that would, any family, any group of families that would come to the district with a desire for something like this, we would treat the request in the same way. We would deal with the situation in the same way.

Id. at 27:17-24. Furthermore, the Policy is written in the plural, declaring that it will cooperate "with the ***various sponsoring groups*** of the school district," clearly anticipating that more than one religious organization could offer a course to students under the Policy. Ex. B-13 (Policy).

[22] Plaintiffs cannot show that the District had an unconstitutional purpose by arguing that the District knew what the likely effects of its Policy would be. See Ex. B-26 (Tillett v.2 dep.) at 27:21-28:2 ("they knew or had reason to know . . . that the bulk of whatever would be taught would be taught by an evangelical Christian group. I mean . . . they know the community well enough . . . ."; Ex. B-25 (Tillett v.1 dep.) at 19:22-20:15; Ex. B-6 (Robert Moss dep.) at 121:11-14. If school districts may permissibly accommodate their citizens' desire to participate in released time courses, it makes no sense to require that districts be unaware of which citizens have expressed such desire. The Fourth Circuit in *Smith* found the school district had a secular purpose even though a single organization had been the area's only released time provider for forty years. Smith at 122. The Tenth Circuit in *Lanner* found a secular purpose even though the defendant surely foresaw that the "overwhelming use of the program" would be by the L.D.S. seminary next door. *Lanner* at 1354-55. Likewise, "no constitutional significance may be attributed . . . to the religious demographics of the school district." *Pierce*, 379 F.3d 56, 61 (2d Cir. 2004).

And the District told Plaintiffs before they filed suit that it would treat a released time religious instruction course in Judaism or Islam on the same terms. *See supra* at 9.

c) The District's careful administration of the policy demonstrates that it has a proper purpose.

The District's proper purpose is also demonstrated by the manner in which it administers the Policy. The Policy makes clear that released time credits and oversight will be accepted on the same terms as transfers from accredited schools. Ex. B-13. This arm's-length arrangement shows that the School District has no intention of involving itself with the religious aspects of the released time accommodation. *See id.*; Ex. B-12 (McDaniel dep.) at 10:1-10 (District did not want to be "making judgments about the quality of the course, whether it met our criteria. . . . We didn't intend for that to be our job . . . .")

B. The School District's Policy does not have the principal or primary effect of advancing religion.

Neither can Plaintiffs survive summary judgment under the second prong of the *Lemon* test, as no reasonable jury could conclude that, in implementing its Policy, "the *government itself* has advanced religion through its own activities and influences." *Madison* v. *Riter*, 355 F.3d 310, 318 (4th Cir. 2003) (quoting *Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327, 337 (1987) (emphasis in original)). Evidence of impermissible advancement "includes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* (quoting *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970)). A government action can also run afoul of the effect prong if "an informed, reasonable observer would view the [Policy] as an endorsement of religion." *Lambeth,* 407 F.3d at 272.

As under *Lemon*'s purpose prong, courts are careful to distinguish between what is attributable to the government from what is properly attributable to third parties. "The incidental ad-

vancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government . . . ." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652 (2002). Likewise, a policy's "effect of simply allowing a religious school to 'better . . . advance [its] purposes' does not rise to a constitutionally prohibited magnitude." *Ehlers-Renzi* v. *Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 291 (4th Cir. 2000) (quoting *Amos,* 483 U.S. at 336).

1. Nothing on the face of the Policy advances religion.

The Policy itself does not advance religion; it merely accommodates the religious exercise of parents and students within the District. The Policy is open to all who wish to participate in a released time program; it is not limited to a particular provider, denomination, or religion. Ex. B-13. The School District has repeatedly affirmed its willingness to accommodate different faiths through the Policy. *Supra* at 9. Plaintiffs concede that the District passed its Policy for the same reason South Carolina passed the RTCA: to restore "the school districts' ability to accommodate parents' and students' desires to participate in released time programs," Dkt. 30, p.19 n.8, 2006 S.C. ACTS 322. Nothing on the face of the Policy advances or inhibits religion.

2. The District has implemented the Policy without favoritism.

Just as the District did not pass the Policy with the purpose of promoting any one group, the District has not implemented the Policy in a way that advances religion. The District has not granted any special privileges to students in the released time program; in fact, released time students are at a disadvantage because they may not receive honors or AP credit for their elective course. *See supra* at 11. Moreover, the SCBEST course is academically rigorous (even Plaintiff

Ellen Tillett believes this is true[23]). Many students told SHS guidance counselor John Wolfe that they did not want to take the class because it was too difficult. Ex. B-24 (Wolfe dep.) 52:21-53:7. Two students have failed the class, and SCBEST has given out as many Cs and Ds as it has As (it has given out six of each). Ex. B-29 p.5. The District has not shown any favoritism or created GPA incentives to take the SCBEST class.

The District's approach to implementing its Policy, like the Policy itself, is "student centered." Ex. B-31 (Stevens dep.) 18:11. Its actions implementing its Policy are directed at students and parents, not any particular provider. Ex. B-15 at No. 10. The District does not select or favor released time providers; it merely makes the program available to those who take the initiative to seek it out.[24]

The District has not sponsored religious instruction; released time education takes place outside the school and is provided by instructors with no formal ties to the school. Ex. B-13. It has not provided financial support to religion; no funds are dedicated to the released time program and any staff time dedicated to implementing the Policy is *de minimis*.[25] Ex. B-13.

Moreover, because Plaintiffs cannot show that the District "selected" SCBEST, they also cannot show that the District is guilty of "an unconstitutional denominational preference." Dkt. 30 at 29. Plaintiffs admit that they have no reason to believe that the District would apply different rules to other groups that would seek to offer released time to SHS students. Ex. B-8 (Melissa Moss dep.) at 37:4-12; Ex. B-6 (Robert Moss dep.) 62:18-63:2; 154:6-16 ("I didn't suggest he's saying that only [SCBEST] could have the opportunity.").

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[23] Ex. B-26 (Tillett v.2 dep.) 68:6-17.

[24] Ex. B-15 at No. 3; Ex. B-14 (Hurst) 31:5-7 ("I don't think the Board has any say . . . about which group may offer [released time] classes.")

[25] Plaintiffs appear to concede that the District did not expend public funds to support or sponsor religious activity, (See Dkt. 57 ¶ 13), as they have abandoned their theory of taxpayer standing. Ex. B-23 at Interrog. No. 8.

The undisputed facts demonstrate that the Policy, both on its face and as applied, is a neutral religious accommodation perfectly in keeping with the Establishment Clause. *See Madison,* 355 F.3d at 317 (citing released time programs as a type of permissible accommodation).

3. The Policy does not endorse religion because no reasonable observer could conclude that the District runs SCBEST or has delegated governmental functions to SCBEST.

Nothing in the Policy or its application suggests that the District has endorsed religion by delegating public school authority to a religious organization. Such delegation occurs where released time classes are conducted on school property. *See Smith,* 523 F.2d at 123–24. No such delegation has occurred here.

The District has worked to ensure that no one can confuse its actions with those of SCBEST, and to prevent any delegation of government authority to SCBEST (or any future released time program provider). Ex. B-12 (McDaniel dep.) 27:10-24. Present and former District representatives testified consistently and clearly that SCBEST's program was not a "public school course," and the District always understood that it was not "offering" the SCBEST course. Ex. B-18 (Tobin dep.) 74:4-11; Ex. B-12 (McDaniel dep.) 10:1-10; Ex. B-16 (District 30(b)(6) dep.) 16:25-17:2 ("that's their course, those students are off-campus"). SCBEST does not appear in the SHS catalog, and SCBEST grades do not appear on SHS report cards. *See supra* at 10. In every regard, released time courses are treated just as any other off-campus elective.

The District has made it clear that it does not run the SCBEST program; correcting erroneous statements in the initial letter from SCBEST, and allowing SCBEST access to the same fora as other outside organizations. *See supra* at 8, 12.

Nor is the fact that students may receive grades for SCBEST classes relevant. *See* Ex. B-6 (Robert Moss dep.) at 89:9-15; Ex. B-26 (Tillett v.2 dep.) at 54:6-17. This argument, like so

many Plaintiffs make, has implications that reach far beyond the facts of this suit. If every course for which students could obtain transfer credit was by definition a public school course then all private school transfer courses would be subject to constitutional scrutiny. This rationale leads to an absurd result. A public school does not "offer" courses that are presented to it on transcripts from accredited private schools, just as it does not "offer" dual credit courses at neighboring colleges (such as the one Melissa Moss took her senior year). Ex. B-24 (Wolfe dep.) at 29:5-17.

The process for accepting transfer credits from Oakbrook is no different than the process for any other private school. It is normal practice for the District to accept the transcripts it receives from Oakbrook and other accredited schools at face value. Ex. B-16 (District 30(b)(6) dep.) at 101:13-102:3 (everything transfers automatically from accredited schools). It would be inappropriate for the District to do what Plaintiffs ask: determine for itself whether an accredited private school meets acceptable pedagogical standards. Ex. B-6 (Robert Moss dep.) at 148:19-149:3; Ex. B-24 (Wolfe dep.) at 55:19-56:32. The District has no discretion to refuse or nullify Carnegie units that have already been awarded by another accredited school. Ex. B-24 (Wolfe dep.) at 48:14-49:14. That is why the District did not question Wofford College's accreditation when Plaintiff Melissa Moss presented a transcript from her dual credit German class. Ex. B-24 (Wolfe dep.) at 48:14-49:14. No court has ever found that a public school "advance[s] religion through its own activities and influences" when it records transfer grades and credits earned at a religious accredited private school. The District has not endorsed religion by preferring religious instruction to other electives, or by delegating its authority to a religious organization.

In short, the undisputed facts do not show any advancement of religion, merely an accommodation of the wishes of students and parents.

C. The District has not impermissibly entangled itself with religion.

Finally, the Policy does not foster excessive entanglement with religion. The entanglement test does not require the government to avoid all contact with religion. To the contrary, the First Amendment sometimes "***requires*** the State to recognize and ***even interact*** with religion." *Ehlers-Renzi*, 224 F.3d at 292 (emphasis added). What government cannot do is "***manage*** or ***incorporate*** the religious arena ***itself***." *Id*. (emphasis added). Only "comprehensive, discriminating, and continuing state surveillance" of religious exercise constitutes impermissible entanglement with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1972); *see also Mueller* v. *Allen*, 463 U.S. 388, 403 (1983) (explaining that such comprehensive surveillance is "necessary [for a challenged action] to run afoul of" *Lemon's* third prong).

In the released time context, "the entanglement exceeds permissible accommodation and begins to offend the establishment clause" only when "the program is structured in such a way as to require state officials to monitor and judge what is religious and what is not religious in a private religious institution." *Lanner*, 662 F.2d at 1361 (citing *Lemon*, 403 U.S. 602).

In this case, the District has come nowhere close to the threshold established by *Lanner*. From the beginning, the District was acutely aware of the entanglement problems that released time for credit could present, and it took careful steps to avoid them. If anything, Plaintiffs' complaint seems to be that the District has failed to be entangled *enough* in the SCBEST course, as they complain that the District has failed to show adequate supervision of SCBEST's grading. Although it is not relevant to the Plaintiffs' Establishment Clause claim, the Court should be reassured that there is ample oversight and accountability through the Oakbrook-SCBEST Agreement.

The District keeps an arm's-length relationship with released time providers in order to avoid entanglement concerns. Under the RTCA, the District may award elective credit for released time classes in religious instruction only after determining that the course satisfies "purely secular criteria." Dkt. 57 ¶ 18. The RTCA offers a non-exclusive list of such criteria, and also states that the criteria used must be "substantially the same criteria used to evaluate similar classes at established private high schools." *Id*. South Carolina's Transfer Regulations state that credits transferred from an accredited school will be accepted at face value. S.C. CODE ANN. REGS. 43-273.

The District opted to use the simplest, most objective criteria possible—the same criteria it has long applied to any student wishing to transfer credits into SHS: Does the credit come on a transcript from an accredited school? If so, the District places the credit and the grade on the student's SHS transcript.

It is plainly incorrect to suggest, as Plaintiffs have, that the District grants "important, discretionary governmental powers" to an outside academic institution merely by recording grades awarded by that institution on a public school transcript. Ex. B-26 (Tillett v.2 dep.) at 54:6-17 ("If he graduates from a public school based on credits received from a private school than those — that becomes a governmental function.") Ex. B-6 (Robert Moss dep.) at 147:16-148:9 "The State of South Carolina is putting their stamp of approval on we're letting this child graduate in part because of that credit and that grade.") The District no more grants a "public school academic grade" to SCBEST students than it does any other student who presents the District with a transcript from an accredited school. Released time credits are recorded on District transcripts in precisely the same manner as credits for other off-campus electives (such as Plaintiff Melissa

Moss's dual credit German course), or courses taken by students prior to transferring into the District.

The oversight provided by the Oakbrook-SCBEST relationship is real and rigorous. As SCBEST's Executive Director told its Board: "We are being held accountable by Oakbrook Preparatory School, and have a responsibility to the school districts, the schools, and to the state to offer an academically legitimate class. This is referring to the high school level. We are not like FCA, youth group, or Wyldlife. The best way to think of our class is a private school class being offered to public school students." Ex. B-10 (SCBEST dep.) at dep. ex. 35. More importantly, Oakbrook understood this and would not have entered into the Agreement if they believed that SCBEST did not meet its own standards. Ex. B-35 (Smith dep.) at 46:24-47:5, 14-23. Under the SCBEST-Oakbrook Agreement, Oakbrook agreed to review and approve SCBEST curriculum and teachers and provide oversight for the released time course. Ex. B-2 (Graves dep.) at dep. ex. 147). Oakbrook considered Drew Martin's academic background (Drew went to Duke University and has three Master's degrees) and the fact that he is an accredited teacher. Ex. B-10 (SCBEST dep.) at 6:11-17, 34:10-17; Ex. B-35 (Smith dep.) at 16:8-10 ("He was the kind of teacher I would love to have had at Oakbrook."), 28:12-22, 48:15-22 ("Drew is kind of a consummate professional, and he takes his role as teacher seriously."). Oakbrook reviewed SCBEST's syllabus and tests and made recommendations, which Drew Martin incorporated. Ex. B-35 (Smith dep.) at 40:24-41:5; Ex. B-36 (Oakbrook dep.) at 19:4-11. Oakbrook found that the SCBEST course "absolutely" met its own standards for a religion course. *Id*. at 39:23, 45:7-13. Oakbrook's oversight exceeds the requirements of the Policy, the RTCA, and SCISA (Oakbrook's accrediting agency). See S.C. CODE ANN. § 59-39-11 § 2(A)(1), Ex. B-13; Ex. B-35 (Smith dep.) at 46:24-47:23 (SCBEST course met SCISA's standards). By permitting the Oakbrook SCBEST arrangement,

the School District has ensured high academic standards while avoiding any entanglement with or review of the substance of the released time course.

Nothing in the monitoring of the released time program creates excessive entanglement. While Oakbrook did record student attendance on the transcripts it sent to SHS, the District never asked Oakbrook or SCBEST to provide such information, and Plaintiffs have not shown that the District ever used it for any purpose.[26] Even if the District did monitor attendance, it would be constitutionally unproblematic. As the Fourth Circuit noted in *Smith*, the school district in *Zorach* received reports of children's released time attendance, but the Supreme Court still held that the district did not use "the force of the public school . . . to promote that instruction." *Smith*, 523 F.2d at 123 (quoting *Zorach*, 343 U.S. at 315); see also Dkt. 19 at 27-28. Noting attendance does not create entanglement where, as in this case, students are able to earn elective credit for released time.

Nothing about the Policy, either on its face or in its implementation, creates excessive entanglement with religion. To the contrary, the undisputed facts show that the School District went out of its way to ensure that no such entanglement occurred.

* * *

As set out above, by implementing the Policy, the District did not have the purpose of advancing religion, is not advancing religion, and is not entangling itself with religion. The Policy therefore passes the *Lemon* test, and the School District is entitled to summary judgment on Plaintiffs' Establishment Clause claims.

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[26] See Ex. B-16 (District 30(b)(6) dep.) at 95:8-10; Ex. B-2 (Graves dep.) at 63:12-64:1.

CONCLUSION

For all the above reasons, Defendant's motion for summary judgment should be granted.

Respectfully submitted,

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