

# Released Time Religious Instruction and the Law: Questions and Answers

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## RELEASED TIME CLASSES

### **I. WHAT ARE RELEASED TIME CLASSES?**

Released time classes refer to classes held by churches or other religious groups for public school students where, with the permission of the children's parents or guardians, students are released from the public school during the school day to an off-site location where they are provided religious instruction.

### **II. ARE RELEASED TIME INSTRUCTION CLASSES LEGAL?**

Yes. Michigan law expressly authorizes the release of a public school student for involvement in released time religious instruction.<sup>1</sup> Michigan law permits participation in a released time program for up to two (2) class hours per week. Written permission of a parent or guardian is required.<sup>2</sup>

Furthermore, the United States Supreme Court upheld the constitutionality of released time classes over fifty years ago.<sup>3</sup> In approving of the released time program, the Supreme Court stated: "We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."<sup>4</sup>

Moreover, the Supreme Court's 1952 approval of released time classes is still being relied upon as valid. As recently as August of 2004, a high level federal court approved the same general framework for released time classes that was approved by the Supreme Court over fifty years earlier.<sup>5</sup>

In addition, another high level Federal Court approved of a released time program in which children deposited permission slips from parents directly at the school.<sup>6</sup> Commenting on this particular released time program, that court stated that "public school cooperation with the religious authorities in ... 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

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<sup>1</sup>See MCLA 380.1561 (3)(d); see also Michigan Admin. Code R 340.71.

<sup>2</sup>Mich. Admin Code R 340.71.

<sup>3</sup>See Zorach v. Clauson, 343 US 306, 72 S.Ct. 679 (1952).

<sup>4</sup>Zorach 343 US at 314.

<sup>5</sup>See Pierce v Sullivan West Central School District, 379 F.3d 56, 61 (2d Cir, 2004).

<sup>6</sup>Smith v Smith, 523 F.2d 121, 122 (4<sup>th</sup> Cir., 1975), cert den 423 US 1073 (1976).

control.”<sup>7</sup>

### **III. IS IT OPTIONAL OR MANDATORY FOR PUBLIC SCHOOLS TO RELEASE STUDENTS FOR RELEASED TIME RELIGIOUS INSTRUCTION?**

If a student’s parent or guardian provides a written permission slip, it is mandatory, not optional, for public schools to release the students for released time religious instruction. Michigan regulations provide that: “The board of education or its duly authorized representative, upon written request of the parent, guardian or person having control or charge of any child or children, shall release from attendance at the public school any child or children to attend religious instruction classes not to exceed 2 hours (120 minutes) per week.” (Underlining added)<sup>8</sup>

### **IV. MAY RELEASED TIME RELIGIOUS INSTRUCTION CLASSES BE ADVERTISED IN PUBLIC SCHOOL?**

#### **A. May a public school allow advertising for a released time program?**

Yes. As recently as August of 2004, the Sixth Circuit U.S. Court of Appeals, whose decisions are binding on schools in Michigan, ruled that it does not violate the constitution for a public school to distribute materials from religious organizations to students on the same basis as other secular community groups.<sup>9</sup> The court even stated that if a school “were to refuse to distribute flyers advertising religious activities while continuing to distribute flyers advertising other kinds of activities, students might conclude that the school disapproves of religion.”<sup>10</sup>

#### **B. If a public school allows distribution of advertising for non-religious community groups, can that school refuse to allow distribution of materials from religious community groups?**

Generally “No”, but there is at least one exception to the general rule. Courts have clearly stated that if a public school allows private secular community groups to advertise for activities they are sponsoring, that school may not prohibit religious organizations from advertising for activities they are sponsoring. For example, in 2003 a high-level federal court noted that a public school is not permitted to single out religious groups for exclusion as it relates to materials to be distributed

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<sup>7</sup>Smith, 523 F.2d at 125 (internal citations omitted).

<sup>8</sup>Michigan Admin. Code R 340.71 (emphasis added).

<sup>9</sup>See Rusk v Crestview Local School District, 379 F.3d 418 (6<sup>th</sup> Cir., 2004); see also Daugherty v Vanguard Charter School Academy, 116 F. Supp 2d 897 (W.D. Mich, 2000).

<sup>10</sup>Rusk, 379 F.3d 418 (6<sup>th</sup> Cir, 2004).

or made available to the students of that school from private community groups.<sup>11</sup> In particular, the court held that a public school violated the First Amendment by refusing to distribute materials advertising private religious community groups activities where it distributed or made available materials for private secular community groups.<sup>12</sup> The court stated that “the district cannot refuse to distribute literature advertising a program with underlying religious content where it distributes quite similar literature for secular [programs].”<sup>13</sup>

Likewise, in 2004 yet another high-level federal court held that a public school was engaged in unconstitutional viewpoint discrimination where it improperly excluded private religious community groups from the school’s take-home flyer program.<sup>14</sup> In that particular case, the community group flyers were put in teacher’s mailboxes and then distributed by the teachers to the students.<sup>15</sup>

Moreover, in October of 2004, a high-level federal court specifically said that when a public school refuses to distribute flyers for a religious organization while readily distributing flyers from other groups, the school is engaging in impermissible “viewpoint-based religious discrimination.”<sup>16</sup>

Finally, as recently as January of 2005, the Michigan Court of Appeals ruled that a public school did not violate the Establishment Clause of the Michigan Constitution by allowing the Boy Scouts to distribute and post literature and flyers in the school, and to provide recruitment flyers for distribution by school personnel to students on an equal access basis as other community groups.<sup>17</sup> The court noted that the literature, in order to be distributed or posted, had to satisfy the neutral qualifying criteria of the school.

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<sup>11</sup>Hills v Scottsdale Unified School District, 329 F.3d 1044, 1053 (9<sup>th</sup> Cir., 2003) cert den 124 S. Ct. 1146 (2004).

<sup>12</sup>See Hills, 329 F.3d at 1055-56.

<sup>13</sup>Hills, 329 F.3d at 1053.

<sup>14</sup>Child Evangelism Fellowship of Maryland v Montgomery County Public Schools, 373 F.3d 589, 594 (4<sup>th</sup> Cir., 2004).

<sup>15</sup>See Child Evangelism Fellowship of Maryland, 373 F.3d at 592.

<sup>16</sup>Child Evangelism Fellowship of New Jersey Inc. v Stafford Township School District, 386 F.3d 514, 527 (3<sup>rd</sup> Cir., 2004).

<sup>17</sup>Scalise v Boy Scouts of America, 265 Mich App 1 (2005), leave to appeal pending.

However, one exception to the general rule must be noted. Advertisements with overtly proselytizing language on their face may not be distributed by public schools directly to students.<sup>18</sup> A invitation for a student to attend an event sponsored by a religious organization is not prohibited under this exception.<sup>16</sup>

**C. Does Michigan law expressly prohibit advertising for released time programs?**

It should be noted that a State of Michigan regulation specifically states as follows:

“No solicitation for attendance at religious instruction classes shall be permitted on public school premises. The staff of the public school system shall neither encourage nor discourage participation in any religious instruction program”.<sup>17</sup>

Because the extent that the regulation singles out religious materials for exclusion, it violates the federal constitution and is therefore unenforceable. Because federal constitutional requirements supercede state regulations, schools would be required to follow the dictates of the federal constitution rather than a conflicting state regulation. The state regulation in question was adopted in 1964 and does not take into account recent case law which makes it unconstitutional and unenforceable.<sup>18</sup>

Given well publicized U.S. Supreme Court decisions in the 1960's, school administrators are understandably reluctant to allow distribution of religious materials in public schools. However, in recent cases the U.S. Supreme Court has authorized far more advertising in public schools about religious events than most people realize. For example in 1990, the U.S. Supreme Court ruled that if a public high school allowed one non-religious group to meet on school grounds, it was also required to allow a student religious group to meet as well and to enjoy the same advertising rights as non-religious student groups-including the right to advertise on school bulletin boards and on the school's public address system.<sup>19</sup> As noted above, the Supreme Court's decision in 1990 had been followed by numerous decisions allowing distribution of religious materials in public schools and prohibiting discriminatory exclusion of religious materials.

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<sup>18</sup>See Rusk v Crestview Local School District, 379 F.3d 418 (6<sup>th</sup> Cir., 2004); see also Child Evangelism Fellowship of Maryland v Montgomery County Public Schools, 373 F.3d 589, 599 (4<sup>th</sup> Cir., 2004).

<sup>17</sup>Michigan Admin. Code R 340.71.

<sup>18</sup>Hills v. Scottsdale Unified School District, 329 F3d 1044 (9<sup>th</sup> Cir, 2003) cert den 124 S. Ct. 1146 (2004); Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools, 373 F3d 589 (4<sup>th</sup> Cir, 2004). Child Evangelism Fellowship of New Jersey, Inc. v Stafford Township School District, 386 F.3d 514 (3<sup>rd</sup> Cir, 2004).

<sup>19</sup>Bd.of Education v Mergens, 496 US 226 (1990)

V. **ARE PERMISSION SLIPS REQUIRED?**

Yes. Michigan regulations explicitly require that any student who wishes to participate in a released time program must have his or her parent or guardian furnish for the school a written request for such participation.<sup>20</sup>

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<sup>20</sup>See Mich Admin. Code R 340.71. For case law support, see Zorach v Clauson, 343 US at 308.