

April 17, 2019

The Honorable Douglas D. Rowland
Wyandot County Prosecuting Attorney
137 S. Sandusky Avenue
Upper Sandusky, Ohio 43351

SYLLABUS:

2019-015

1. A public school district board of education's released time religious instruction policy that permits or prohibits various activities to publicize the availability of a religious instruction course must comply with R.C. 3313.6022, Article I, Sections 7 and 11 of the Ohio Constitution, and the Free Speech and Establishment Clauses of the First Amendment to the United States Constitution. Compliance with the provisions of R.C. 3313.6022 alone does not guarantee that a board's policy is constitutional.
2. When a board of education's policy has created a limited public forum in a public school, the board of education may restrict speech to certain subjects or certain speakers that are reasonably related to preserving the purpose of the forum, but the board may not discriminate against speech on the basis of the viewpoint expressed in the speech.
3. Actions taken to publicize the availability of or to encourage participation in a released time religious instruction course will not violate the Establishment Clause if each of the following is true: (1) the school district board of education has a secular purpose for permitting the course to be publicized in a particular manner; (2) the actions taken or permitted by school officials to publicize the course do not advance religion; (3) a reasonable person would not perceive the actions of school officials as endorsing religion or a particular religion; and (4) the actions taken or permitted by school officials to publicize the course do not result in an excessive entanglement of school or district officials with religion.
4. A public school district may not prohibit students from inviting fellow students to released time religious instruction or from distributing literature for a released time course during non-instructional time while on school property, unless engaging in such student-to-student speech causes a material and substantial interference with school work or infringes on the rights of others.

However, the school district may impose content-neutral and viewpoint-neutral time, place, and manner restrictions on the speech.

5. A public school district may not prohibit community members from encouraging students to recruit their friends to enroll in released time religious instruction classes when those community members are not school employees, and the speech or conduct encouraging students occurs off school district property.
6. A public school district may not prohibit its employees from encouraging public school students to attend or discouraging public school students from attending released time religious instruction classes, if the employee makes the statements as a private citizen, as opposed to making the statements pursuant to the employee's official duties, and the employee's interest in making the statement outweighs the school district's interest in promoting the efficiency of the public services it performs through its employees.



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OPINION NO. 2019-015

The Honorable Douglas D. Rowland
Wyandot County Prosecuting Attorney
137 S. Sandusky Avenue
Upper Sandusky, Ohio 43351

Dear Prosecutor Rowland:

You have requested an opinion about the implementation of a school district's policy permitting students to be released from school to attend a course in religious instruction that is conducted by a private entity off school property. Such policies are known as "released time religious instruction policies." To assist a board of education in drafting its policy, you ask the following specific questions that relate to what a school district's policy may permit or prohibit:

1. May the availability of a released time religious instruction course be publicized in or through a public school in the following ways:
 - a. If a school district permits entities offering non-school sponsored activities or opportunities for students to host tables or other displays at orientation or other open house-type events, may it permit entities offering information about released time classes to host tables or other displays at orientation or other open house-type events?
 - b. If a school district permits the distribution of materials regarding non-school sponsored activities or opportunities for students, may it permit distribution of materials regarding released time religious instruction and sign-up forms?
 - c. May students take home from school consent forms for parents to review and to decide whether to consent for release of their child for religious instruction?
 - d. If a district offers credit for released time religious instruction high school classes, may the course description be included in the district's course description materials?

2. May a public school district prohibit students from inviting fellow students to released time religious instruction or from distributing literature for a released time course during non-instructional time while on school property?
3. May a public school district prohibit community members – whether or not part of the organization offering released time religious instruction – from encouraging students to recruit their friends to enroll in released time classes?
4. May a public school district prohibit its employees, outside of their working hours, from encouraging public school students to attend, or discouraging public school students from attending, released time religious instruction classes?

Released Time Religious Instruction Policies under R.C. 3313.6022

A school district board of education may adopt a policy permitting students to be released from school to attend a “released time course in religious instruction.” R.C. 3313.6022(B). Your letter explains that some school districts restrict the ability of parents, students, school employees, or community members to publicize the availability of or to encourage participation in released time religious instruction courses. You have indicated that those restrictions have been imposed in reliance on a 1988 Attorney General opinion, rather than on R.C. 3313.6022. That observation seems to suggest that you question whether the advice of the 1988 opinion still applies after the enactment of R.C. 3313.6022. For the reasons that follow we conclude that it does.

1988 Op. Att’y Gen. No. 88-001

In 1988, several years before the enactment of R.C. 3313.6022,¹ the Attorney General advised that, under R.C. 3313.20 (authority to adopt rules) and R.C. 3313.47 (power to manage and control public schools in the school district), a board of education may adopt a released time religious instruction policy provided that the policy “comport[s] with the establishment clause of the first amendment to the United States Constitution and the religious freedom provisions of Article I, §7 of the Ohio Constitution, as applied and interpreted by the United States Supreme Court and the courts of Ohio respectively.” 1988 Op. Att’y Gen. No. 88-001 (syllabus). The opinion suggested various ways to ensure that a released time religious instruction policy comports with constitutional principles:

the religious instruction permitted by such a policy should not take place on public school premises, or upon other property owned or leased by the school district; public school personnel should assume little or no responsibility for the actual, daily implementation of the individual aspects of the released-time program; public funds

¹ R.C. 3313.6022 was enacted in 2014. Sub. H.B. 171, 130th Gen. A. (2014) (eff. Sept. 11, 2014).

should not be expended in support of the released-time program; and the released-time policy formulated by the board of education should apply in a nondiscriminatory fashion to students of all religious faiths and persuasions.

Id. at 2-5 (citations omitted). The enactment of R.C. 3313.6022 does not alter the opinion's general advice that a released time religious instruction policy must comport with constitutional guarantees. While a school district's released time religious instruction policy is required to satisfy the terms of R.C. 3313.6022, such a policy is also subject to the First Amendment to the United States Constitution, and Article I of the Ohio Constitution. A policy that satisfies the terms of R.C. 3313.6022, but that violates the First Amendment or Article I of the Ohio Constitution is, nevertheless, unlawful. Compliance with the provisions of R.C. 3313.6022 does not guarantee that a school district's policy is constitutional.

Your questions ask us to consider whether particular actions to publicize the availability of or to encourage participation in a released time religious instruction course are permissible. The scenarios in your questions implicate the Establishment and Free Speech Clauses of the First Amendment to the United States Constitution, which state that "Congress shall make no law respecting an establishment of religion ...; or abridging the freedom of speech[.]" Your questions also implicate sections 7 and 11 of Article I of the Ohio Constitution, which are Ohio's religion and free speech clauses. We address your questions in light of the First Amendment and Article I of the Ohio Constitution.² In doing so, we have assumed that the school district's released time religious instruction policy complies with the requirements of R.C. 3313.6022.

Relationship of Pertinent Provisions of Federal and Ohio Constitutions

In answering your questions, we use case law examining the First Amendment to also evaluate the constitutionality of a board of education's policy under Article I of the Ohio Constitution. Courts have recognized that the jurisprudence examining the Establishment and Free Speech Clauses of the First Amendment may be used to interpret the protections of the comparable provisions of the Ohio Constitution. *See Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 10, 711 N.E.2d 203 (1999); *City of Cleveland v. Trzebuckowski*, 85 Ohio St. 3d 524, 528, 709 N.E.2d 1148 (1999); *Preterm Cleveland v. Voinovich*, 89 Ohio App. 3d 684, 690, 627 N.E.2d 570 (Franklin County 1993). For the purpose of this opinion, if a scenario presented in your questions is constitutional under the jurisprudence of the

² The scenarios in your questions may also implicate the provisions of Federal laws, such as the Equal Access Act, 20 U.S.C.S. § 4071, *et seq.*, which generally prohibits "any public secondary school which receives Federal financial assistance and which has a limited open forum [from denying] equal access or a fair opportunity to, or [from discriminating] against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C.S. § 4071(a). We have not addressed the application of particular Federal laws in this opinion as the primary concern of your questions appears to be compliance with constitutional provisions.

First Amendment, it is reasonable to conclude that it is also constitutional under Article I of the Ohio Constitution. See *Quappe v. Endry*, 772 F. Supp. 1004, 1015 (S.D. Ohio 1991). With those principles in mind, we now turn to your questions.

Publicizing the Availability of a Released Time Religious Instruction Course

Your first question asks whether the availability of a released time religious instruction course may be publicized in or through a public school. Publicizing the availability of such a course in or through a public school involves the authority of a board of education to regulate or engage in speech that is related to religion. When a public school endeavors to convey its own message, the speech is considered to be school- or government-sponsored speech. *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004). Speech is considered to be private speech when “a school or other government body facilitates the expression of ‘a diversity of views from private speakers[.]’” *Id.* (quoting *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995)). “[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Bd. of Ed. v. Mergens*, 496 U.S. 226, 250 (1990).

Accordingly, if the availability of a released time religious instruction course is publicized through a public school as the school’s own message, the constitutionality of that action is dependent on whether engaging in the speech violates the Establishment Clause. Alternatively, if the school district permits the availability of the course to be publicized at or through a school by other entities or parties just as it permits a variety of programs to be publicized, the constitutionality of that action requires a balancing of the Free Speech Clause’s protection of private speech against the avoidance of a violation of the Establishment Clause. Whether actions taken or activities permitted or prohibited by a board of education are constitutional under the First Amendment is dependent on the factual context and circumstances in which they occur. *Lee v. Weisman*, 505 U.S. 577, 597 (1992) (“[o]ur Establishment Clause jurisprudence remains a delicate and fact-sensitive one”); *Curry v. Sch. Dist.*, 452 F. Supp. 2d 723, 734 (E.D. Mich. 2006); *Quappe v. Endry*, 772 F. Supp. at 1015. Ultimately, only a court may determine whether a board of education’s policy is constitutional.

Permitting Tables and Displays and Distributing Materials and Sign-Up Forms

The first scenario presented in your first question asks whether entities, at a school-sponsored open house or orientation, may host tables or displays for the purpose of offering information about a religious instruction course. For the purpose of evaluating this scenario, we assume that the tables or displays are staffed by representatives from the organization that provides the religious instruction, and those representatives are not school personnel. We refer to this scenario as the “open house forum.”

The second scenario presented in your first question asks whether materials providing information about a released time religious instruction course and sign-up forms for the course may be distributed at a public school. In addressing the constitutionality of this scenario, we assume that the materials and sign-up forms are provided by the organization to the school and are distributed to students at the school, either by school personnel handing them out to students (*i.e.*, placing the papers

in mailboxes, cubbies, or take home folders), or by making the papers available for students or parents to pick them up if they so choose (*i.e.*, making the papers available in the principal's office or on a kiosk or bulletin board). Under either method of distribution, the materials and sign-up forms are not part of the curriculum and are not discussed by teachers or school personnel as part of classroom instruction. *Cf. Child Evangelism Fellowship of Md. v. Montgomery Cnty. Pub. Schs.*, 373 F.3d 589, 597 (4th Cir. 2004). The school and school personnel do not collect the sign-up forms once they have been completed. We refer to this scenario as the "handout forum."

In both scenarios, you have asked us to assume that the school district permits other entities to provide information and to distribute materials about other non-school-sponsored activities in the same manner. Under those circumstances, when the school district permits materials and information to be distributed, the district facilitates the expression of a diversity of views from private speakers, which constitutes private speech. *See Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d at 525-526.

"Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). Rather, "[t]he right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or ... has been reserved for specific official uses." *Capitol Square Review Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995); *see also State v. Spingola*, 136 Ohio App. 3d 136, 142, 736 N.E.2d 48 (Athens County 1999). The nature of the forum dictates the extent to which the government may restrict speech. *M.A.L. v. Kinsland*, 543 F.3d 841, 846 (6th Cir. 2008). That concept also applies to the regulation of speech in a public school. "The latitude that the Constitution gives school administrators to regulate student speech has depended in large measure on the context in which the speech is made." *Curry v. Sch. Dist.*, 452 F. Supp. 2d at 734.

Generally, a public school is not a traditional public forum. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). A public school or a portion of a public school may become a limited public forum if it is opened to expressive activity for certain purposes, subjects, or speakers. *See Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d at 526 ("Stafford had no constitutional obligation to distribute or post *any* community group materials or to allow *any* such groups to staff tables at Back-to-School nights. But when it decided to open up these fora to a specified category of groups (*i.e.*, non-profit, non-partisan community groups) for speech on particular topics (*i.e.*, speech related to the students and the schools), it established limited public fora"); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 225 (3d Cir. 2003).

With respect to the first two scenarios presented in your question, the board has permitted other non-school-sponsored activities to share information or distribute materials in the open house forum and the handout forum. We assume that the board has adopted a policy that specifies certain permitted types of groups, information, and materials that may be shared in the open house forum and the handout forum. In doing so, the board has created a limited public forum. In a limited public forum, a board of education may restrict speech to certain subjects or certain speakers that are

reasonably related to preserving the purpose of the forum, but the board may not discriminate against speech on the basis of the viewpoint expressed in the speech. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001). As applied to your scenarios, if the information, materials, and sign-up forms related to a released time religious instruction course otherwise satisfy the criteria set forth in the board's policy for permitting information or materials to be shared in the open house forum or the handout forum, the board may not prohibit the presentation of information, materials, and sign-up forms in the forum simply because the speech is presented from a religious viewpoint. See *J.S. v. Holly Area Schs.*, 749 F. Supp. 2d 614, 628 (E.D. Mich. 2010).

In accommodating speech from a particular viewpoint, however, a board of education must also be cognizant of the Establishment Clause. Broadly, the Establishment Clause requires the government to maintain neutrality toward religion – “favoring neither one religion over others nor religious adherents collectively over nonadherents.” *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994). At the same time, however, “just as the state may do nothing to advance religion, neither may it do anything which would inhibit religion.” *Quappe v. Endry*, 772 F. Supp. at 1013. The United States Supreme Court has held that “the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995).

The following three-part test is used to determine whether government action comports with the Establishment Clause: (1) the government action “must have a secular legislative purpose;” (2) the government action’s “principal or primary effect must be one that neither advances nor inhibits religion[;]” and (3) the government action “must not foster ‘an excessive government entanglement with religion.’” *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)). A question has been raised whether those three prongs have been replaced with solely a determination of whether the government endorses religion – the “endorsement” analysis. See, e.g., *Granzeier v. Middleton*, 955 F. Supp. 741, 745-746 (E.D. Ky 1997). The Sixth Circuit has clarified that the “endorsement” analysis does not replace the *Lemon* test. *Smith v. Jefferson Cnty. Bd. of Sch. Comm’rs*, 788 F.3d 580, 587 (6th Cir. 2015). According to the Sixth Circuit, a consideration of whether the government’s action endorses religion is part of evaluating whether the principal or primary effect of the government action advances or inhibits religion. *Id.*

Determining the constitutionality of government action under the Establishment Clause “is a fact-specific inquiry which may be altered by any of a myriad of factual permutations.” *Quappe v. Endry*, 772 F. Supp. at 1015. Courts are “mindful of both the context of the government action and the specific circumstances surrounding it.” *Smith v. Jefferson Cnty. Bd. of Sch. Comm’rs*, 788 F.3d at 587. The environment of a public school is unique. Students are subject to compulsory attendance laws and, as a result of their youth, elementary students may have a more difficult time deciphering government speech from private speech, which may make them more susceptible to “subtle coercive pressure[.]” *Lee v. Weisman*, 505 U.S. at 592.

In light of the facts described in your letter, precedent suggests that the Establishment Clause is not violated when a board of education's policy permits entities offering non-school-sponsored activities or opportunities for students, including entities offering religious instruction courses, to host tables or other displays at orientation or other open house-type events ("the open house forum"). Relevant case law suggests that the Establishment Clause is not violated by a board of education's policy that permits the distribution of materials regarding non-school-sponsored activities or opportunities for students, including the distribution of materials regarding released time religious instruction and sign-up forms ("the handout forum"). The determination of the constitutionality of a practice or policy, however, must be made by a court of competent jurisdiction on the basis of the facts at issue. The board's policy presumably has a secular purpose – providing information to students about a variety of non-school related activities. Insofar as religious instruction entities are permitted to participate in the open house forum or the handout forum on the same terms as other non-school activity providers, the policy's principal or primary effect does not advance or inhibit religion. Likewise, to the extent that the school permits a variety of participants from a variety of perspectives to participate in the open house forum and the handout forum, it is unlikely to convey a message of endorsement or disapproval. *See Widmar v. Vincent*, 454 U.S. 263, 274 (1981) ("[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect"); *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 611 (4th Cir. 2012) (addressing attendance of bible school representatives at a public school registration fair); *Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 422 (6th Cir. 2004) (doubting that a public school's distribution of flyers from various non-school organizations amounts to an endorsement of religion).

Finally, the policy does not appear to result in the board of education or the school being excessively entangled in religion. School officials or personnel simply pass along materials or provide an opportunity for private entities to provide information in a forum that is available to a wide variety of non-school entities. *See Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d at 535 (finding no excessive entanglement where school district grants equal access and "would merely perform the largely ministerial tasks needed to distribute and post the materials and ... accommodate a Child Evangelism representative at Back-to-School nights").

Therefore, it is our opinion that if a board of education permits entities offering non-school-sponsored activities or opportunities for students to host tables or other displays at orientation or other open house-type events, the board may permit entities offering information about released time classes to host tables or other displays at orientation or other open house-type events. We conclude further that if a board of education permits the distribution of materials regarding non-school sponsored activities or opportunities for students, the board may permit distribution of materials regarding released time religious instruction and sign-up forms.

Sending Consent Forms

The third scenario of your first question asks whether students may take home from school consent forms for parents to sign permitting the school to release students for a religious instruction course. We assume that the consent forms are produced by the school district for the purpose of complying with R.C. 3313.6022(B)(1) ("[t]he student's parent or guardian gives written consent").

The content of the form is limited to documenting a parent's or guardian's permission for a student to be released from school to attend a released time religious instruction course and does not contain any other religious content. The consent form is government speech, as opposed to private speech. Therefore, the question is whether the government-sponsored speech is an endorsement or advancement of religion in violation of the Establishment Clause.

Applying each of the prongs of the *Lemon* test, case law suggests that the Establishment Clause is not violated when school personnel send home consent forms for released time religious instruction. Again, a court is the appropriate arbiter of such constitutional issues. The school district likely has a secular purpose in permitting consent forms to be sent home from the schools because R.C. 3313.6022(B)(1) mandates that a school district's released time religious instruction policy require that a student's parent or guardian give consent. Permitting schools to send home the consent forms, as we have described them, does not have the effect of endorsing or inhibiting religion, and does not engender an impression that the school is endorsing religion. A consent form is nothing more than an accommodation of a parent's wish that the student be released to attend religious instruction. That sort of accommodation of a parent's wish has been accepted as permissible under the Establishment Clause because it does not endorse religion. *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 311 (1952). Finally, distributing and collecting consent forms does not result in an excessive entanglement of the school with religion. In producing and collecting consent forms, a school is fulfilling an aspect of its responsibility to supervise the students placed in the school's custody each day. *See Lanner v. Wimmer*, 662 F.2d 1349, 1358 (10th Cir. 1981). Under the facts described above, students may take home from school consent forms for parents or guardians to sign permitting the school to release students for a religious instruction course.

Including a Description in the District's Course Description Materials

The fourth include a description of a released time religious instruction course in the district's course description scenario mentioned in your first question asks whether a school district may materials when the school district has elected to award high school credit for the completion of the course. Whether this inclusion is constitutionally permissible depends on whether the school district includes descriptions of other courses offered by non-school-sponsored entities.³ If the released time religious instruction course is the only non-school-sponsored course or program that is included, the school district may run afoul of the Establishment Clause because the district's action will not survive all the prongs of the *Lemon* test. The school district satisfies the first prong (a secular purpose) because including a description of released time religious instruction course in the course description materials serves the purpose of informing students of the various courses for which they may earn high school credit. However, the school district's action may fail the second prong of the *Lemon* test

³ *See, e.g., R.C. 3365.02(A)* (“[t]here is hereby established the college credit plus program under which, beginning with the 2015-2016 school year, a secondary grade student who is a resident of this state may enroll at a college, on a full- or part-time basis, and complete nonsectarian, nonremedial courses for high school and college credit”).

because, if the released time religious instruction course is the only non-school-sponsored course included in the course description materials, even though the school district awards credit for completion of other courses offered by non-school entities, the school district's action may be deemed to have the effect of advancing religion or appearing to endorse religion.

In *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, the Fourth Circuit Court of Appeals concluded that awarding course credit for completing released time religious instruction courses did not violate the Establishment Clause because the school district “carefully maintained a neutral relationship with the [religious instruction course sponsoring entity], neither encouraging nor discouraging student participation in the ... course.” *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d at 610. The court likened the school district's award of credit for a released time religious instruction course to awarding credit to a student who transfers to a public school from a parochial school, in that in both situations, the school district “passively accommodates the ‘genuine and independent choices’ of parents and students to pursue [religious] instruction.” *Id.* at 609-611 (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002)). The court further noted that the high school “*never actively or directly engaged in promoting* the [religious instruction course] or any other released time course” and that the “[religious instruction] course was not listed in the [school's] course catalog[.]” *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d at 603 (emphasis added). This statement indicates that whether a religious instruction course is included in a public school district's course catalog is a factor in the court's analysis of whether a school district actively promotes religion.

The case law is fairly consistent that passive accommodation of a parent's or guardian's wish that his or her child receive religious instruction does not endorse or advance religion. That passive accommodation is gradually eroded, however, to the extent that the school district's policy permits school officials to take more active or overt actions to inform students and parents of the existence of released time religious instruction courses. The case law suggests that the Establishment Clause may be violated when a school district includes a description of a released time religious instruction course in the district's course description materials, when the school district does not include a description of other courses offered by other non-school entities.⁴

If the school district has included descriptions of other non-school-sponsored courses for which credit may be awarded, the school district may not prohibit the inclusion of a description of a released time religious instruction course on the basis that the course is taught from a religious viewpoint. In that situation, the fact that the religious instruction course description is one of a variety of non-school-sponsored course descriptions bolsters the notion that the school district is not endorsing or advancing religion in violation of the Establishment Clause. Rather, the school district is simply offering credit for courses from a variety of viewpoints.

⁴ If a released time religious instruction course is the only type of course provided by a non-school entity for which a student may receive credit, the inclusion of a disclaimer that the school district does not endorse the views presented in the course may assist in minimizing an impression that the school district endorses religion.

Prohibiting Students from Inviting or Distributing Literature

Your second question asks whether a school district may prohibit students from inviting fellow students to or distributing literature from a released time religious instruction course during non-instructional time while on school property. We assume that the school district's prohibition applies to student-to-student interactions, as opposed to addressing multiple students in a school-wide forum (such as over the public address system or during a school assembly or sporting event).

This student-to-student speech is private student speech that is governed by the standard established in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-509 (1969). Neither “students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[.]” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. at 506. To justify a restriction on student speech that is not school-sponsored and that is not vulgar or lewd, the school officials must show that the “forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school[.]’” *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

A school may impose content-neutral time, place, and manner restrictions on student speech that is protected by the *Tinker* standard. *See M.A.L. v. Kinsland*, 543 F.3d at 850. As explained by the Sixth Circuit Court of Appeals, “schools must meet a higher constitutional standard when they seek to foreclose particular viewpoints than when they seek merely to impose content-neutral and viewpoint-neutral regulations of the time, place, and manner of student speech.” *Id.* A blanket ban on students inviting fellow students to or distributing literature from a released time religious instruction course during non-instructional time while on school property is not a content-neutral and viewpoint-neutral time, place, and manner restriction on speech. *See J.S. v. Holly Area Schs.*, 749 F. Supp. 2d at 624.

Therefore, a public school district may not prohibit students from inviting fellow students to released time religious instruction or from distributing literature for a released time course during non-instructional time while on school property, unless engaging in such student-to-student speech causes a material and substantial interference with schoolwork or infringes on the rights of others.

Prohibiting Community Members from Encouraging Enrollment

Your third question asks whether a board of education may prohibit community members from encouraging students to recruit their friends to enroll in released time religious instruction. A school district board of education is a creature of statute. 2018 Op. Att’y Gen. No. 2018-011, at 2-99. As such, the board has only those powers as are expressly conferred by statute or that may be implied as necessary to carry out an express power. *Id.* A board of education’s authority to adopt rules and policies governing conduct is limited to “rules that are necessary for [the board’s] government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises.” R.C. 3313.20(A); *see also* R.C. 3313.47 (school district board of education has management and control of public schools in the district). Accordingly, a board of education has no authority to regulate the speech or conduct of community members, when those community members are not school employees and the speech or conduct occurs off school property.

Prohibiting Public School Employees from Encouraging or Discouraging Enrollment

Your fourth question asks whether a board of education may prohibit its employees, during non-working hours, from encouraging or discouraging public school students to enroll in released time religious instruction courses. It is well established that “public employees do not renounce their citizenship when they accept employment, and . . . public employers may not condition employment on the relinquishment of constitutional rights.” *Lane v. Franks*, 573 U.S. 228, 236 (2014). However, in order to efficiently provide public services, government employers need to have “a degree of control over their employees’ words and actions” just like a private employer. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Accordingly, the government may restrict the speech of its employees in ways or to a degree that it may not for private citizens who are not employees of the particular government employer. See *Waters v. Churchill*, 511 U.S. 661, 671 (1994); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

A three-pronged analysis is used to determine whether a public employer may restrict the speech of its employees: (1) whether the subject of the speech is a matter of public concern; (2) whether the employee spoke as a private citizen; and (3) whether the employee’s interest in speaking outweighs the government’s interest in restricting the speech to preserve its efficient operation. *Mayhew v. Town of Smyrna*, 856 F.3d 456, 462 (6th Cir. 2017).

“Speech involves matters of public concern ‘when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”’” *Lane v. Franks*, 573 U.S. at 241 (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). Whether the speaker believes, intends, or states that he is speaking for the benefit of the public on a matter of public concern is not alone sufficient to conclude that the speech involves a matter of public concern. See *Handy-Clay v. City of Memphis*, 695 F.3d 531, 543-544 (6th Cir. 2012); *Dunaway v. City of Cincinnati*, No. 1:17cv801, 2018 U.S. Dist. LEXIS 159647, at *8 (S.D. Ohio Sept. 19, 2018). Instead, whether speech involves a matter of public concern is determined from the “content, form, and context” of a statement. *Connick v. Myers*, 461 U.S. 138, 147-148 (1983); accord *Lane v. Franks*, 573 U.S. at 241. Applying this prong of the analysis to your fourth question, speech by public school employees during non-working hours to encourage students to participate, or to discourage students from participating, in released time religious instruction courses is likely speech involving a matter of public concern.

A public employee does not speak as a private citizen if the statements are made pursuant to the employee’s official duties. *Garcetti v. Ceballos*, 547 U.S. at 421. “Employers have heightened interests in controlling speech made by an employee in his or her professional capacity.” *Id.* at 422. Speech is made pursuant to an employee’s official duties when “the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.” *Lane v. Franks*, 573 U.S. at 240. The Sixth Circuit has described the inquiry as “a ‘practical’ inquiry that encompasses ‘ad hoc or de facto duties,’ as well as formal ‘written job description[s].’” *Bouldrey v. Mich. Dep’t of Corr.*, No. 18-11543, 2019 U.S. Dist. LEXIS 26607, *8 (E.D. Mich. Feb. 20, 2019) (quoting *Fox v. Traverse City Area Pub. Schs. Bd. of Educ.*, 605 F.3d 345, 348 (6th Cir. 2010)).

Accordingly, although an employee's job description is pertinent to determining whether speech is made pursuant to the employee's official duties, a public employer cannot create an excessively broad job description in order to unreasonably restrict a public employee's right to free speech. *Garcetti v. Ceballos*, 547 U.S. at 424.

When determining whether an employee spoke as a private citizen or whether the speech was pursuant to the employee's official duties, the court looks to “‘content and context – including to whom the statement was made[,]’” as well as, “the ‘impetus for the speech, the setting of the speech, and speech's audience, and its general subject matter.’” *Keeling v. Coffee Cnty.*, 541 Fed. Appx. 522, 526 (6th Cir. 2013) (citations omitted). “[W]hether the speech was made inside or outside of the workplace and whether it concerned the subject-matter of the speaker's employment’ are relevant considerations but are not dispositive.” *Henderson v. City of Flint*, No. 17-2031, 2018 U.S. App. LEXIS 26855, *12 (6th Cir. Sept. 20, 2018) (quoting *Handy-Clay v. City of Memphis*, 695 F.3d at 540-541). The same may be said of whether the speech occurs outside of the employee's working hours. Whether the speech occurs during non-working hours is a factor, but is not dispositive, of whether the speech occurs as part of the performance of official duties.⁵

Resolution of each of the questions pertinent to determining whether speech is made as a private citizen or pursuant to an employee's official duties is dependent on the facts of a particular situation. Consequently, we are unable to determine, to any reasonable degree of certainty, whether in a particular situation a public school employee's speech encouraging or discouraging participation in released time religious instruction courses constitutes speech made as a private citizen. Nevertheless, so long as the content and context of the speech – determined by examining the impetus, the setting, the audience, and the subject matter of the speech – indicate that the speech by a public school employee was made as a private citizen, rather than pursuant to the employee's official duties, the First Amendment protections presumptively apply to the speech and the third prong of the test must be examined.

The third prong requires a balancing of the employee's interest as a citizen in engaging in speech on a matter of public concern against “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering v. Bd. of Educ.*,

⁵ A public school employee's speech about participation in religious instruction courses may occur outside of the employee's working hours, but may nevertheless constitute or be construed as speech in which an employee engaged pursuant to the employee's official duties. For example, a guidance counselor comes upon a student during non-school hours, off school property, and in a venue other than a school function, and has a conversation with the student about courses to enroll in for the upcoming school year. During that conversation, the guidance counselor discourages the student from participating, or, conversely encourages the student to participate in released time religious instruction courses. Although the conversation occurs outside of working hours, because advising students on available courses is part of the guidance counselor's duties, one may question whether the guidance counselor engaged in the speech as a private citizen.

391 U.S. at 568. As with the other two prongs of the analysis, to engage in the *Pickering* balancing test, one must be aware of the factual circumstances of the speech. “In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee’s expression are relevant, as is the context in which the dispute arose.” *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). The Sixth Circuit has explained that the following considerations are important to balancing the interests of the employee and the State as the employer: “whether an employee’s comments meaningfully interfere with the performance of her duties, undermine a legitimate goal or mission of the employer, create disharmony among co-workers, impair discipline by superiors, or destroy the relationship of loyalty and trust required of confidential employees.” *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1053 (6th Cir. 2001) (quoting *Williams v. Kentucky*, 24 F.3d 1526, 1536 (6th Cir. 1994)). In addition, the role the employee has in the organization and the extent to which the employee engages with the public in that role are important factors in weighing the interests. *Rankin v. McPherson*, 483 U.S. at 390.

Applying this third prong to your question, it is possible that a board of education might assert that the board’s interest in avoiding an Establishment Clause violation is sufficient to outweigh a public school employee’s interest in speech encouraging or discouraging participation in released time religious instruction courses. Only a court may determine whether a policy is constitutional. One factor a court may consider is the likelihood that the speech may be perceived by a reasonable person as the school district’s endorsement or promotion of religion. For example, a school district’s interest in restricting the employee’s speech may carry greater weight in the balancing test if the public employee is a teacher or administrator who interacts with students and the community on matters related to school curriculum, policies, or mission. Another factor that will impact the balancing test is the content and context of the speech. For example, the interests of the employee may outweigh the interests of the public school district if the employee makes comments off school property, outside of working hours, in a setting that is unrelated to a school function, and the employee prefaces his or her comments with a disclaimer that the comments do not represent the views of the public school and are not made pursuant to the employee’s official duties. Those precautions lessen the risk of an Establishment Clause violation. With a lower risk of an Establishment Clause violation, the employee’s interest is more likely to outweigh the interests of the school district in restricting the speech.

In sum, a public school district may not prohibit its employees from encouraging public school students to attend, or discouraging public school students from attending, released time religious instruction classes, if the employee makes the statements as a private citizen, as opposed to making the statements pursuant to the employee’s official duties, and the employee’s interest in making the statement outweighs the school district’s interest in promoting the efficiency of the public services it performs through its employees.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. A public school district board of education's released time religious instruction policy that permits or prohibits various activities to publicize the availability of a religious instruction course must comply with R.C. 3313.6022, Article I, Sections 7 and 11 of the Ohio Constitution, and the Free Speech and Establishment Clauses of the First Amendment to the United States Constitution. Compliance with the provisions of R.C. 3313.6022 alone does not guarantee that a board's policy is constitutional.
2. When a board of education's policy has created a limited public forum in a public school, the board of education may restrict speech to certain subjects or certain speakers that are reasonably related to preserving the purpose of the forum, but the board may not discriminate against speech on the basis of the viewpoint expressed in the speech.
3. Actions taken to publicize the availability of or to encourage participation in a released time religious instruction course will not violate the Establishment Clause if each of the following is true: (1) the school district board of education has a secular purpose for permitting the course to be publicized in a particular manner; (2) the actions taken or permitted by school officials to publicize the course do not advance religion; (3) a reasonable person would not perceive the actions of school officials as endorsing religion or a particular religion; and (4) the actions taken or permitted by school officials to publicize the course do not result in an excessive entanglement of school or district officials with religion.
4. A public school district may not prohibit students from inviting fellow students to released time religious instruction or from distributing literature for a released time course during non-instructional time while on school property, unless engaging in such student-to-student speech causes a material and substantial interference with school work or infringes on the rights of others. However, the school district may impose content-neutral and viewpoint-neutral time, place, and manner restrictions on the speech.
5. A public school district may not prohibit community members from encouraging students to recruit their friends to enroll in released time religious instruction classes when those community members are not school employees, and the speech or conduct encouraging students occurs off school district property.
6. A public school district may not prohibit its employees from encouraging public school students to attend or discouraging public school students from attending released time religious instruction classes, if the employee makes the statements as a private citizen, as opposed to making the statements pursuant to the employee's official duties, and the employee's interest in making the

statement outweighs the school district's interest in promoting the efficiency of the public services it performs through its employees.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive, flowing style.

DAVE YOST
Ohio Attorney General