OPINION NO. 88-001

Syllabus:

Pursuant to R.C. 3313.20 and R.C. 3313.47, a board of education may adopt a policy that permits high school students to be excused from attendance during regular school hours for the purpose of receiving religious instruction off school property. A religious instruction released-time policy adopted by a board of education pursuant to R.C. 3313.20 and R.C. 3313.47 must comport 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.

To: John J. Plough, Portage County Prosecuting Attorney, Ravenna, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, January 25, 1988

You have requested my opinion regarding the authority of a board of education to adopt a religious instruction released-time policy for high school students. Specifically, you have asked that I address the following questions:

> 1. Does a board of education have legal authority to release students from school for religious training, and could the release time be lawfully counted as hours of instruction for purposes of computing the minimum hours of instruction required by the State Board of Education?
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> 2. If such authority exists, should not a policy be adopted by the board of education to authorize the release of students for religious instruction?

You have indicated in your letter that the local parish priest has requested the school district to release Catholic students in grades nine through twelve on three afternoons each week for the purpose of receiving religious instruction at the Catholic church.

I shall consider first the question whether a board of education may, as a general matter, formulate and implement a policy that permits high school students to be excused from attendance during regular school hours for the purpose of receiving religious instruction off school property. Article VI, §3 of the Ohio Constitution states, in part, that, "[p]rovision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds." Pursuant to this constitutional mandate, the General Assembly has enacted laws "establishing school districts and boards of education and granting such boards power to organize, administer control and conduct public schools." *Holroyd v. Eibling*, 116 Ohio App. 440, 445, 188 N.E.2d 797, 800 (Franklin County 1962). *See, e.g.*, R.C. Chapters 3311 (school districts; county planning); 3313 (boards of education); 3315 (school funds); 3318 (school facilities); 3321 (school attendance). Thus, as a creature of statute, a board of education may exercise those powers expressly conferred upon it by statute, or that may be implied by those that have been expressly granted. *CADO Business Systems of Ohio, Inc. v. Board of Education*, 8 Ohio App. 3d 385, 457 N.E.2d 939 (Cuyahoga County 1983) (syllabus, paragraph one) ("Ohio boards of education are creations of statute and their authority is derived from and strictly limited to powers that are expressly granted by statute or clearly implied therefrom"); *Brownfield, Bowen, Bally & Sturtz v. Board of Education*, 56 Ohio App. 2d 10, 11, 381 N.E.2d 207, 208 (Jackson County 1977) (same).

R.C. Chapter 3313 sets forth the numerous powers, duties, and responsibilities conferred upon the boards of education of the various city, county,

local, and exempted village school districts established throughout the state. As pertains to your particular questions, I find that two provisions of R.C. Chapter 3313 are relevant, namely, R.C. 3313.20 and R.C. 3313.47. R.C. 3313.20 states, in part, as follows:

> *The board of education shall make such rules as are necessary for* its government and *the government of* its employees, *pupils of its schools*, and all other persons entering upon its school grounds or premises. Rules regarding entry of persons other than students, staff, and faculty upon school grounds or premises shall be posted conspicuously at or near the entrance to such grounds or premises, or near the perimeter of such grounds or premises if there are no formal entrances, and at the main entrance to each school building. (Emphasis added.)

R.C. 3313.47, which addresses generally the management and control of the public schools, reads as follows:

> *Each* city, exempted village, or local *board of education shall have the management and control of all of the public schools of whatever name or character in its respective district.* If the board has adopted an annual appropriation resolution, it may, by general resolution, authorize the superintendent or other officer to appoint janitors, superintendents of buildings, and such other employees as are provided for in such annual appropriation resolution. (Emphasis added.)

Thus, R.C. 3313.47 vests in each board of education responsibility for the management and control of all of the public schools within the board's district, *see* R.C. 3311.06 (territory of school districts), and R.C. 3313.20 bestows upon a board of education specific, express authority to promulgate whatever rules it deems necessary for the government of the pupils of its schools.

The foregoing provisions of R.C. 3313.20 and R.C. 3313.47 have been interpreted as conferring fairly broad authority upon a board of education with respect to the types of policies and rules the board may promulgate, and the actions it may pursue, for the government of its schools and the pupils attending therein. *See, e.g., Holroyd v. Eibling*, 116 Ohio App. at 445-6, 188 N.E.2d at 801 (under R.C. 3313.20 and R.C. 3313.47 and the general statutes concerning the powers of boards of education, "it has been held that the rule-making power of such boards for the proper conduct, control, regulation and supervision of its employees, pupils and the entire school system is unlimited except to the extent that it is curtailed by express law"); *State ex rel. Idle v. Chamberlain*, 39 Ohio Op. 2d 262, 263, 175 N.E.2d 539, 540 (C.P. Butler County 1961) ("[t]here is ample authority to the effect that in the exercise of the foregoing statutory powers [under R.C. 3313.20 and R.C. 3313.47], boards of education have been granted a wide area of discretion"); 1982 Op. Att'y Gen. No. 82-030 at 2-87 (citing *Holroyd v. Eibling*); 1982 Op. Att'y Gen. No. 82-029 at 2-85. Further, it has been stated that a board of education's exercise of its discretionary power under R.C. 3313.20 and R.C. 3313.47 will be upheld unless the exercise of such power is unreasonable, is done in bad faith, is fraudulent, or constitutes an abuse of discretion. *State ex rel. Ohio High School Athletic Association v. Judges*, 173 Ohio St. 239, 181 N.E.2d 261 (1962); *Greco v. Roper*, 145 Ohio St. 243, 61 N.E.2d 307 (1945); *Brannon v. Board of Education*, 99 Ohio St. 369, 124 N.E. 235 (1919); *Board of Education of Sycamore v. State ex rel. Wickham*, 80 Ohio St. 133, 88 N.E. 412 (1909); *State ex rel. Milhoof v. Board of Education*, 76 Ohio St. 297, 81 N.E. 568 (1907); *Youngstown Education Association v. Board of Education*, 36 Ohio App. 2d 35, 301 N.E.2d 891 (Mahoning County 1973); *Holroyd v. Eibling*; *State ex rel. Idle v. Chamberlain*. Thus, for example, it has been determined that a board of education, pursuant to R.C. 3313.20 and R.C. 3313.47, may enact policies pertaining to smoking by students on school property, 1974 Op. Att'y Gen. No. 74-095; participation of pregnant students in certain extracurricular activities, 1971 Op. Att'y Gen. No. 71-046; 1962 Op. Att'y Gen. No. 2998, p. 346; participation of students in extracurricular activities generally, 1963 Op. Att'y Gen. No. 120, p. 198; and students leaving school property at the lunchtime hour, 1962 Op. Att'y Gen. No. 3495, p. 1005.

I am not aware of any statutory provision that expressly prohibits a board of education from enacting a policy to permit high school students to be excused from attendance during regular school hours for the purpose of receiving religious instruction off school property. Further, from the information you have provided in your letter, it does not appear that the adoption of such a policy by the board would be characterized as unreasonable, in bad faith, or an abuse of discretion. Accordingly, I conclude that a board of education, pursuant to the authority conferred upon it by R.C. 3313.20 and R.C. 3313.47, may determine that a policy to permit high school students to be excused from attendance during regular school hours for the purpose of receiving religious instruction off school property is necessary for the government of the pupils of its schools. Having made such a determination, a board of education may properly adopt such a policy pursuant to the terms of R.C. 3313.20 and R.C. 3313.47.

A religious instruction released-time policy promulgated by a board of education under R.C. 3313.20 and R.C. 3313.47 is, however, subject to the strictures of the first amendment to the United States Constitution, which provides, in pertinent part, that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] The religious liberty guarantees expressed by the free exercise and establishment clauses have been held to be applicable to the individual states by virtue of the fourteenth amendment to the United States Constitution. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Under currently prevailing decisions of the United States Supreme Court, a particular state law or governmental policy challenged as running afoul of the establishment clause will be upheld as constitutionally valid if it is demonstrated that the law or policy in question (1) has a secular purpose; (2) produces a principal or primary effect that neither advances nor inhibits religion; and, (3) does not result in an excessive entanglement of government with religion. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984); *Mueller v. Allen*, 463 U.S. 388 (1983); *Wolman v. Walter*, 433 U.S. 229 (1977); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Religious instruction released-time programs for public school students have been subject to close judicial scrutiny under the first amendment's establishment clause. A released-time program in which religious instruction is provided to students upon public school property will almost certainly be declared unconstitutional. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) (declaring invalid a released-time arrangement whereby students were permitted to attend religious instruction classes conducted during regular school hours in the public school building by religious instructors of various faiths). On the other hand, a released-time program that permits public school students to be excused from attendance during regular school hours for the purpose of receiving religious instruction off school property does not, as a general matter, violate the proscriptions of the first amendment's religion clauses. *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding a released-time program that permitted a public school, upon written request of the parents of students, to release students during regular school hours for the purpose of attending religious instruction classes conducted off school premises by, and at the expense of, a duly constituted religious body). *See also Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975) (syllabus paragraph), *cert. denied*, 423 U.S. 1073 (1976) (released-time program whereby public school students were released during school hours for religious instruction off school premises by a nonprofit organization supported by a council of churches had a secular purpose in accommodating the wishes of parents, did not excessively entangle the state with religion in that classrooms were not turned over to religious instruction, and, as its primary effect neither advanced nor inhibited religion, did not violate the establishment clause); *State ex rel. Holt v. Thompson*, 66 Wis. 2d 659, 225 N.W.2d 678 (1975) (released-time program did not violate establishment clause where the classes for religious instruction were conducted elsewhere than in public school buildings, students were released on written request or permission of their

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[1] Article I, §7 of the Ohio Constitution also states, in part, that, "[n]o person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted."

parents, the responsibility for ensuring attendance at the religious classes was solely that of the religious organizations involved, the time allotted for such classes was limited, and there was no expenditure of public funds other than for the minor expense of filing attendance reports); *Lewis v Spaulding*, 193 Misc. 66, 85 N.Y.S.2d 682 (Sup. Ct. 1948) (a released-time program that permitted the release of public school pupils from regular school attendance for one hour or less weekly, on their parents' request, to enable them to attend religious instruction classes, under auspices of churches of their choice, outside school builidngs and grounds, not per se unconstitutional as violating guarantees of religious liberty and separation of church and state). *See generally Dilger v. School District 24 CJ*, 222 Or. 108, 352 P.2d 564 (1960) (statute authorizing public school released-time for attendance at religious instruction not unconstitutional because it failed to designate official or board of school system to whom application for released-time is to be made).

In addition, however, certain individual aspects of such "off campus" released-time programs have, on occasion, been challenged successfully as violating the establishment clause. *See, e.g., Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981) (finding that the first amendment was violated by public schools' assumption of burden of gathering seminary's attendance slips which had been prepared and provided by public schools in view of less entangling alternative of requiring released-time personnel to transmit attendance reports to the public school, and by the granting of state credit for religious classes in satisfaction of elective courses, insofar as the released-time program required public school officials to make a judgment whether the classes offered under the program were "mainly denominational" in content). *Cf. Perry v. School District No. 81*, 54 Wash. 2d 886, 344 P.2d 1036 (1959) (concluding that the distribution of cards in schools upon which parents of public school children could indicate their desire to have their children attend religious education classes off school property, and the making of announcements regarding such released-time programs in public school classrooms by representatives of religious groups or school instructors, violated specific religious freedom provisions of the Washington Constitution); *Fisher v. Clackamas County School District 12*, 13 Or. App. 56, 507 P.2d 839 (1973) (holding that a released-time program in which fifth and sixth grade parochial school students, as full-time students of purported public school maintained in parochial school building, received their instruction from public school teacher but were released for religious instruction in another room, violated provision of Oregon Constitution prohibiting the use of public money for the benefit of religious institutions). In the single reported Ohio decision on this subject, for example, a court of common pleas declared a school district's purportedly off campus released-time program unconstitutional under the first amendment's establishment clause because the school district in question had, according to the evidence presented, entered into such a close partnership with a local church in developing and implementing the released-time program as part of the students' public school regimen that any distinction between the students' secular education on the one hand, and their religious instruction on the other, had effectively been obliterated. *Moore v. Board of Education*, 4 Ohio Misc. 257, 212 N.E.2d 833 (C.P. Mercer County 1965). In this regard, the syllabus to the court's decision summarizes the salient characteristics of the challenged released-time program, and the court's holding with respect thereto, as follows:

> Where a board of education of a local school district maintains four elementary schools, in three of which all pupils are Roman Catholic and in the other, most are non-Catholic; a released time religious instruction is conducted for one hour per day, five days per week in the three former schools only, under the following circumstances: (1) the religious instruction is conducted in the same buildings with, or ones nearby, the classrooms, (2) the same teachers (including members of religious orders) give both classroom and religious instruction, (3) teacher recruitment policies are designed to obtain only those able and willing to fulfill the dual role, (4) pupil attendance at the several schools is not determined by geographic considerations, and (5) some pupils from outside the district attend such schools, with tuition paid by their parish, there is such a commingling of religious with secular instruction and assistance to a religious sect that the plaintiff's rights

> under the Establishment of Religion Clause of the First Amendment and of the Ohio Constitution have been violated and an injunction will be granted to prevent its continuance.

Moore v. Board of Education (syllabus, paragraph seven).

Accordingly, a board of education that proposes to adopt and implement a religious instruction released-time policy pursuant to R.C. 3313.20 and R.C. 3313.47 should ensure that the policy it formulates comports with the religious freedom guarantees set forth in the United States and Ohio Constitutions, as applied and interpreted by the United States Supreme Court and the courts of this state respectively. Thus, for example, 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 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. *Zorach v. Clauson*; *Lanner v. Wimmer*; *Moore v. Board of Education.*

You have also asked whether released-time religious instruction may be counted as hours of instruction for purposes of computing the minimum hours of instruction required by the State Board of Education. R.C. 3301.07 sets forth the powers, duties, and responsibilities conferred upon the State Board of Education. R.C. 3301.07(D) provides, in pertinent part, that the State Board of Education shall "[f]ormulate and prescribe minimum standards to be applied to all elementary and secondary schools in this state for the purpose of requiring a general education of high quality." Pursuant thereto the State Board of Education has promulgated comprehensive minimum educational standards for all elementary and secondary schools in Ohio. Those standards appear in 3 Ohio Admin. Code Chapter 3301-35. The minimum standards for secondary schools may be found in rule 3301-35-02(B)(13). Those standards describe the coursework subject areas, and the minimum credit units in such subject areas, that students in grades nine through twelve must satisfy in each academic year. *See* 3 Ohio Admin. Code 3301-35-02(B)(13)(b)(i)-(xiv).

Insofar as the General Assembly has expressly delegated to the State Board of Education the authority to prescribe minimum course and credit requirements for secondary school students, I conclude that your particular question concerns a matter that may be addressed more appropriately by the State Board of Education than by a formal opinion of the Attorney General. Thus, I must respectfully decline to render you an opinion with respect to this question.

Finally, you have asked whether a board of education should adopt a religious instruction released-time policy. As I have already noted, R.C. 3313.20 and R.C. 3313.47 confer authority upon a board of education, in the reasonable exercise of its discretion, to adopt whatever policies it deems necessary for the government of the pupils of its schools. Thus, whether a board of education should adopt a religious instruction released-time policy is a matter that must be resolved by the board itself, taking into account the particular circumstances of the school district in question and the need within the school district for such a policy.

Based upon the foregoing it is my opinion, and you are advised that, pursuant to R.C. 3313.20 and R.C. 3313.47, a board of education may adopt a policy that permits high school students to be excused from attendance during regular school hours for the purpose of receiving religious instruction off school property. A religious instruction released-time policy adopted by a board of education pursuant to R.C. 3313.20 and R.C. 3313.47 must comport 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.