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**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION**

H.S., on her own behalf and as parent and next
friend of her minor child, J.S.,

Plaintiff,

vs.

HUNTINGTON COUNTY COMMUNITY
SCHOOL CORPORATION,

Defendant.

Case No. 1:08-cv-00271-JTM-RBC

Judge James T. Moody
Magistrate Judge Roger B. Cosby

**BRIEF OF AMICUS CURIAE
ASSOCIATED CHURCHES OF
HUNTINGTON COUNTY IN SUPPORT
OF DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

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I. INTERESTS OF AMICUS CURIAE

To say Amicus Curiae Associated Churches of Huntington County (the “Association”) has an “interest” in this case would be a gross understatement. Indeed, if this Court grants Plaintiff’s motion for preliminary injunction, the Association’s released-time program, which has been offered to third and fourth grade students who attend Horace Mann Elementary School (the “School” or “Horace Mann”) since 1954, will cease to exist.¹

As explained more fully in the attached affidavit and below memorandum of law, granting the injunction will result in the immediate and permanent shutting down of the released-time program at Horace Mann. The Association cannot relocate to properties adjacent to the School due to the numerous safety risks such relocation would pose to the students (including crossing a river, crossing busy streets, and environmental hazards), and the unavailability of space at the only adjacent building. Further, requiring the Association to transport students to an off-site location is not possible due to the time constraints Horace Mann imposes on the released-time program. The Association has 30 minutes to run its program, and having to transport students to any off-site location would leave the Association with little or no time for instruction. If an injunction is granted, it will immediately and permanently end a released-time program that has been offered for 54 years to students at Horace Mann School.

II. INTRODUCTION

Before the Court can consider the merits, Plaintiff must prove her standing. But, Plaintiff has failed to do so and lacks standing to challenge all aspects of the Association’s released-time program. For one, she completely lacks taxpayer standing because the Corporation does not spend a single cent on the program. Without taxpayer standing, then, her “injuries” can only be

¹ For this reason, should this Court grant Plaintiff’s injunction, the Association will assist the Huntington County Community School Corporation (“Corporation”) in requesting an immediate stay of the decision and in pursuing an emergency appeal to the U.S. Court of Appeals for the Seventh Circuit.

based on the “injuries” her child allegedly suffers. Yet, the only possible basis for “injury” is Plaintiff’s child once being brought to the released-time trailer to be introduced to the program — a practice which no longer occurs, thereby negating the possibility of future injury and eliminating the need for injunctive relief. Were Plaintiff to have any standing, it would only apply to the child’s school, Horace Mann, and would be under an improperly expansive view of standing, premised upon some alleged “harm” resulting from the mere presence of the trailers on Horace Mann’s property. While this overly expansive approach to standing should not be taken, even under it the only potential issue that could be decided at this juncture is whether locating the trailers on Horace Mann’s (and no other school) property violates the Establishment Clause.

Plaintiff would have this Court believe that this issue can be decided based on the answer to a single question: does the Association’s released-time instruction take place on school property? Under Plaintiff’s simplistic approach, if the answer is “Yes,” the Establishment Clause is violated and an injunction must issue that requires the Association to move its trailers off of school property. If the answer is “No,” the Establishment Clause is not violated, and the Association can continue to bring its trailers onto School property.

Is Establishment Clause analysis really this simplistic? Of course not. The Supreme Court has rejected such an absolutist and formalistic approach to applying the Establishment Clause to government actions alleged to violate it. *See Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (explaining that the “Court consistently has declined to take a rigid, absolutist view of the Establishment Clause”); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993) (upholding placement of sign language interpreter paid with public funds in religious school and rejecting lower court’s position that the Establishment Clause imposes an “absolute bar” to such placements as “exalt[ing] form over substance”).

Rather, in Establishment Clause analysis, context is king. *See, e.g., Lynch*, 465 U.S. at 679-80 (in rejecting Establishment Clause challenge to inclusion of crèche in governmental holiday display, Court explained that proper focus was not on the “religious component” of the crèche, but instead on the “creche within the context of the Christmas season”) (emphasis added); *McCreary County, Kentucky v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844, 864 (2005) (rejecting plaintiff’s invitation for the Court to “cut context out of the [Establishment Clause] enquiry”) (emphasis added). And here, context demonstrates two things: 1) that Plaintiff does not have a likelihood of succeeding on the merits of her Establishment Clause claim; and 2) that an injunction requiring the Association to move its operation off-campus would result in the immediate and permanent shutting down of the released-time program. Since context determines constitutionality, the Association’s position is that under the specific facts of this case, locating trailers on Horace Mann’s property does not violate the Establishment Clause.

III. SUMMARY OF THE FACTS

The Association and Its Released-Time Program

The Association has been in existence since 1946, and has offered released-time religious education to students who attend elementary schools within the Corporation every year since its inception. Ex. 1, ¶5. The Corporation has eight elementary schools, and the Association offers its released-time program at each of these schools to students within the third and fourth grades. *Id.* ¶8. The Association’s program is very popular, and has outstanding support from the community. Indeed, close to 97% of the parents with third and fourth grade students who attend elementary schools within the Corporation choose to send their children to the Association’s released-time program, which amounts to over 950 students.² *Id.* ¶10. At Horace Mann, which

² The Second Circuit upheld a released-time program in *Pierce v. Sullivan West Cent. Sch. Dist.*, 379 F.3d 56, 60-61 (2d Cir. 2004), stating that “no constitutional significance may be attributed to the percentage of participating families.”

is the school Plaintiff's child attends, all 62 students enrolled in the fourth grade attend the program, and 51 out of the 54 enrolled third graders attend the program. *Id.* ¶9.

Granting Plaintiff's Motion for Preliminary Injunction Will Immediately And Irrevocably Destroy A Program That Has Been In Existence for Half a Century

An injunction requiring the Association to move its trailers/program off-campus would bring the Association's program at Horace Mann to a screeching, and permanent, halt. *Id.* ¶¶11-12. There are numerous reasons for this. First, there are no buildings or sites available adjacent to the school where the Association could rent space or buy land to operate its released-time program, and each site poses significant safety risks for the children. *Id.* ¶13.

For instance, Horace Mann's 60 acre parcel of land is bounded on one side by a river, and obvious safety concerns prevent the Association from using any property on the other side of the river. *Id.* ¶14. In fact, the school has a fence in place that prevents students from getting too close to the river to prevent drowning and other water-related safety hazards. *Id.*

Horace Mann is also bounded on another side by a city street. *Id.* ¶15. Across this street, and adjacent to the school's property, is a former scrap yard where environmental hazards were dumped. *Id.* This site is not a viable alternative for the Association's program. Subjecting students to the danger of crossing the city street and the many environmental hazards lurking on the property would be irresponsible, and could subject the Association to legal liability. *Id.*

Horace Mann is bounded on the other side by a busy road, formerly a state highway. *Id.* ¶16. On the opposite side of this road, and adjacent to the school, there is a building that is used almost entirely by a carpet business. *Id.* There is not enough room in this facility for the Association to run its program, and, as with the hazardous waste dump, asking the children to walk across a busy road to attend released-time education poses far too many safety hazards. *Id.*

In addition to there being no viable locations adjacent to Horace Mann where the Association could move its trailers/program, the rural nature of Huntington County also means that any other potential locations are in most instances many miles from the school. *Id.* ¶18. After the filing of this lawsuit, the Association researched all potential locations it could possibly use and found that none of them are within walking distance of the school, and thus the Association would have to bus the students to and from these locations. *Id.* ¶¶11, 18-19.

The problem with transporting children, even to the closest potential facility, is that the time it would take to collect the children, load them on the bus, and unload them, both to and from the an off-site location, would leave no time for any meaningful instruction. *Id.* ¶¶20-21. This is because the State of Indiana imposes stringent requirements on what must be included within a public school day. *Id.* As a result, the School Board allots the Association 30 minutes per grade to run its released-time program. *Id.* Even if the Association used a small church located about 2078 feet from Horace Mann, transporting the students to and from that church would leave the Association with 10 minutes or so for actual instruction.³ *Id.* This would render the program meaningless, and there would be no reason to continue it. *Id.* Regarding other potential locations, their distances from the school would leave the Association no time for instruction because 30 minutes (or more) would be used for transporting students. *Id.* ¶21.

Many of the Facts In the Amended Complaint Regarding How the Program Is Operated Are Inaccurate or No Longer True

The Amended Complaint contains numerous factual inaccuracies. *Id.* ¶24. First, the Amended Complaint asserts that the Association's trailers are hooked up to Horace Mann's electric service, and that the School pays the Association's electric bills. Am. Compl. ¶¶27-28, 31. This is not true. The Association spent its own money getting electric service established for

³ In addition, this small church is an unsuitable option because of significant limitations with regard to space and program presentation capabilities. Ex. 1, ¶20. Participating students would have zero space to accomplish desk-type work, and the Association cannot conduct the audio/visual presentations that are crucial to its program. *Id.*

the trailer at Horace Mann. Ex. 1, ¶26. The electrical service pole at Horace Mann has its own meter attached to it. *Id.* The Association receives the bill for this meter, and pays the bill. *Id.* The School did not pay a penny in establishing the Association's electrical service at Horace Mann, and has never paid any portion of any of the Association's electric bills. *Id.*

Second, the Amended Complaint claims that Plaintiff's child's teacher walks students who attend the released-time program directly to the trailer, while leaving nonparticipating students unattended. Am. Compl. ¶¶21-23. This also is not true. The practice at Horace Mann is for teachers to walk their classes to the front entrance when it is time for the released-time program. Ex. 1, ¶25. The released-time teachers then observe the participating students walk the short distance to the released-time trailer. *Id.* No Horace Mann teachers have ever walked participating students to the trailer, while leaving nonparticipating students unsupervised. *Id.*

The Amended Complaint also alleges how students and parents are notified about the released-time program and how permission slips are collected. Am. Compl. ¶¶12-14, 18. This process has already been permanently changed. Ex. 1, ¶27. The Association will now have its materials distributed to students under the Corporation's policy governing the distribution of materials by nonschool organizations. *Id.*; Ex. 2, Corp.'s Lit. Dist. Policy. The Association will provide a copy of its brochure and permission slip to the Superintendent. Ex.1, ¶28. If the Superintendent approves these materials, they will be distributed to students in the same manner as other materials submitted by outside groups. *Id.* In addition, no student is allowed to go to the released-time trailer until that student's parent has signed a permission slip allowing him or her to participate in the released-time program. *Id.* ¶30. The released-time teachers will collect the permission slips and forward them to the School office, so that the School and its teachers are aware of which students will remain in class and which students will go to the trailer. *Id.* ¶29.

The Amended Complaint also makes general allegations that school personnel supervise, direct, or participate in the Association's released-time program. Am. Compl. ¶32. But this is not true. No school official or employee selects or approves the curriculum used in the Association's program, or the teachers who teach that curriculum. Ex. 1, ¶¶33-34. Neither does any school official or employee supervise or direct any aspect of the program, or participate in any of the religious instruction provided as a part of the program. *Id.* ¶¶35-36.

The Corporation Operates A Forum for Private Expression Whereby Nonschool Groups May Use School Facilities for Community Purposes

The Corporation's Use of School Facilities policy (*See* Ex. 3) allows nonschool groups, whether religious or nonreligious, to use school facilities for community purposes, including the provision of released-time education. *Id.* ¶31. The policy states that facilities "should be made available for community purposes, provided that such use does not infringe on the original and necessary purpose of the property or interfere with the educational program of the schools." Ex. 3. The policy allows the use of facilities by nonschool groups during school hours, so long as the use does not interfere with the school's educational functions. *Id.* ¶32; Ex.3.

IV. ARGUMENT

A. Plaintiff Lacks Standing to Seek Injunctive Relief.

Plaintiff challenges various aspects of the Association's released-time program through her preliminary injunction motion. The relief she requests is not limited to the operation of the released-time program at Horace Mann, but at all of the Corporation's elementary schools. *See* Am. Compl., Request for Relief, ¶ 3 (requesting an injunction preventing the Corporation from "allowing religious instruction to occur on its property during instructional time"). The problem for Plaintiff is that she lacks standing to challenge every aspect of the program that she complains of in her Motion. Plaintiff's standing argument is based on two theories: her "injury"

as a taxpayer, and the “injury” her child suffers as a result of exposure to various aspects of the Association’s program at Horace Mann. But, Plaintiff lacks taxpayer standing altogether, and the standing she claims by way of her child’s “injuries” are not continuing harms.

As the Seventh Circuit has reminded, “Jurisdiction is the ‘power to declare law,’ and without it the federal courts cannot proceed.” *Hay v. Indiana State Bd. of Tax Com’rs*, 312 F.3d 876, 879 (7th Cir. 2002) (quoting *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999)). Since standing is a “threshold jurisdictional question,” federal courts “not only may...police subject matter jurisdiction *sua sponte*, they must.” *Hay*, 312 F.3d at 879. Also, the Seventh Circuit has entertained standing where solely *amicus curiae* raised it as an issue. *See Peick v. Pension Ben. Guar. Corp.*, 724 F.2d 1247, 1257-58 (7th Cir. 1983).

1. Plaintiff does not have standing as a taxpayer to challenge the Association’s released-time program.

Taxpayer standing exists only when a plaintiff can establish that a specific, measurable allocation of tax money is being spent on a program that allegedly violates the Establishment Clause. The Supreme Court and the Seventh Circuit have recently affirmed this principle. *See Hein v. Freedom From Religion Found. Inc.*, 127 S. Ct. 2553 (2007) (proof of extraction and spending of tax dollars in support of program that allegedly violates Establishment Clause prerequisite to taxpayer standing); *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly*, 506 F.3d 584, 599 (7th Cir. 2007) (plaintiffs lacked taxpayer standing because “[t]hey have not shown that the legislature has extracted from them tax dollars for the establishment and implementation of a program that violates the Establishment Clause”).)

The Seventh Circuit has consistently rejected taxpayer standing where the plaintiff could not demonstrate actual expenditure of tax monies on the allegedly unconstitutional practice. For example, in *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F. 2d 1463, 1470 (7th Cir.

1988), the Seventh Circuit held that municipal taxpayers lacked standing to challenge a Ten Commandments monument in a city park because they “did not establish that the City of La Crosse has used tax revenues on the allegedly unconstitutional display” Similarly, in *Gonzales v. North Twp. of Lake County, Indiana*, 4 F.3d 1412, 1416 (7th Cir. 1993), the Seventh Circuit held that municipal taxpayers lacked standing to challenge the display of a crucifix in a public park because of “their inability to show that tax revenue is spent for the crucifix.”

Under these cases, Plaintiff lacks taxpayer standing for a simple reason: she is wrong that the Corporation pays the Association’s electric bills for its trailers. *See* Am. Compl. ¶31. To the contrary, the Association or its supporters pay the electric bill for the use of trailers at every school, including Horace Mann. Ex. 1, ¶26. Further, Plaintiff is wrong that the trailer is “plugged into a post with [Horace Mann’s] electrical meter on it”).) The Association spent its own money for separate electrical service for trailers at each school, including Horace Mann. *Id.* In addition, the meters on the power poles for the trailers are separate from the schools’ electric meters, and the Association, not the schools, receive bills generated from these meters. *Id.*

As in *Hein, Hinrichs, Zielke, and Gonzales*, Plaintiff lacks taxpayer standing here because she fails to demonstrate (nor could she) that any of her tax dollars are spent on the Association’s program. Accordingly, Plaintiff cannot challenge any aspect of the Association’s program at Horace Mann, or at other schools within the Corporation, based on her status as a taxpayer.

2. Plaintiff’s standing can only be predicated on her child’s alleged “injuries,” which are not ongoing and thus insufficient for standing.

Because Plaintiff lacks taxpayer standing, her standing can only be based on the “injuries” she claims that her child is suffering at Horace Mann as a result of the released-time program. *See Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437, 440 (7th Cir. 1992) (recognizing that a parent “has derivative standing” via injuries suffered by his minor

child). The problem for Plaintiff under this theory of standing is that her child is no longer exposed to any aspect of the program she seeks an injunction against, and continuing, ongoing harm is a prerequisite to establishing standing to seek injunctive relief.⁴

Indeed, where a plaintiff seeks an injunction, she “must establish ‘that [s]he is in immediate danger of sustaining some direct injury.’” *Feit v. Ward*, 886 F.2d 848, 857 (7th Cir. 1989) (citation omitted). As the Supreme Court explained in *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974), past harm that is not ongoing is insufficient to confer such standing: “Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”

This well-settled rule submerges Plaintiff’s standing to seek an injunction against every aspect of the Association’s program. For instance, Plaintiff seeks to enjoin the Corporation from “promoting student participation in the religious released time program,” and “participating in the religious released time program in any way.” PI’s MPI Mem. 22. But the actions she alleges result in such promotion and participation no longer occur or are untrue.

For instance, Plaintiff complains that her child’s teacher took all the students out to the released-time trailer where they were given brochures and permission slips by released-time personnel. Am. Compl. ¶¶12-14. The Corporation has already changed this process. Now the Association must seek to have its material distributed to students pursuant to the Corporation’s policies governing the distribution of literature by nonschool organizations. Ex. 1, ¶27; Ex. 2. The Association will submit brochures and permission slips to the Superintendent, who will then determine whether they may be distributed. *Id.* ¶28. If approved, the materials will be distributed to students in the same manner as all other approved nonschool organization materials. *Id.* Also,

⁴ Further, because Plaintiff’s child attends Horace Mann and no other school in the Corporation, Plaintiff can only challenge the ongoing “harm” her child is suffering at Horace Mann. Whatever “injuries” her child suffers at Horace Mann (and none of the complained of injuries is ongoing) cannot suffice to confer standing on Plaintiff to challenge the Association’s program at other elementary schools within the Corporation.

neither the Corporation nor the Association will allow a student to go to the released-time trailer for any reason unless that student has a signed permission slip from the parent. *Id.* ¶30. Because the Corporation has ceased the practices Plaintiff complains of, her child is no longer in “immediate danger of sustaining some direct injury.” *Feit*, 886 F.2d at 857.

Plaintiff’s other primary complaint regarding the Corporation’s alleged “participation” in the program concerns the manner in which teachers dismiss their students for released-time education. Plaintiff claims that when it is time to take the children to the released-time class, her child’s teacher walks the class to the School’s front entrance and leaves all the children who do not participate in the program (including Plaintiff’s child) unattended in the hallway, while he walks the participating students to the trailer. Am. Compl. ¶¶21-23. This is not accurate. The practice at Horace Mann is for the teachers to walk their classes to the front entrance, where a released-time teacher observes the participating students walk the short distance to the trailer. Ex. 1, ¶25. Plaintiff’s child’s teacher has never walked the participating children to the released-time trailer while leaving nonparticipating students in the School, unsupervised. *Id.*

These are the only allegations in Plaintiff’s Amended Complaint that support her request for an injunction enjoining the Corporation from promoting or participating in the released-time program.⁵ None of these activities are ongoing, so Plaintiff does not have standing to seek an injunction against them. Moreover, the Association does not involve Corporation officials or employees in its program in any way. Corporation employees do not: select or approve the curriculum used by the Association; select or approve the teachers who provide the instruction;

⁵ Plaintiff complains that school teachers collect the permission slips from students, but this practice has already been changed, as released-time teachers will now collect the permission slips from students and forward them to the School office. Ex. 1, ¶29. More importantly, however, as the Tenth Circuit Court of Appeals noted in upholding a released-time program that operated similarly, a public school must be involved in these administrative aspects of the program because of their “legitimate interest in knowing where their students are during school hours.” *Lanner v. Wimmer*, 662 F.2d 1349, 1358 (10th Cir. 1981). As the Tenth Circuit said, “The registration and recordkeeping involved are necessary to administer the released-time program and do not excessively entangle the government in religion or indicate the schools’ endorsement of the content of the released-time courses.” *Id.* at 1359.

supervise or direct any part of the Association’s program; or participate in any way in the religious instruction provided as part of the program. *Id.* ¶¶33-36. Clearly, Plaintiff has no standing to seek an injunction against the Corporation promoting or participating in the Association’s released-time program where no such promotion or participation is ongoing.

In sum, because Plaintiff lacks taxpayer standing, her standing to seek injunctive relief can only be based on injuries suffered by her child, which are not ongoing and therefore insufficient to confer standing.⁶ Moreover, even under an erroneous expansion of standing where the mere presence of a trailer on School property somehow causes a constitutional injury, Plaintiff would only have standing to challenge the presence of the released-time trailer on Horace Mann’s property. As shown below, Plaintiff’s Establishment Clause challenge fails as to this single aspect of the released-time program, and an injunction should not issue requiring the Association to locate its trailer/program off of school property.

B. A Preliminary Injunction Should Not Issue.

Should this Court accept Plaintiff’s erroneous standing argument, this case boils down to a single issue: whether Plaintiff is entitled to a preliminary injunction requiring that the Association move its trailers off of Horace Mann school property. To obtain this “extraordinary

⁶ Moreover, Plaintiff cannot validly assert that if she does not have standing, then no one does, so this Court must find that she has standing. The Supreme Court rejected this very argument in *Valley Forge Christian College v. Americans United for Sep. of Church and State*, 454 U.S. 464 (1982), on review of a Court of Appeals decision that, based on the same reasoning, found plaintiff standing. The Supreme Court observed:

Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that “cases and controversies” are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme.

454 U.S. at 489. The Court went on to hold that

[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing. This view would convert standing into a requirement that must be observed only when satisfied.

Id. (internal quotations omitted) (emphasis added).

and drastic remedy,” Plaintiff must show that: (1) she has a reasonable likelihood of success on the merits; (2) no adequate remedy at law exists; (3) she will suffer irreparable harm which, absent injunctive relief, outweighs the irreparable harm the respondent will suffer if the injunction is granted; and (4) the injunction will not harm the public interest. *Goodman v. Illinois Dept. of Fin. and Prof. Reg.*, 430 F.3d 432, 437 (7th Cir. 2005). Plaintiff fails this test.⁷

1. Plaintiff Is Not Likely To Succeed On The Merits.

Plaintiff’s Establishment Clause argument boils down to this: because the Association provides religious instruction via trailers parked on school property, the Establishment Clause is violated. As noted *supra*, the Supreme Court has rejected such a formalistic approach to the Establishment Clause. Rather, context matters when evaluating Establishment Clause challenges, and here context demonstrates that Plaintiff is not likely to succeed on the merits.

a. The released-time program satisfies the *Lemon* test.

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) outlines the prevailing Establishment Clause test. To satisfy the *Lemon* test, the challenged practice must have a secular purpose, not have the primary effect of advancing or inhibiting religion, and not result in any government entanglement in religion. The released-time program at Horace Mann easily satisfies this test. As Plaintiff concedes, “released time programs are clearly constitutional.” Pl’s MPI Mem. 1.

(1) The Corporation has a secular purpose in allowing students to participate in the released-time program.

It is well-settled that released-time programs serve a secular purpose. As the Tenth Circuit held in *Lanner v. Wimmer*, 662 F.2d 1349, 1357 (10th Cir. 1981), a public school’s “desire to accommodate the public in its spiritual needs satisfies the secular legislative purpose prong of the [*Lemon*] test.” The Fourth Circuit agrees: “The purpose of the Harrisonburg [school

⁷ While Plaintiff does not have an adequate remedy at law to rectify her alleged harm (and such only applies if the mere location of a trailer at Horace Mann even qualifies as such harm), as shown *infra* Plaintiff fails to satisfy the other three factors of the test, and therefore no injunction should issue.

district] released-time program . . . is secular[:] the schools aim only to accommodate the wishes of the students' parents." *Smith v. Smith*, 523 F.2d 121, 124 (4th Cir. 1975). These courts' holdings regarding purpose are based on the Supreme Court's decision in *Zorach v. Clauson*, 343 U.S. 306 (1952), where it upheld a religious released-time program.⁸ The *Zorach* Court spoke eloquently of the valid and benevolent secular purpose that supports released-time education:

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.

Id. at 684. Clearly, the Corporation's release of Horace Mann students, pursuant to their parents' wishes, to attend the Association's released-time program serves a valid secular purpose.⁹

Also, allowing the Association's trailer to be placed on school property serves the valid secular purpose of protecting and accommodating participating school children. Certainly it is a secular purpose for a public school to be concerned with student safety. In light of the safety risks for children posed by holding the released-time program at adjacent buildings or sites (even if the Association were able to do so, which it is not), having an on-site trailer serves to further this secular purpose. The on-site trailer keeps the children from crossing heavily-traveled streets and shields them from environmental hazards posed by adjacent locations. Ex. 1, ¶¶14-17. Without question, having the trailer on school property protects children and accommodates their participation in the program in a way that an off-site trailer location (even if feasible) does not.

(2) The released-time program does not have the primary effect of advancing religion.

The second prong of the *Lemon* test analyzes the primary effect of a program.

⁸ Although *Zorach* was decided prior to *Lemon*, "cases applying the [*Lemon*] test cite the continuing vitality of *Zorach* and treat released-time programs as satisfying the test." *Lanner*, 662 F.2d at 1357.

⁹ Plaintiff concedes that students not participating in the Association's program are allowed to "read books or do homework" during the time other students are at released-time. Am. Compl. ¶17. As such, the Corporation's released-time practices are in compliance with *Moore v. Metropolitan School District of Perry Township*, 2001 WL 243292, *7 (Feb. 7, 2001), which merely required that students not participating in released-time programs be permitted to "work on school work or homework during the release time."

Importantly, courts analyzing the issue have found that religious released-time programs do not have the primary effect of advancing religion. In *Smith*, 523 F.2d at 125, the Fourth Circuit held that *Zorach*'s continued vitality under the *Lemon* test demonstrates that such programs do not violate the effects prong, but rather provide a mere "indirect or incidental" benefit to religion:

Since *Zorach* is still good law, [the] effect [of a released-time program] is indirect or incidental rather than principal or primary. As the [Supreme] Court has recently reasserted, with a citation to *Zorach*, "not all . . . programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution."

We take this language to mean that the primary effect of the public school's released-time program in *Zorach* must be seen as simply the innocuous diminishing of the number of children in school at a certain time of day. According to this view, public school cooperation with the religious authorities in *Zorach* and 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 control."

Id. (internal citations omitted). *See also Lanner*, 662 F.2d at 1357-58 ("[I]t is clear that the mere release of students during school hours to attend religious courses does not unconstitutionally advance or inhibit religion . . .").

Plaintiff would have this Court find an unconstitutional effect here for a single reason: the Association provides instruction from trailers parked on school property. But as noted above, the Establishment Clause is not so rigid and absolutist. Context is paramount in Establishment Clause analysis, and here the context shows that the fact that the trailers are located on school property does not transgress *Lemon*'s primary effect prong.

There are many reasons for this. First, in making her effects argument Plaintiff relies heavily on her allegations that the Association's trailers are hooked into Horace Mann's electrical service, and that Horace Mann pays the Association's electric bills. Pl's MPI Mem. 9. Both these allegations are untrue. Rather, the Association took steps to separate its trailers from the school by: paying for electrical service to be established for its trailers that is separate and

distinct from the School's electrical service; paying for a meter to be set up for its trailers that is separate and distinct from the meter for the School's electrical service; and by receiving and paying the electric bills associated with their trailers. Ex. 1, ¶26.

Further, and more importantly, placing the Association's trailer temporarily on Horace Mann's property does not have the effect of advancing religion because it is meant to and does protect and accommodate participating children. As detailed above in the Summary of Facts and in the attached affidavit, the Association could not relocate to any properties adjacent to Horace Mann due to safety concerns. One side of the school is bounded by a river, so the Association cannot set up its trailers on the other side of the river for obvious safety reasons. *Id.* ¶14. And, locating on adjacent properties would also impose safety hazards on the children, like exposure to environmental hazards and having to walk across busy city roads. *Id.* ¶¶15-17.

Complicating matters, the rural setting of Horace Mann means that the only off-site alternatives for the Association are not within walking distance of the School. *Id.* ¶18. The Association would thus have to transport students to and from these locations. *Id.* ¶19. Such transportation would mean the death of the program. The School Board allots only 30 minutes for the Association's released-time program. *Id.* ¶20. Therefore, even if there were a suitable nearby alternative site (which there is not), transporting students to and from the site would leave the Association with only about 10 minutes or so for instruction, an insufficient amount of time for any meaningful instruction. *Id.* Any other alternative sites are miles from the school, and transporting the students to these sites would leave no time for any instruction. *Id.* ¶21.

Plaintiff turns a blind eye to these facts and, relying on *McCullum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948), argues that the Establishment Clause rigidly mandates that the trailers be moved off campus. But it is precisely this kind of "callous indifference to religious

groups,” and Establishment Clause rigidity, that the Supreme Court denounced in upholding released-time education in *Zorach*, 343 U.S. at 314, and in subsequent cases. *See supra*.

Consider the story behind the Supreme Court’s overruling of *Aguillar v. Felton*, 473 U.S. 402 (1985) twelve years later in *Agostini v. Felton*, 521 U.S. 203 (1997). In *Aguilar*, the Supreme Court held that “the Establishment Clause barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program.” *Agostini*, 521 U.S. at 208. This absolutist approach to the Establishment Clause led to many impractical and expensive results. To comply with the Court’s decision, the defendant New York City Board of Education had to transport students who needed remedial instruction funded by the congressional program to “public school sites, . . . leased sites, and . . . mobile instructional units . . . parked near the sectarian school.” *Id.* at 213. Worse, these so-called “*Aguilar* costs” amounted to \$7.9 million dollars for the Board over an 8 year period. *Id.* These costs required the Board to cut back on the number of students who received these remedial services. *Id.*

Motivating the decision in *Aguilar* was the Court’s concern that allowing public school teachers to teach activities on a religious school’s property, and to be involved in the religious instruction provided at those schools, would constitute an impermissible “‘symbolic union’ between church and state.” *Agostini*, 521 U.S. at 227. The Court’s rejection of this assumption, in the context of countering Justice Souter’s dissent in the case, is directly applicable here:

Justice SOUTER maintains that . . . Title I continues to foster a “symbolic union” between the Board and sectarian schools because it mandates “the involvement of public teachers in the instruction provided within sectarian schools,” and “fus[es] public and private faculties.” Justice SOUTER does not disavow the notion . . . that Title I services may be provided to sectarian school students in off campus locations, even though that notion necessarily presupposes that the danger of “symbolic union” evaporates once the services are provided off campus. *Taking this view, the only difference between a constitutional program and an unconstitutional one is the location of the classroom,* since the degree of

cooperation between Title I instructors and parochial school faculty is the same no matter where the services are provided. We do not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside. To draw this line based solely on the location of the public employee is neither “sensible” nor “sound,” and the Court in *Zobrest* rejected it.

Id. at 227-28 (internal citations omitted) (emphasis added). *Aguilar* was overturned, and public school teachers were permitted to provide remedial education on a religious school’s campus.

Just as location was not dispositive of the Establishment Clause question in *Agostini*, neither should it be dispositive here. The Court rejected a formalistic approach to the Establishment Clause in *Agostini*, stating that a rigid rule requiring that publicly-funded teachers provide remedial education somewhere other than on a religious school’s property “smack[ed] of antiquated notions of ‘taint,’ [and] would indeed exalt form over substance.” *Id.* at 233-24. Instead, the *Agostini* Court took into account the many harmful impacts its earlier ruling had had on the operation of Congress’s remedial education program. Given the vast amount of monetary and logistical headaches *Aguillar* had caused, the Court came to the sensible conclusion that a public employee’s involvement in the religious instruction provided by a sectarian school while on that school’s property did not violate the Establishment Clause.

Taking the same approach here, it is clear that Plaintiff’s interpretation of the Establishment Clause is far too rigid and formalistic and should not be accepted by this Court. Given that the Association has no viable option for relocation, and that requiring relocation of the program would result in its immediate demise, the trailers should be permitted to stay put.

(3) The released-time program does not endorse religion.

As the Seventh Circuit has observed, *Lemon*’s effects prong “has been refined to focus on whether the government action in question has the effect of endorsing religion.” *Books v. Elkhart County, Ind.*, 401 F.3d 857, 866 (7th Cir. 2005). Under this inquiry, the “effects”

question becomes whether “the practice under review in fact conveys a message of endorsement or disapproval.” *Id.* In evaluating the effect of a challenged action under this test, a court must “assess[] the totality of the circumstances surrounding the [challenged practice] to determine whether a reasonable person would believe that the [practice] amounts to an endorsement of religion.” *Id.* at 867. The Supreme Court explains that the “reasonable observer” is “deemed aware of the history and context of the community and forum in which the religious [speech takes place].” *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 119 (2001).

Here, for several reasons, the reasonable observer would not perceive a message of endorsement from the Association placing its trailers on the school’s property. First, the reasonable person would know all the facts noted *supra*, including: that the Association does not hook its trailers into Horace Mann’s electrical service; that Horace Mann does not pay the Association’s electrical bill; that Corporation officials and employees are not involved in any way in the program; the rural nature of the area in which Horace Mann is located; the safety hazards posed by providing the program on adjacent property; the small amount of time allotted for the program; and that given these time constraints, transporting students to any off-site location would leave no time for any instruction. Given these facts, the reasonable observer would not perceive an endorsement of religion from the mere fact that the trailers are located on school property. Rather, this person would understand that this accommodation is necessary for the program to continue to exist. The reasonable person would know that the Corporation is not allowing this arrangement to favor religion, but to ensure that parents of Horace Mann students who want their children to attend the program may continue to exercise their right to do so.

These facts distinguish this case from *Moore v. Metropolitan School District of Perry Township*, 2001 WL 243292 (Feb. 7, 2001). In that unpublished decision, the court found unlawful endorsement because the School paid the electrical bills of the released-time trailers,

directed the content of the released-time program, and gave the released-time provider access to students to promote its program during a lunch time presentation. *Id.* at *1, 5. Exactly zero of these things occur here. Further, no facts were present in *Moore*, as here, demonstrating that the released-time program would cease to exist if it was required to move its program off campus.

Further, the Corporation's Use of School Facilities policy (*see* Ex. 3) allows the school's property to be used by nonschool groups. Pursuant to this policy, the Corporation permits nonschool groups to use the school's property for "community purposes." *Id.* This policy allows nonschool groups to use school property during school hours, so long as the use does not "interfere with the educational program of the schools." *Id.*

That the Association is simply using School facilities on an equal basis with other nonschool groups, pursuant to this policy, shows that there is no impermissible endorsement here. Moreover, courts have made clear that providing equal access does not impermissibly endorse religion. Indeed, the Supreme Court and the Seventh Circuit have consistently held that a policy that grants religious speakers the same access to public school property as other speakers does not violate the Establishment Clause. *Good News Club*, 533 U.S. at 118-19 (no risk of endorsement where religious group uses public school facilities to engage in religious instruction and prayer); *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. at 248 ("[T]he message [of equal access] is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion"). Following Supreme Court precedent, the Seventh Circuit held in *Sherman* that a religious group's use of public school facilities pursuant to a policy of equal access did not result in the endorsement of religion. 8 F.3d at 1165 (the "even-handed treatment of religious and nonreligious . . . groups" sends no message of government

endorsement of religion). Allowing the Association to use school facilities under a neutral policy does not endorse religion, and thus does not have the primary effect of advancing religion.¹⁰

Plaintiff may argue that endorsement is nonetheless occurring here because the Association's program involves Biblical instruction and prayer during the school day. But this is constitutionally irrelevant. If prayer and Biblical instruction was illegal during the school day then a slew of cases upholding equal access for groups engaging in such practices during the school day were wrongly decided. For example, in *Prince v. Jacoby*, 303 F.3d 1074, 1092 (9th Cir. 2002), the Ninth Circuit found that the First Amendment required a school to permit a religious club to meet during the school day, when all other clubs were allowed to meet. Its meetings included "teach[ing] students that Jesus Christ is the Answer to the confusion, pain, and uncertainty this world offers," prayer, and worship songs. *Id.* at 1097 (Berzon, J., dissenting).

Moreover, the cases Plaintiff relies on to argue that public school students "may not receive religious instruction on school premises" are easily distinguishable. Pl's MPI Mem. 11. In *Berger v. Rensselaer Central School District*, 982 F.2d 1160 (7th Cir. 1993), the school forced students to sit through a presentation from the Gideons, with no option to opt out, in which they were encouraged to read the Bible and instructed to take a Bible from a stack on a classroom table. *Id.* at 1164. And in *Herdahl v. Pontotoc County School District*, 933 F. Supp. 582 (N.D. Miss. 1996), the school had supervisory authority over teachers who taught a Bible class at the school, the school bought the religious curriculum materials for the class (which was part of the school's "rotational class" that included music, library, and physical education). *Id.* at 591-92. Nothing like what was going on in the above cases is going on here.

¹⁰ The Corporation's Use of Facilities policy distinguishes this case from *Doe v. Human*, 725 F. Supp. 1503 (W.D. Ark. 1989). In *Doe*, the district argued that it allowed other groups to use its facilities on the same terms as an outside organization that taught Bible classes in school classrooms. The court rejected the argument because "no equal access policy existed before th[e] lawsuit was filed." *Id.* at 1507. That is not the case here. The Corporation has had such a policy in place for years.

(4) The Corporation is not excessively entangled with the Association's released-time program.

Lemon's third prong asks whether the program results in excessive entanglement between religion and government. Entanglement must be "comprehensive, discriminating, and continuing" in nature to rise to the level of a constitutional violation. *Lynch*, 465 U.S. at 684. Here, there is no entanglement at all and no evidence to support such a finding. Corporation officials do not supervise, direct, or participate in the Association's religious instruction. Ex. 1, ¶¶33-34. Neither do they control the Association's teachers or curriculum. *Id.* ¶¶35-36. Teachers will distribute the Association's brochures and permission slips (on the same terms as other outside groups) to students. *Id.* ¶¶28. Teachers also walk their classes to the front entrance of the School so released-time teachers can direct participating students to the trailer. *Id.* ¶25. But these mere administrative tasks "do not excessively entangle the government in religion," and are necessary to effectuate the School's "legitimate interest in knowing where their students are during school hours." *Lanner*, 662 F.2d at 1358-59. Nor is there excessive entanglement from merely allowing the trailers to temporarily locate on school property for the safety of the students. Clearly, there is no unconstitutional entanglement here.

b) There is no evidence of coercion.

Plaintiff claims that the Corporation violates the Establishment Clause's coercion test. But, the allegations she relies on for this claim are either not true, or are no longer occurring. Thus, she has no standing to seek an injunction against them. For instance, Plaintiff alleges that Horace Mann coerces students to attend the program by walking them to the trailer for released-time classes. Pl's MPI Mem. 19. But as noted *supra*, this is simply not true.

Plaintiff also alleges that students are first introduced to the released-time program when school teachers walk students to trailers where representatives of the program hand out brochures

and permission slips. Pl’s MPI Mem. 19. Again, as explained *supra*, this practice no longer occurs. Students no longer visit the trailers unless and until the parent signs a permission slip. Further, the Corporation will distribute the Association’s brochures and permission slips to students along with materials from other approved nonschool groups. Plaintiff lacks standing to seek an injunction against an allegedly unconstitutional practice that is not ongoing.

The only other facts Plaintiff relies on for her coercion claim—that Horace Mann teachers hand out and collect program permission slips—do not rise to the level of unlawful coercion. As noted, the materials will be distributed along with other materials approved for distribution. Ex. 1, ¶¶27-28. As the Fourth Circuit has held, coercion does not exist within the context of an equal access forum where a school distributes a flyer advertising a religious activity along with “a host of flyers and other materials” to students. *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Pub. Sch.*, 373 F.3d 589, 599 (4th Cir. 2004). Further, as noted *supra*, the collection of the permission slips serves the School’s interest in knowing where their students are during the school day. These actions do not coerce students to participate in the Association’s program, they simply make administrative sense.

2. An Injunction Would Seriously Harm the Defendant and The Public Interest, While Denying the Injunction Would Not Harm Plaintiff.

Regarding the preliminary injunction test, the Seventh Circuit explains that the lower a plaintiff’s likelihood of success, the “more the balance needs to weigh towards its side.” *Storck, USA, L.P. v. Farley Candy Co.* 14 F.3d 311, 314 (7th Cir. 1994). In *Storck*, the Seventh Circuit denied an injunction because the plaintiff had a low likelihood of success on the merits and the harms favored the defendant and the public interest far more than the plaintiff. There, the injunction would have resulted in the defendant company being “put out of the butter toffee business.” *Id.* at 316. This, in turn, would have harmed “the public insofar as [the defendant]

would cease providing price competition with Stork, the clear market leader.” *Id.* Plaintiff here is in the same predicament as the plaintiff in *Storck*. She is not likely to succeed on the merits, so she must make a very strong showing under the harm balancing prong for an injunction to issue. And here, as in *Storck*, the balance of harms tips decidedly against Plaintiff.

Indeed, it is difficult to imagine a situation in which an injunction would more severely harm the public interest than the circumstances of this case. In *Storck*, the harms involved were economic in nature, but here fundamental constitutional rights are at stake. Hundreds of parents at Horace Mann are exercising their constitutional rights in sending their children to the Association’s released-time program. Further, the Association’s constitutionally-protected religious speech and practices are at stake. If granted, the injunction would trample the constitutional rights of the Horace Mann parents who have chosen to send their children to the released-time program, and the Association’s First Amendment rights to speak and exercise their religious beliefs, because it would require the immediate, and permanent, cessation of the program, a program that has been offered to Horace Mann students since 1954.

An injunction would also seriously harm the Corporation. The Corporation has an interest in structuring its schedule to accommodate the wishes of parents who desire to send their children to released-time education. *See Zorach, supra.* An injunction would prevent the Corporation from accommodating the spiritual needs of the parents whose children attend Horace Mann. An injunction would also harm the Corporation’s provision of equal access to nonschool groups under its facility usage policy. *See supra.* The Corporation would be enjoined from allowing a religious group to use its property, while it continues to allow nonreligious groups to do so, possibly presenting equal access concerns under the Free Speech Clause.

Balanced against these harms to the Corporation and the public interest, what does Plaintiff stand to gain from the issuance of an injunction? She would get her feelings of offense

mollified, and nothing more. Upholding a released-time program, the Second Circuit noted that the Supreme Court’s admonishment that “offense” is not sufficient justification for striking down alleged violations of the Establishment Clause: “[the Supreme Court] has . . . instructed that we should ‘not hold every state action implicating religion is invalid if one or a few citizens find it offensive.’” *Pierce*, 379 F.3d at 61. As discussed *supra*, the Corporation has ceased all of the actions Plaintiff complained of, except one: allowing the Association to place its trailers on Horace Mann’s property. Under the circumstances of this case, allowing this does not violate the Establishment Clause. Plaintiff’s offense at the trailer being on school property simply cannot overcome the devastating effects the requested injunction would have on Horace Mann parents, the Corporation, and the Association’s released-time program.

V. CONCLUSION

For the foregoing reasons, the Association respectfully prays that this Court deny Plaintiff’s Motion for Preliminary Injunction.

Respectfully submitted this 5th day of January, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2009, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to the following:

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