



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 18, 2000

The Honorable Glenn F. McConnell
Senator, District No. 41
27 Bainbridge Drive
Charleston, South Carolina 29407

Dear Senator McConnell:

You have asked for an opinion concerning the application of the Comprehensive Health Education Act to a particular health education program being used in many of South Carolina's public schools. Specifically, you state the following:

Since 1992, the State Department of Education has accepted Centers for Disease Control (CDC) grants to implement health education programs in our public schools. In order to receive grant monies, the Department must promote five specific CDC programs called "Programs that Work," so called because they "appear" to be effective in promoting abstinence and responsible sexual behavior among minors. The five programs are: Get Real About AIDS; Reducing the Risk; Becoming A Responsible Teen; Focus on Kids; and Be Proud! Be Responsible!

Because some of these materials are extremely graphic in suggesting "acceptable" sexual activities, I am requesting that you review them to determine if they violate the spirit and intent of the letter of the State's Comprehensive Health Education Act (CHEA) or any laws pertaining to sexual activity involving minors.

Charleston County schools use a program called Comprehensive Health for Middle Grades which is quite

The Honorable Glenn F. McConnell
Page 2
August 18, 2000

graphic in its references to homosexuality and alternate sexual activities and promote sexual activity outside of marriage. I also request a review of these materials to determine if they violate the CHEA or any laws pertaining to sexual activity involving minors.

As required by the CHEA, the State Board of Education developed Health and Safety Education Curriculum Standards. While the Standards and the "Programs that Work" curricula may seem to be separate issues, it appears the two are inextricably linked. The Department urges schools to use CDC grants to comply with the standards, and the Department is the sole assessor in determining compliance. Therefore, I request that you review the standards to determine if they violate the CHEA or any other laws pertaining to sexual activity involving minors.

Law / Analysis

Because the materials in these programs are so graphic, I apologize to the public for having to describe them in this opinion in order to answer your questions.

The Comprehensive Health Education Act, codified at Section 59-32-5 et seq., was enacted in 1988. The General Assembly's purpose in adopting this legislation was

... to foster the department and dissemination of educational activities and materials which will assist South Carolina students, teachers, administrators and parents in the perception, appreciation and understanding of health principles and problems and responsible sexual behavior.

The CHEA provides specific guidelines for implementing this general policy. Section 59-32-10(2), for example, defines "Reproductive health education" as

instruction in human physiology, conception, prenatal care and development, childbirth, and postnatal care, but does not include instruction concerning sexual practices outside marriage or practices unrelated to reproduction except within the context

of the risk of disease. Abstinence and the risks associated with sexual activity outside of marriage must be strongly emphasized (emphasis added).

Section 59-32-10(4) defines "Pregnancy prevention education" to be "instruction which is intended to:

- (a) stress the importance of abstaining from sexual activity until marriage;
- (b) help students develop skills to enable them to resist peer pressure and abstain from sexual activity;
- (c) explain methods of contraception and the risks and benefits of each method. Abortion must not be included as a method of birth control. Instruction explaining the methods of contraception must not be included in any education program for grades kindergarten through fifth. Contraceptive information must be given in the context of future family planning. (emphasis added).

In addition, Section 59-32-30 requires local school boards to implement the CHEA. Pursuant to Subsections (2), (3) and (5) of § 59-32-30, it is required that

- (2) Beginning with the 1988-89 school year, for grades six through eight, instruction in comprehensive health must include the following subjects: reproductive health education. Sexually transmitted diseases are to be included as a part of instruction. At the discretion of the local board, instruction in family life education or pregnancy prevention education or both may be included, but instruction in these subjects may not include an explanation of the methods of contraception before the sixth grade.
- (3) Beginning with the 1989-90 school year, at least one time during the four years of grades nine through twelve, each student shall receive instruction in comprehensive

health education, including at least seven hundred fifty minutes of reproductive health education and pregnancy prevention education.

- (5) The program of instruction provided for in this section may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases. (emphasis added).

Other provisions of the Act are also worthy of note. For example, § 59-32-50 gives parents the right to receive notice of the materials being taught as part of the comprehensive education program and to exempt their children from the program if they so choose. Section 59-32-50 provides:

[p]ursuant to policies and guidelines adopted by the local school board, public school principals shall develop a method of notifying parents of students in the relevant grades of the content of the instructional materials concerning reproductive health, family life, pregnancy prevention, and of their option to exempt their child from this instruction, and sexually transmitted diseases if instruction in the diseases is presented as a separate component. Notice must be provided sufficiently in advance of a student's enrollment in courses using these instructional materials to allow parents and legal guardians the opportunity to preview the materials and exempt their children.

A public school principal, upon receipt of a statement signed by a student's parent or legal guardian stating that participation by the student in the health education program conflicts with the family's beliefs, shall except that student from any portion or all of the units on reproductive health, family life and pregnancy prevention where any conflicts occur. No student must be penalized as a result of an exemption. School districts shall use procedures to ensure that students exempted from the program by their parents or guardians are not embarrassed by the exemption. (emphasis added).

The Honorable Glenn F. McConnell

Page 5

August 18, 2000

Section 59-32-60 requires the State Department of Education to "ensure compliance with this chapter." Section 59-32-80 provides that "[a]ny teacher violating the provisions of this chapter or who refuses to comply with the curriculum prescribed by the school board as provided by this chapter is subject to dismissal." Finally, § 59-32-90 expressly provides that "[f]ilms, pictures, or diagrams in any comprehensive health education program in public schools must be designed solely for the purpose of explaining bodily functions or the human reproduction process and may not include actual or simulated portrayals of sexual activities or sexual intercourse."

By way of historical overview, it is important to emphasize that reports concerning the Comprehensive Health Education Bill as it headed toward passage in 1988 stressed the intent of the legislation. While we cannot rely upon the statements of legislators or others, such statements are nevertheless instructive. For example, one news report noted that the "bill also insists that abstinence be taught as the primary method of combating sexually transmitted diseases and teenage pregnancy." The State, February 4, 1988, p. 1C. (Emphasis added). A proponent of the legislation, former Senator Heyward McDonald, then a member of the State Board of Education, stated that the legislation would "stress that sex before marriage is irresponsible and just plain wrong and would provide students guidance on how to say no." Moreover, Senator McDonald trumpeted as one of the Bill's virtues the fact that the legislation "does not authorize instruction on homosexuality or other sexual practices unless reference is absolutely necessary to answer questions or inform teenagers about AIDS or other sexually transmitted diseases." Senator McDonald also pointed to the Bill's provision which he noted required that "parents be given full details of any curriculum selected so they can make an informed choice on behalf of their youngsters." The State, February 10, 1988, p. 12A. As will be seen below, the Programs That Work ignore this expressed intent at virtually every turn.

We are constrained by the rules of statutory interpretation, as opposed to individual expressions of intent, however, and the following rules are applicable in that regard. In interpreting any statute, of course, the fundamental tenet which must be followed is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statutory provision should be given a reasonable and practical construction which is consistent with the purpose and policy expressed therein. Jones v. S.C. Highway Dept., 247 S.C. 132, 146 S.E.2d 166 (1966). Words used in an enactment should be given their plain and ordinary meaning. Smith v. Eagle Const. Co., 282 S.C. 140, 318 S.E.2d 8 (1984). Full effect must be given to each section of a statute, words given their plain meaning and phrases must not be added or taken away in absence of ambiguity. Hartford Acc. & Indem. Co. v. Lindsay, 273 S.E. 79, 254 S.E.2d 301 (1979).

The Honorable Glenn F. McConnell

Page 6

August 18, 2000

A previous opinion of this Office interpreting the CHEA is also pertinent to our inquiry. In an opinion dated July 23, 1997, we addressed the question of whether "a curriculum teaching putting off intercourse until an older age or 'until you're ready' [would] comply with §59-32-10(2)?" We stated:

[t]he referenced statute states that 'reproductive health education' "...does not include instruction concerning sexual practices outside marriage or practices unrelated to reproduction except within the context of the risk of disease." It also states that "[a]bstinence ... must be strongly emphasized." Under the above rules of construction, teaching about intercourse outside of marriage does not appear to be permitted by the General Assembly except in the context of disease. (emphasis added).

In other words, gratuitous, graphic descriptions of sex outside of marriage, which are unrelated to disease control, violate both the letter, as well as the spirit, of the CHEA.

In addition, the 1997 opinion dealt with the question of whether "contraceptive information [can] be given in hopes of preventing a future family for the students or does this paragraph [§59-32-10 (4)(c)] apply to teaching about the use of contraceptives in future marriages as applied in §59-32-10 (2)." Our response to this question was as follows:

Section 59-32-10(2) requires contraceptive information to be "... given in the context of future family planning" and paragraph (4)(c), as quoted above, restricts instruction about sexual practices outside marriage or unrelated to reproduction. These restrictions in paragraph (10)(4)(c) indicate that the contraceptive information in (4)(c) must be given in the context of planning a future family during marriage.

Again, as we read the CHEA, gratuitous promotion of contraceptives is the antithesis of what the Legislature had in mind in the CHEA. While students must certainly be instructed with regard to contraceptives, educators must also take care that such instruction does not promote premarital sex, but rather discourages it.

Programs That Work
Curricula

With the foregoing overview in mind, we turn now to the specific programs about which you have inquired. It is our understanding that, in order for the State of South Carolina to receive grant monies from the United States Centers for Disease Control [CDC], the State is required to use five curricula which CDC designates as "programs That Work for HIV, STD, and Pregnancy Prevention." Included within the "Programs That Work" are the following five separate curricula: Be Proud!; Be Responsible!; Becoming A Responsible Teen; Focus on Kids; Get Real About Aids; and Reducing the Risk.

The intent of the Comprehensive Health Education Act is clear. First, the Legislature mandated that teaching about contraceptives could only be done in the context of future family planning during marriage. Secondly, teaching about sexual intercourse outside of marriage could be done only in the context of disease. Third, abstinence from sex until marriage must be stressed because that is the surefire, foolproof way to prevent sexually transmitted diseases. Fourth, notice must be provided sufficiently in advance of a student's enrolling in courses using the Programs That Work curricula in order to allow parents the opportunity to review the materials and exempt their child from these courses should they so desire.

Notwithstanding these basic requirements, time after time, the Programs That Work curricula fail to adhere to the directives of the Legislature. Reading these curricula, one believes that the authors are discussing sex for the sake of sex and promiscuity among adolescents is being encouraged, not discouraged. Simply putting the word "AIDS" on the cover of a health education textbook clearly does not permit educators to place a graphic sex manual or promotional advocacy for condoms inside.

Rather than emphasizing the risks and dangers of sex outside of marriage, each of these programs focus upon adolescents experiencing the pleasures and joys of safe sex right now. Instead of teaching that abstinence from premarital sex is the best means of preventing sexually transmitted diseases, the curricula repeatedly authorize or even encourage premarital sex so long as teenagers properly protect themselves from sexually transmitted diseases. In our opinion, the Legislature did not define adolescent sexual responsibility to mean safe sexual promiscuity.

Contraceptive instruction permeates these texts, but that instruction is not provided in the context of future family planning during marriage, as the law requires, but in the

The Honorable Glenn F. McConnell

Page 8

August 18, 2000

context of how it is "fun" and "pleasurable" for teenagers to use condoms in the here and now. "Condom hunts" are encouraged. Unbelievably, adolescents are advised that grape jelly, maple syrup or honey may be used by teenagers as a substitute "lubricant" for intercourse. One text, Becoming A Responsible Teen, best demonstrates this blatant disregard for the limits placed upon schools by the Legislature with respect to contraceptive instruction, stating that "[u]sing condoms correctly during sexual activity is a central part of becoming a responsible teen and acting responsibly to protect yourself and others." Such a goal hardly provides youngsters instruction regarding contraceptives in the context of future family planning during marriage, as the Legislature has directed.

Programs That Work is less like a textbook for teenagers and more like the latest issue of Cosmopolitan or Playboy. Anal sex, oral sex, orgasms and mutual masturbation are all discussed in ways which titillate and encourage youngsters, telling them in essence that it is acceptable to have sex prior to marriage so long as the proper precautions against disease are taken. While these texts occasionally emphasize for the record that they are not "endorsing" sexual activity between unmarried teenagers, more often than not, that is exactly what they do. Rather than stressing abstinence until marriage as the single most effective means for preventing AIDS, as the law says they must do, these materials only occasionally pay token lip service to the virtues and desirability of abstinence.

Not only do the Programs That Work materials contravene the substantive provisions of the law, but they disregard the procedural requirements as well. There are instances in these materials which require participants to make a "verbal contract" of confidentiality not to tell anyone - including their parents - as to what is discussed in the classroom. Such secrecy, hiding from a child's parents what is being taught, is in clear contravention of § 59-32-50's mandate to give parents the opportunity to exempt their children from the program. Furthermore, the confidentiality contract raises grave constitutional concerns. The integrity of the parent-child relationship is protected by the Due Process Clause of the Fourteenth Amendment. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The Supreme Court of the United States has frequently emphasized the importance of the family, noting that "the rights to conceive and raise one's children are deemed essential." Hodgson v. Minnesota, 497 U.S. 417, 447 (1990) (quoting Stanley v. Illinois, 405 U.S. 645 (1972)). The Comprehensive Health Education Act's requirement that the parents be entitled to preview the programs is a necessary safeguard to protect this parent-child relationship. The Act's requirement must be construed both substantively and procedurally to preserve the parent's essential right to "direct the upbringing and education of children under their control." Wisconsin v. Yoder, 406 U.S. 205, 233 (1972). Thus, any encouragement of the children

The Honorable Glenn F. McConnell
Page 9
August 18, 2000

to keep secrets about the program encroaches upon the Due Process rights of their parents, in addition to violating State law.

We will now discuss each curriculum which comprises the Programs That Work materials in greater detail.

Be Proud! Be Responsible!

In the Be Proud! Be Responsible! curriculum, teachers are told to teach the following:

[m]any young women do not reach orgasm during vaginal intercourse, especially when they and their partners are just learning about sex. Most women need to have their clitoris (the arousal organ in their vulvas) touched, directly or indirectly in order to have an orgasm. This sometimes happens during intercourse, but only if a partner rubs in manually or with the pelvis or other body parts Using a condom also can make a male's erection last longer. Most men say that the longer they are stimulated without having an orgasm, the better the orgasm feels when they have it ... Since many women need more stimulation to have an orgasm, having him stay hard longer is beneficial.

Aside from its sheer graphic nature, this passage contradicts § 59-32-10(2), which prohibits "instruction concerning sexual practices outside marriage or practices unrelated to reproduction." In addition, the referenced passage is inconsistent with the General Assembly's prohibition upon "actual or simulated portrayals of sexual activities or sexual intercourse." See, § 59-32-90. While the authors of this passage did not place an actual picture or drawing of a couple engaged in sexual intercourse in the text, the description is so vivid and so graphic that the exact same purpose is served. One must ask the question what does this graphic description have to do with disease control?

In addition, the principles outlined in the Be Proud! Be Responsible! text fail to "stress" abstinence until marriage, as the statute requires, and do not instruct youngsters with respect to contraceptives in the context of future family planning during marriage as the law directs. Principle 6, for example, treats abstinence simply as one form of safer sex, noting that "practicing safer sex, including abstinence, is not something anyone can do without the

The Honorable Glenn F. McConnell

Page 10

August 18, 2000

cooperation of his or her partner.” (emphasis added). Principle 4 seeks to convince students that “condoms don’t ruin the mood and are acceptable,” and Principle 5 reminds youngsters that “using condoms correctly is easy.” Principle 8 argues that “[t]here are times when young people are sexually aroused and want to have intercourse, yet no condom is available. It is at that moment that young people should say “Let’s stop and not have sex until a condom is available.” Not only do these Principles fail to emphasize abstinence until marriage, but they fail to instruct students about contraceptives only in the context of future family planning.

Indeed, the Be Proud! Be Responsible! curriculum actually promotes condom usage in the context of how “pleasurable” condoms can be rather than in the context of future family planning during marriage. The materials tell instructors how they can “identify ways to make condoms a more pleasurable part of the sexual experience.” p. 73. Teenagers are told how they need time to adjust to a condom, as evidenced by the following passage: “Just as a person might need time to adjust to wearing a new pair of glasses, using a condom requires getting used to new sensations.” p. 77. Nonpetroleum lubrication is described in these materials as something which will increase “the pleasure for both partners and decrease the chance of breakage.” p. 79. Students are given the message to “do something positive and fun” by going to the “store together” and buying “lots of different brands and colors” of condoms. The materials say to teenagers that “Just talking about how you’ll use all of these condoms can be a turn on.” p. 82.

Get Real About AIDS

This curriculum furnishes the following Note to teachers: “Explain that when you say that ‘having sex’ is risky behavior, you mean that ‘having unprotected sexual intercourse - anal, oral or vaginal intercourse - with an infected person’ is risky behavior.” In our opinion, this passage flies directly in the face of the Legislature’s mandate that “abstinence and the risks associated with sexual activity outside of marriage must be strongly emphasized.”

In addition, the Get Real About AIDS Message to Parents explains:

Get Real About AIDS doesn’t state that sex is good or bad, only that unprotected sexual intercourse is one way for HIV to be transmitted. At some point in their lives most people decide to have sex, however, and they need to understand the

consequences of having sex - benefits as well as risks - before they make that decision.

Again, this passage ignores the Legislature's directive that "[a]bstinence and the risks associated with sexual activity outside of marriage must be strongly emphasized." Likewise, the General Assembly's instructions to "stress the importance of abstaining from sexual activity until marriage" is obviously ignored here.

Focus on Kids

Focus on Kids, a curriculum for 9 - 15 year olds, encourages "finding fun ways to be together that don't involve sex" such as "mutual masturbation." Thus, this curriculum proceeds down the perilous path of the idea that certain forms of sexual activities which do not involve intercourse between two people aren't really "sex." Common sense tells everyone otherwise. In addition, Lesson Two of the Focus on Kids suggests the following "Note for Group Leaders":

You may need to describe anal intercourse. (When a man puts his penis into another person's rectum or a _____. The other person can be a male or female.)

These passages contradict §59-32-10(2) which prohibits "instructions concerning sexual practices outside marriage or practices unrelated to reproduction."

This curriculum also suggests that students "Go on a 'condom hunt'" as a Field Assignment. There can be no more obvious violation of the Legislature's directive that any instruction regarding contraceptives must be limited to future family planning during marriage than to invite teens to go on a "condom hunt."

Reducing the Risk

The Reducing the Risk curriculum contains numerous examples where contraceptives are discussed outside the context of future family planning, in contravention of § 59-32-10(4)(c). Among these are the following:

- 1) the lesson summary for class 2, entitled "abstinence: Not Having Sex," concludes as follows:

[e]xplain to students that if it doesn't seem like the right time for sex, it probably isn't.

- 2) "the message in RTR is to avoid unprotected sex."
- 3) in Lesson 8 of Reducing the Risk, students are required to complete the "Visit or Call a Clinic" worksheet and may complete "The Way to the Clinic" worksheet for extra credit. Students are encouraged "to go with their boyfriends or girlfriends, even those who aren't in the class."

In other words, students are encouraged to use contraceptives immediately, rather than in the context of future family planning. This approach does not comply with our interpretation of the Comprehensive Health Education Act as expressed in the opinion of July 23, 1997. The General Assembly certainly did not envision that educators could teach students that premarital sex for teenagers is perfectly acceptable behavior so long as beforehand they purchase a condom from the nearest drug store and use it.

Also, the Introduction to Reducing this Risk is contradictory to the Comprehensive Health Education Act's clear intent. The Introduction states that

[t]he greatest emphasis of Reducing the Risk is teaching students the interpersonal or social skills they can use to abstain or protect. No judgment is made about which of these responses is best.

However, § 59-32-10(2) requires that "abstinence and the risks associated with sexual activity outside of marriage must be strongly emphasized." Section 59-32-10(4) requires that educators must "a) stress the importance of abstaining from sexual activity until marriage; b) help students develop skills to enable them to resist peer pressure and abstain from sexual activity ...". Thus, state law does not permit a curriculum to declare neutrality with respect to whether students "abstain or protect." Instead, state law requires that abstaining from sex until marriage must instead be "strongly emphasized."

Becoming a Responsible Teen

This same type of disregard for the statute is found in the curriculum, Becoming A Responsible Teen. The Introduction to this curriculum enumerates the skills and

- some "grocery store" lubricants are safe to use if they do not contain oil: grape jelly, maple syrup and honey.
- some are not safe: synthetic whipped cream, marshmallow fluff, butter, Crisco and mayonnaise.

As we emphasized in the 1997 Opinion, pursuant to the Comprehensive Education Act, contraceptive instruction may be given only in the context of future family planning.

Finally, as we noted earlier, this text suggests that students enter a "verbal contract" whereby they "agree not to discuss any personal information you have in these sessions outside our group. ... I will not tell your parents or anyone else what is said here." This type of "agreement" not only is inconsistent with the Comprehensive Health Education Act's directive to allow parents to be given full information regarding the program, but interferes as well with the constitutionally protected parent-child relationship. The importance of the directive as a safeguard of the parents' Due Process rights cannot be stressed enough.

Conclusion

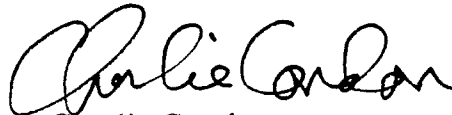
In our opinion, Programs That Work do not work because these materials violate both the letter and spirit of the Comprehensive Health Education Act¹. Further, these materials, by advising instructors to encourage students not to tell their parents what is being discussed in the classroom, intrude upon the constitutional right of parents to raise their children. Rather than emphasizing abstinence, as the surest way to prevent AIDS, as state law mandates, these curricula give only passing lip service to abstinence. Rather than contraceptive instruction being provided only in the context of future family planning during marriage, as state law directs, these curricula portray condoms as a means to instant pleasure and sexual gratification for the teenager. Rather than openly presenting this material to parents for their review so that they can decide for themselves whether it is suitable to be

¹ In this opinion, we address only the Programs That Work curricula. Your other questions relating to the curricula being used in Charleston and the Health and Safety Curriculum Standards developed by the State Board of Education are still under review and an opinion as to those questions will be forthcoming.

The Honorable Glenn F. McConnell
Page 16
August 18, 2000

federal funds cannot exempt us from state law. Taking money from the federal government is not a license to ignore State law.

Sincerely,

A handwritten signature in black ink that reads "Charlie Condon". The signature is written in a cursive, flowing style.

Charlie Condon
Attorney General