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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 30, 1996

The Honorable Michael L. Fair
Senator, District No. 6
501 Gressette Building
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Senator Fair:

You have written, seeking an opinion on behalf of the Chairman of Concerned Parents in Spartanburg. In your letter, you state that "[i]t seems that all of a sudden there is a lot of 'soft porn' being utilized in our schools as instructional material." You are, therefore, seeking guidance concerning the "Comprehensive Health Education Act", S.C. Code Ann. Sec. 59-32-5 et seq. Specifically, complaints have been received by you that school districts are not acting in compliance with the law, inasmuch as these statutes require that films, 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."

It is stated in the information which you have provided that many school districts "are in blatant violation of our law" by showing films which do not conform to this requirement. The information you have enclosed notes, for example, that "[a]s of the spring of 1994, at least 30 [school] districts were using the 3R's or "Reproductive Risk Reduction" curriculum that came out of DHEC years ago ... and should have been discontinued when the law came into being especially due to the above mentioned section."

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Request Letter

We are advised that the 3R program does not use a student textbook, but rather relies upon visual and audio-visual information. The purpose of the program is to "actively and authoritatively discourage early sexual involvement of teens through the factual exploration of the physical, social and psychological consequences of early sexual involvement." Facts About The South Carolina Reproductive Risk Reduction Project (3R). While the information you have enclosed centers upon this one program, however, we need not (and do not) focus upon any particular health education program. Because an opinion of this Office cannot make factual findings, Op. Atty. Gen., December 12, 1983, we discuss herein only the relevant law, and make no conclusion regarding any particular set of facts. Regardless of the particular program, the law involved would be the same.

LAW / ANALYSIS

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 development 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.

Section 59-32-10 defines "comprehensive health education" to mean "health education in a school setting that is planned and carried out with the purpose of maintaining, reinforcing, or enhancing the health, health-related skills, and health attitudes and practices of children and youth that are conducive to their good health and that promote wellness, health maintenance and disease prevention." "Reproductive health education", defined in Section 59-32-10(2),

> ... means 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.

Section 59-32-30 provides that "[p]ursuant to guidelines developed by the board" [State Board of Education], each local school board is to implement the comprehensive health

education program. Pursuant to Section 59-32-30(B), local school boards "may use the instructional unit made available by the board [State Board] pursuant to Section 59-32-20, or local boards may develop or select their own instructional materials addressing the subjects of reproductive health education, family life education, and pregnancy prevention education." Section 59-32-50 mandates that public school principals must "develop a method of notifying parents of student in the relevant grades of the contents of the instructional materials ... ." A 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 conflict's with the family's beliefs," must exempt the student from the program, without penalty.

Finally, Section 59-32-90 makes it clear as to the General Assembly's restrictions placed upon the content of the program. That Section succinctly requires 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 reproductive process and may not include actual or simulated portrayals of sexual activities or sexual intercourse. (emphasis added).

A number of principles of statutory interpretation are worthy of mention. First and foremost, the intent of the General Assembly must govern. When interpreting a statute, the primary purpose is to ascertain legislative intent. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Where the intent of a law is manifest, as it is here, the terms of the law must be given their literal meaning. Crown Cork and Seal Co., Inc. v. South Carolina Tax Comm., 302 S.C. 140, 394 S.E.2d 315 (1990). Words used in the enactment should be given their ordinary and popular significance, Hay v. South Carolina Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). Full effect must be provided to each section of a statute, words therein given their plain meaning and phrases not added or taken away in absence of ambiguity. Hartford Acc. and Indem. Co. v. Lindsay, 273 S.C. 79, 254 S.E.2d 301 (1979).

By its specific and express terms, Section 59-32-90 makes it emphatically clear that the 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." The word "must", just as the word "shall", typically imposes a mandatory duty. Op. Atty. Gen., Feb. 1, 1994 (and cases cited therein). Moreover, by requiring that the health education program be designed "solely" for the purpose of explaining bodily functions of

the human reproductive system, the General Assembly sought to emphasize in no uncertain terms that this must be the single purpose of the program, and no other. The word "solely" means "singly, alone, exclusively; to the exclusion of other purposes ... ." Bergsvik v. Bergsvik, 205 Or. 670, 291 P.2d 724, 730 (1955) . For further emphasis, the General Assembly specifically specified what such health education program could not contain - neither "actual nor simulated portrayals of sexual activity or sexual intercourse."

Thus, the meaning of Section 59-32-90 is clear and its words controlling with regard to the preparation of any health education programs. Films, pictures or diagrams contained as a part of such health education program: (1) must be designed solely and singly for the purpose of explaining bodily functions or the human reproduction process and; (2) may not include "actual or simulated portrayals of sexual activities or sexual intercourse." Whatever discretion the State Board or local school board may have pursuant to Section 59-32-30, is thus governed and controlled by the express pronouncements and prohibitions of Section 59-32-90. With respect to a comprehensive health education program.

The question of what remedies are available if Section 59-32-90 is not followed, would entail a number of possibilities. Section 59-32-60 requires the State Department of Education to "assure compliance with this chapter." Thus, if the Act is not being followed, a complaint should certainly start with the Department.

Secondly, 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." (emphasis added). Of course, the local board and school would ordinarily approve a particular program, rather than the individual teacher.

However, I would note several cases where disciplinary action has been taken against teachers and school officials for showing material which was deemed too explicit for a school classroom and such action was upheld by the courts. For example, in Fowler v. Bd. of Ed. of Lincoln County, Ky., 819 F.2d 657 (6th Cir. 1987), a teacher was dismissed for showing an "R" rated movie in her high school class. The teacher sued pursuant to 42 U.S.C. § 1983 for violating her civil rights, particularly her First Amendment right to "academic freedom". The Court of Appeals disagreed, concluding that the showing of the movie "did not constitute expression protected by the First Amendment." 819 F.2d at 662. Moreover, the Court held that the teacher's conduct constituted "conduct unbecoming a teacher" pursuant to Kentucky law. Said the Court,

> [i]n the present case, we conclude that plaintiff's conduct, although not illegal constituted serious misconduct. Moreover, there was a direct connection between this misconduct and Fowler's work as a teacher. She introduced a controversial and sexually explicit movie into a classroom of adolescents without preview, preparation or discussion. In the process, she abdicated her function as an educator. Her having the movie shown under the circumstances involved demonstrates a blatant lack of judgment.

819 F.2d at 666. See also, Cohen v. San Bernardino Valley College, 883 F.Supp. 1407 (C.D.Cal. 1995) [college professor disciplined for repeated focus on topics of sexual nature, use of profanity and vulgarities and comments directed at female students in a humiliating and harassing manner, upheld.]; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159, 3164, 92 L.Ed.2d (1986) ["The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot by conveyed in a school that tolerates lewd, indecent, offensive speech and conduct ...."].

In State v. Parker, 124 N.J. 628, 592 A.2d 228 (1991), a teacher was convicted of official misconduct. She taught a class of perceptually-impaired children and the parents of the child began complaining about her conduct. The jury acquitted her of other acts, but found that she exhibited sexually explicit magazines. She contended that the acts were not criminal in nature and, thus, she could not be convicted of official misconduct.

The New Jersey Supreme Court rejected this argument. The Court noted that New Jersey law defined official misconduct as "an act relating to [an official's] office, but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner ... ." Defendant's conduct met this requirement, concluded the Court:

> [t]he State introduced evidence at trial that defendant had exhibited sexually-explicit magazines to her students; that she had the children make cut-outs from those magazines; and that she had discussed her sexual proclivities and those of other with her students. All of those acts were unauthorized and were performed in the course of the exercise of her official function as teacher, presumably, as the jury could have found, to satisfy her own interests. If believed by the jury, defendant's course of conduct would undoubtedly constitute official misconduct.

592 A.2d at 235. Thus, the mere fact that the conduct of the school official was not authorized by law was sufficient to subject the individual to a prosecution for official misconduct. Of course, South Carolina recognized the common law offense of misconduct in office which occurs "when duties imposed by law have not been properly and faithfully discharged." State v. Hess, 279 S.C. 14, 20, 301 S.E.2d 547 (1983). Such conduct must be done willfully and dishonestly, however, which is a question for the jury. Id.

Third, the Act allows a parent or guardian to himself or herself police the program. If the program conflicts with the family's beliefs, the parent or guardian has an absolute right to have the student exempted from the program with no penalty to the child. Section 59-32-50. Clearly then, parents who feel the Act is not being complied with, or who disagree with the approach being taken, do not have to participate in the program.

The question then becomes what, if any, criminal penalties or other relief are available. This issue was discussed recently in an Informal Opinion to you dated March 18, 1996. There, we were advised by you that "R" rated movies containing sexually explicit scenes were being shown in the school. We addressed the applicability of the "Harmful to Minors" statutes, Section 16-15-385 et seq.

We concluded that the South Carolina "Harmful to Minors" statute was facially constitutional because it had adopted the test used in Miller v. California, 413 U.S. 15 (1973) as modified for minors. We noted that in Ginsberg v. New York, 390 U.S. 629 (1968), the United States Supreme Court had told state legislatures that it was constitutionally permissible under the First Amendment to ban access to materials which are obscene for minors, but not necessarily obscene as to adults. The Supreme Court has frequently concluded that the State "has a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." Sable Comm. v. F.C. C., ____ U.S. ____, 106 L.Ed.2d 93, 105 (1989).

We also noted in the March 18 opinion that the elements of the offense, contained in Section 16-15-385 are as follows:

> [a] person commits the offense of disseminating harmful material to minors if, knowing the character or content of the material, he:

(1) sells, furnishes, presents or distributes to a minor material that is harmful to minors; or

(2) allows a minor to review or peruse material that is harmful to minors.

Based upon these elements, we opined that "if a jury concludes beyond a reasonable doubt that anyone, including a school employee [or a school official], has engaged in the conduct referenced in the above provision, such would constitute a violation of the "harmful to minors" statute."

We also pointed out that Section 16-15-385 (c) expressly authorizes an affirmative defense if the defendant is a school carrying out its legitimate function ... or an employee or agent of such an organization acting in that capacity and carrying out a legitimate duty of his employment." This provision is further evidence that school officials are subject to the criminal law in the same way as everyone else. Furthermore, we noted, that the statute "presently allows school officials to disseminate to minors material [which meets the legal definition of] "harmful to minors" without criminal liability if the official asserts and proves as an affirmative defense to a jury (presumably by a preponderance of evidence) that he or she was disseminating the 'harmful material' to the minor as a 'legitimate function' of the school.

Presumably, this is an unlikely possibility, however. If a jury finds that the material is "harmful to minors", it would seem unlikely that the jury would then conclude that providing such material was a "legitimate function" of a school. This is particularly true where Sections 16-15-385 (c) and 59-32-90 would likely be read together. If the material includes "actual or simulated portrayals of sexual activities or sexual intercourse", in contravention of Section 59-32-90, then presumably the jury would be instructed that such, by definition, is not a "legitimate function" or "legitimate duty" of a school or its employees. Ultimately, these would all be questions for a jury. Of course, I would stress that the threshold issue in this type of prosecution would be whether the material was "harmful to minors" as defined by Section 16-15-375. A decision whether a particular prosecution would be brought under the "Harmful to Minors" Act would, of course, depend upon all the facts and circumstances and the particular material which was being shown to the class. Obviously, I make no comment herein as to whether the showing of any particular film or picture would warrant prosecution.

You have also asked in connection with a criminal prosecution, who represents the parent in such a matter, either the Solicitor or would the parent have to have his or her

own lawyer? Of course, in any criminal prosecution, the Solicitor represents the State as a whole, not a particular individual. The parent or guardian could retain his or her own counsel with respect to any criminal matter, if desired. However, as far as a private attorney's actual participation in any criminal prosecution is concerned, while our Supreme Court has recognized that "[p]rivate counsel may participate in the trial of a case to assist the Solicitor", and it probably does not constitute error for the Solicitor to appoint private counsel and give that person control of a case, the Court has strongly expressed its "disapproval of the practice of appointing private counsel to prosecute criminal cases." State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867, 868 (1986).

You have also asked who may swear out a warrant for a violation of the "Harmful to Minors" statute. In Op. No. 93-74 (November 4, 1993), we stated that

> [i]t is generally stated that
>
> > Any citizen who has reasonable grounds to believe that the law has been violated has the right to cause the arrest of a person who is honestly and in good faith believes to be the offender.
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> 22 C.J.S., Criminal Law, Section 326, p. 392. The probable cause expressed in the affidavit of an arrest warrant may be based on personal knowledge or hearsay. Opin. of the Atty. Gen. dated March 18, 1980. The affiant to an arrest warrant must be able to satisfy an inquiring magistrate that sufficient and information exist to support the warrant which determination is entirely within the magistrate's judgment. The penalty for perjury attaches to the facts alleged in the affidavit.
>
> Therefore, as to your question as to who may serve as the affiant on the warrant, any individual who can meet the requirements as to providing probable cause as set forth above may serve in that capacity.

Certain provisions of the obscenity law permit only the Solicitor to request an arrest warrant or search warrant for "violation of §§ 16-15-305, 16-15-315, or 16-15-325." However, the provisions of the "Harmful to Minors" statute are not included within such limitation and I am unaware of any such restrictions upon such statutes. It is well-settled that the "enumeration of particular things excludes the idea of something else not

mentioned." Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 554, 320 S.E.2d 458 (Ct.App. 1984). Thus, anyone with sufficient knowledge of a violation of the "Harmful to Minors" statute could swear out a warrant for that violation. Again, I make no comment as to whether a violation has occurred in any particular case.

Another potential remedy would be a civil action by a taxpayer. The Supreme Court of South Carolina recognized in Brown v. Wingard, 285 S.C. 478, 480, 330 S.E.2d 301 (1985) that "taxpayers ... have an interest in seeing that city officials disburse funds in a lawful manner." While the Court has also held that it will not "attempt to control the discretionary powers conferred upon a [board] ... and will not interfere, by means of a taxpayer suit, to restrain the authorities of a [board] from the exercise of their discretionary power ...", here the limitation of Section 59-32-90 is clear on its face. A taxpayer would likely have standing to assert that Section 59-32-90 is not being complied with.

As to legislative remedies, we discussed this at some length in my March 18 opinion to you. We noted therein that the affirmative defense provision for schools contained in Section 16-15-385 (c) and other organizations is not constitutionally required. Quoting at length from an opinion issued by the Attorney General of Georgia, Ga. Op. Atty. Gen. No. U95-25 (Unofficial Opinion, October 13, 1995), we stated that "the Legislature [is] in no way required to provide a statutory exception to schools."

Moreover, the March 18 opinion referenced the recent federal district court decision of Borger v. Bisciglia, 888 F.Supp. 97 (E.D.Wis. 1995). In Borger, the Court reviewed the constitutionality of a school board policy which stated that "[n]o film having a rating of R, N17, or X shall be shown to students at any school." Under existing guidelines, an R-rated film could "include hard language, or tough violence, or nudity within sensual scenes, or drug abuse or other elements, or a combination of some of the above, so that parents are counseled, in advance, to take this advisory rating very seriously. Parents must find out more about an R-rated movie before they allow their teenagers to view it." 888 F.Supp. at 99.

A student had sued the school district, alleging that the school district policy disallowing schools in the district to show an R-rated film, violated his First Amendment rights. The Court rejected the argument, concluding:

> [t]his is not a case in which the plaintiff alleges that school officials acted pursuant to political or religious beliefs ... . The defendants have presented an unrebutted "legitimate pedagogical concern"--that its students not be subjected to movies with too much violence, nudity, or "hard" language.

> This is a view point-neutral, non-ideological reason for a facially neutral application of that policy. Borger does not dispute that a school has a legitimate policy to try to keep harsh language, violence, and nudity out of the history or government classroom curriculum.
>
> ... "R" ratings are the threshold which the School Board has chosen as movies that will not even be considered. An R-rating, indicates that reasonable people could determine that high school students should not view the film. ... That "reasonableness" is all that is necessary in a high school setting. This is a constitutional exercise of school board discretion, and the court shall not enjoin the enforcement of policy 6161.11.

888 F.Supp. at 99, 101. As to the contention that the school board's ban on R-rated movies constituted an unlawful delegation of legislative authority to a private organization (here, the Motion Picture Association of America) the Borger court concluded that such argument was unpersuasive in the context of regulating unsavory material in the school:

> [i]t is true that a private organization's rating system cannot be used to determine whether a movie receives constitutional protection. For instance, a city cannot rely on the rating system to determine which movies are "obscene speech" and thereby less protected. See e.g. Engdahl v. Kenosha, 317 F.Supp. 1133 (E.D.Wis. 1970); Motion Picture Assn. v. Specter, 315 F.Supp. 824 (E.D.Pa. 1970). Neither this court nor the School Board is bound by the R-rating that "Schindler's List" received.
>
> However, that does not mean that the School Board cannot choose to use the ratings system as a filter of films. As noted above, the Supreme Court has said that schools and classrooms are non-public forums, outside the general market place of expression .... The grounds for school board curriculum decisions need only bear a reasonable relationship to their legitimate purpose. ... The School Board has established, through literature on the MPAA, that relying on the ratings is a reasonable way of determining which movies are more likely to contain harsh language, nudity, and inappropriate material

> for high school students. Borger has not presented any evidence to counter this evidence. The School Board has also presented unrebutted evidence that as the ratings change, the policy gets amended or at least reconsidered. Movies with lesser ratings than "R" are dealt with on a case-by-case basis. However, "R" ratings are the threshold which the School Board has chosen as movies that will not even be considered. An R-rating indicates that reasonable people could determine that high school students should not view the film. See Krizek [v. Board of Ed.] 713 F.Supp. 1131] at 1139 (N.D.Ill. 1989). That "reasonableness" is all that is necessary in a high school setting.

888 F.Supp. at 101.

Of course, it is a matter of policy, not the subject of this Opinion, as to whether the General Assembly wishes to make any legislative changes in either the current "Harm to Minors" statute, the Comprehensive Health Education law or add any new statutory provisions. Under the guidelines established in the Borger case, at least one court has found that it is constitutional to ban R-rated movies from the school setting.[1] Moreover, courts have held, as seen above, that the Constitution does not require an exemption or an affirmative defense provision for a school and at least one court has concluded that it violates Equal Protection to treat schools differently from commercial dealers. See, discussion in March 18, 1996 Opinion. One further legislative approach might be to provide an enforcement mechanism for Section 59-32-90 where such provision is not complied with by a school district or a school.

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[1]If the General Assembly undertook to legislate in this area by prohibiting movies receiving a certain rating being shown in schools, State v. Watkins, 259 S.C. 185, 191 S.E.2d 135 (1972) would have to be considered. Watkins declared a statute which exempted from the obscenity laws movies with certain ratings by the Motion Picture Association of America to be an unlawful delegation of legislative power to a private group. The same distinction made by the court in Berger, discussed above, may well serve to distinguish Watkins. However, if the Legislature chose to take any action based upon movie ratings, certainly legislative findings based upon the standards used by the rating system would be prudent as would some mechanism for periodic review.

CONCLUSION

Our public schools are no place for graphic, sexually explicit material. Thus, the General Assembly meant exactly what it said when it enacted the Comprehensive Health Education Act of 1988. The statute strictly limits the content of comprehensive health education programs which may be provided in South Carolina's schools. This law provides that a health education program 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." My opinion is that this law must be followed with uniformity and without fail.

With respect to what remedies are available if the law is not complied with in a particular instance (and we express no opinion thereupon), a number of options are available and are stated herein. These include:

1. A complaint to the State Department and State Board of Education which is legally responsible for seeing that the Act is followed. The Department's duty in assuring compliance with the law is mandatory.

2. Withdrawal by a parent from a program which conflicts with the beliefs of the family.

3. If the material is "harmful to a minor" as defined in Section 16-15-375 (and we again express no opinion regarding any particular program) the matter is subject to the "Harmful to Minors" law. School officials are not exempt from this law. They are entitled to assert to the jury in any prosecution thereunder as an affirmative defense that they were carrying out a "legitimate function" of the school. However, if the particular material being used as part of a health education program does not comport with Section 59-32-90, it is highly unlikely that the use of such material could be deemed a "legitimate function" of a school because such use is not otherwise in compliance with the law..

   Any citizen with knowledge of a violation of the "Harmful to Minors" statute may go before a magistrate and swear out a warrant upon a showing of probable cause of such violation. As there are no criminal penalties for a violation of the Comprehensive Health Education Act, however, any criminal prosecution must involve material which is legally deemed "Harmful to Minors" as defined by Section 16-15-375,

4. While there are no criminal penalties attached, a civil action by a taxpayer to force compliance with Section 59-32-90 of the Comprehensive Health Education Act of 1988 could probably be brought.

5. Courts have upheld disciplinary actions against school personnel where such is not in compliance with school policies or laws. Moveover, even though Section 59-32-90 does not contain criminal provisions, courts have recognized that an action for official misconduct can be brought against a school official performing unauthorized actions. Again, I make no comment about or judgment concerning a particular program.

6. Legislative clarification as discussed herein. It would not, for example, violate the Constitution if the Legislature or a school district banned "R" rated movies being shown in the schools or if the General Assembly provided other enforcement remedies to insure that the Comprehensive Health Education Act was being followed.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph