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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 21, 1997

The Honorable William E. "Bill" Sandifer
Member, House of Representatives
112 Cardinal Drive
Seneca, South Carolina 29672

Re: Informal Opinion

Dear Representative Sandifer:

You have asked this Office to examine an enclosed copy of Straight Talk, A Magazine for Teens to determine if it is in compliance with S.C. Code Ann. Sec. 59-32-5 et seq., the Comprehensive Health Education Act. You have particularly referenced the article entitled "The Sexual Being" on pages 5-8 of this magazine. Your concern is with whether such provision complies with Section 59-32-30 (A) (5). It is your information that the enclosed magazine is proposed as part of the instruction for the eighth grade students.

The Article which you reference states in part that

> [b]ecause heterosexuality is the predominant sexual orientation in most societies, there are many people who look upon homosexuality as abnormal and unacceptable. As a result, many young people who think they are homosexual attempt to hide -- even reject -- their new sense of who they are.

The Article then presents a "true-life story" by a high school junior who realized at the age of 12 that she was not heterosexual. The student recounts in considerable detail the social difficulties confronting her and the adjustment to this realization. The Article ends with the individual's coming to "grips" with her situation and becoming actively involved with student activities concerning the "gay lifestyle." An example of the theme of this Article is the following quotation therefrom:

> [i]n addition, there are awkward situations that come up with teachers during classes. "Most teachers just assume everyone in their class is straight and that there's no such thing as gay students," explains Jessica. "During my sophomore year, for example, we would get into these discussions in biology class about gay people, and people would say they were sure they didn't know any gay people. I really wanted to come out and tell them what they were saying was ridiculous. But it's not like I'm going to just tell them I'm gay in the middle of the class."
>
> Instead, Jessica has become involved in projects that help increase awareness about sexual differences. Project 10 East was created by a gay teacher at Jessica's school. Open to all students, the group has biweekly meetings at which young people can discuss various sexuality issues.
>
> For teens who think they are gay, Jessica offers this thought: "The worst feeling is to think that you are the only one -- that you're abnormal and you're all alone. Realize that, no matter where you are, you're not the only one, even if you think you are."

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 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.

As part of the Act, Section 59-32-30 provides for a program of instruction in health education to be presented by local school boards. This program is limited however, by Section 59-32-30 (A) (5) which mandates the following:

> [t]he 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.

Several principles of statutory construction are applicable here. First and foremost, is the fundamental tenet that, in interpreting a statute, the primary purpose 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. Hwy. 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. and Indem. Co. v. Lindsay, 273 S.C. 79, 254 S.E.2d 301 (1979). Exceptions made in a statute give rise to a strong inference that no other exception were intended. Pa. Nat. Mut. Cas. Inc. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (S.C. App.1984).

As I read Section 59-32-30 (A) (5), it is clear and unambiguous. The statutory provision plainly states that a school district's program of instruction "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." The only exception contained in the statute is where the discussion of "alternate sexual lifestyles, including, but not limited to, homosexual relationships" is in the context of "instruction concerning sexually transmitted diseases."

I cannot imagine how the Article you have presented for my review would fit within this lone exception. Clearly, the Article is presented not in the context of instruction concerning sexually transmitted diseases, but instead is nothing but a "discussion of alternate sexual lifestyles from heterosexual relationships, including ... homosexual relationships ... ." It is apparent from the face of Section 59-32-30 (A) (5) that the Comprehensive Health Education Act does not permit such "instruction" in the public schools.

It is also clear that the State or locality may determine what is part and what is not of a school's curriculum. As the United States Supreme Court recognized in Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 680, 106 S.Ct. 3159, 92 L.Ed. 549 (1986),

> [t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the

> boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

Moreover, the Court has expressly held that the constitutional rights of students "are not automatically co-extensive with the rights of adults in other settings. Bethel, supra at 682, citing, New Jersey v. T.L.O., 469 U.S. 325, 340-342, 105 S.Ct. 733, 742-743, 83 L.Ed.2d 720 (1985). The Court emphasized in Hazelwood School Dist. 484 U.S. 260, 270, 108 S.Ct. 562, 570, 98 L.Ed.2d 592 (1988) that

> [a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," ... or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."

School-sponsored speech may be constitutionally limited, in other words, where it is "reasonably related to legitimate pedagogical concerns." Ward v. Hickey, 996 F.2d 448, 452 (5th Cir.1993) quoting Hazelwood, 484 U.S. at 273, 108 S.Ct. at 571.

In matters of curriculum, the State is given even more control over expression than may be enjoyed in other areas of activity. Virgil v. Sch.Bd. of Columbia County, 862 F.2d 1517 (11th Cir.1989). In Virgil, the school board decided to discontinue use of a universities textbook which it deemed sexual and vulgar. The Court concluded that the decision to remove the text from the curriculum met the standards of the First Amendment because such decision was "reasonably related to its [the Board's] legitimate concerns regarding the appropriateness (for this high school audience) of the sexuality and vulgarity in these works." 862 F.2d at 1523.

And in Cary v. Bd. Ed. of Adams-Araphoe Sch. Dist. 28-J., Aurora, Colorado, 598 F.2d 535 (10th Cir.1979), the Court concluded that it is entirely appropriate under the First Amendment that a school's curriculum "reflect the value systems and educational

emphasis which are the collective will of those whose children are being educated and who are paying the costs." Id. at 542.

Mercer v. State Bd. of Ed., 379 F.Supp. 580 (E.D.Mich.S.D. 1974), affd., 419 U.S. 1081 (1974), is instructive here. In Mercer, the Court reviewed the constitutionality of a state statute which forbade the teaching of birth control in the public schools. In upholding the constitutional validity of the statute, the Court stated that

> [t]he State may establish its curriculum either by law or by delegation of its authority to the local school boards and communities. This is a long recognized system of operation within our Nation. ...
>
> The parents who send their children to public schools accept the curriculum which is offered with certain limited exceptions. Parents may and often times do work at local and state levels in an effort to add to or delete from the curriculum certain material. ... The legislature has seen fit to insure a particularly sensitive subject be left to the wisdom of parents. ...
>
> The statutes which have been presented for the court's scrutiny are not overly broad nor do they violate the First Amendment Anti-establishment Clause. The State has the power to establish the curriculum or to delegate some of its authority to local agencies for the final shaping of the curriculum.

Id. at 585-586. Here the State has by statute determined the limits of discussion of homosexual relationships in the classroom of the State's schools. Such a statutory requirement is reasonably related to legitimate pedagogical concerns and is thus constitutionally valid.

There is also the question of what remedies are available where the Comprehensive Health Education Act is not being followed. As noted in an opinion dated April 30, 1996, such 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 could certainly start with the Department.

Secondly, Section 59-32-80 provides that "any 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." Of course, the local board and school board ordinarily approve a particular program, rather than the individual teacher. Several cases, however uphold the dismissal of a teacher who is violating state law. See Fowler v. Bd. of Ed. of Lincoln County, Ky., 819 F.2d 657 (Cir.1987) [teacher dismissed for showing an "R rated movie to her high school class, upheld]; State v. Parker, 124 N.J. 628, 592 A.2d 228 (1991) [mere fact that the conduct of the school official was not authorized by law constituted official misconduct].

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 59-32-30 (A) (5) is patently clear. A taxpayer would likely have standing to assert that this statutory provision is not being complied with.[1]

In conclusion,

(1) Section 59-32-30 (A) (5) patently prohibits the "discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationship except in the context of instruction concerning sexually transmitted diseases."

(2) Based upon the information available to me, the publication which you have enclosed, in particular the article you reference, would not involve "the context of instruction concerning sexually transmitted diseases." Therefore, it is my opinion that the enclosed article would not comply with Section 59-32-30 (A) (5).

(3) Section 59-32-30 (A) (5) is constitutionally valid and enforceable.

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[1] Of course, only a court could make this determination with binding finality. While this Office is not empowered to make factual finding or to declare that a school district is not complying with state law, this provision [Section 59-32-30 (A) (5)] appears clear on its face.

(4) There are a variety of mechanisms and remedies available for enforcement of Section 59-32-30 (A) (5) including:

(a) complaint to State Department of Education;

(b) teacher discipline or dismissal;

(c) civil action by a taxpayer for enforcement on the basis that public funds are being expended in violation of state law.

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