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The State of South Carolina

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The Honorable Mike Fair
Member, House of Representatives
323-B Blatt Building
Columbia, SC 29211

Dear Representative Fair:

You have requested the Opinion of this Office as to the meaning of the following statement which will be included in a proposed Resolution (Resolution) requesting the State Superintendent of Education (Superintendent) to communicate the statement to teachers throughout the State:

> "Please instruct your teachers that consistent with the expressions of the Supreme Court in Edwards v. Aguillard, they shall have the freedom and flexibility (they presently possess) to supplement the (present science) curriculum with the presentation of various scientific theories about the origins of life, if done with the secular intent of enhancing the effectiveness of science instruction."

You have stated that your question is whether, according to Edwards v. Aguillard, ____ U.S. ____, 96 L.Ed.2d 510, 107 S.Ct. 2573 (1987), teachers can teach creationism when that subject is done with the "secular intent of providing optional explanations for origins of life in a scientific context without promoting religion?". To answer your question fully probably requires that the questions be broken down into several parts which are addressed below.

Addressing your questions are somewhat dependent upon the meaning given to "creationism" which is not defined or expressly referenced in the Resolution. In Edwards, the Supreme Court found to be unconstitutional, under the Establishment Clause of the First Amendment of the United States Constitution, a Louisiana "creationism act" that forbid the teaching of the theory of evolution in the public schools unless accompanied by instruction in "creation science". Under the Louisiana Law, "...evolution and creation science [were] statutorily defined as 'the scientific evidences for [creation or evolution] and inferences from those scientific evidences.'" 107 S.Ct. at 2576. The concurring opinion of Justice Powell noted dictionary meanings of the theory of creation as "holding that...the various forms of life were created by a transcendent God out of nothing." Id. at 2585. Therefore, for the purposes of this Opinion "creationism" will be assumed to be the scientific evidences for creation. See also Ops. Atty. Gen., November 8, 1979.

The first question that would need to be answered is whether, in the absence of the proposed Resolution, teachers in South Carolina would have the authority, under State law, to address a subject such as creationism. Although South Carolina law provides that certain science courses shall be taught in high school, such as biology, it does not address everything that should be covered in those subjects except as to certain aspects of some subjects such as Comprehensive Health Education (Section 59-20-20 of the Code of Laws of South Carolina, 1976, as amended; section 59-29-10, et seq.; section 59-32-10 et seq.; see e.g. Defined Minimum Program for South Carolina School Districts, 1986, p. 56); however, the State has assumed some authority over textbooks and instructional material. See Ops. Atty. Gen., February 27, 1974. Under section 59-5-60(7), the State Board of Education (State Board) has the authority to prescribe and enforce the use of textbooks and other instructional material for the various subjects taught or used in the public schools. In particular, section 59-31-50 makes unlawful the use of any textbook which has been condemned or disapproved by the State Board. In addition, State Board Regulation 43-70 (Vol. 24 of the Code) provides that any school "...may be given the right to select and to use a new and improved textbook not already on the state-adopted list... upon the recommendation of the Director of the Office of General Education and with the approval of the State Board of Education." Therefore, a teacher would be limited by these provisions in the text material that he or she could use in class.

Assuming that the teacher's instruction in creationism did not come from prohibited textbooks under these provisions, and assuming that the instruction did not depart from the purpose and nature of

the courses, such teaching would not be expressly prohibited by South Carolina law; however, no South Carolina case, statute or regulation appears to address the question of to what extent an individual teacher can use resources other than textbooks to supplement classroom instruction. Moreover, the limits of the "academic freedom" of a public school teacher in instruction, to the extent that such "freedom" may differ from that of speaking on issues of public concern, does not appear to have been squarely addressed by the U.S. Supreme Court. Edwards, supra (107 S.Ct. at 2578 n. 7) did cite the Court of Appeals opinion in that case which stated that "[a]cademic freedom embodies the principle that individual instructors are at liberty to teach that which they deem appropriate in the exercise of their professional judgment, but the Court said that "...states may prescribe public school curriculum concerning science instruction under ordinary circumstances..." and noted that in the State of Louisiana, the State Board of Education prescribed courses, and that the teachers were not free, absent permission, to teach courses different from what was required. Edwards, 107 S.Ct. at 2578; see also Fisher v. Fairbanks North Star Borough School, 704 P.2d 213 (Alaska, 1985); as to rights of a teacher to comment upon matters of public concern, see Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, 1968; Piver v. Pender County Board of Education, 835 F.2d 1076 (4th Cir., 1987); Kim v. Coppin State College, 662 F.2d 1055 (4th Cir., 1981). 1/

Although, as noted, neither the South Carolina Legislature nor the State Board have prescribed details of most courses, the Legislature has indicated that it believes that it has some authority to do so in prescribing some of the matters to be covered in Comprehensive Health Education, in requiring that the history of black people be included in history and social studies courses, and in requiring that "higher order problem solving skills" be emphasized in the curriculum at all levels. (Sections 59-29-55, 59-29-180, 50-32-10(2), 59-32-30(D), and 59-32-80). The Legislature has also given the State Board the power to "[p]rescribe and enforce courses of study" (section 59-5-60(6)); however, course content relating

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1/ Although addressing a free speech issue on the college level rather than in an elementary or secondary school and although not addressing an instructional issue, the Fourth Circuit in Kim, supra, did make the following statement concerning academic freedom:

> "Not only is academic freedom fundamental to freedom of expression under the First Amendment, but freedom of expression is likewise fundamental to academic freedom." 662 F.2d at 1063.

to the origins of life has apparently not been prescribed by the Legislature or the State Board. Although a teacher's supplementing the curriculum with instruction in creationism is not expressly barred by South Carolina law when the instruction does not depart from the nature of the courses or use prohibited textbooks, little guidance is provided as to the permissible extent of such supplemental instruction. Therefore, because of the absence of statutory, regulatory and judicial guidance, and because of the factual nature of instructional matters, in the event of conflict between an individual teacher and a school district over the extent and manner of a teacher's teaching of creationism from non-prohibited materials, such a dispute would involve significant factual issues that would fall outside the scope of Opinions of this Office. Ops. Atty. Gen., (December 12, 1983); See Kim, supra at 1062-1065.

Assuming no conflict as to instructional materials under the authority set forth above, the next question to be addressed would be whether a teacher would be prohibited by the Establishment Clause of the First Amendment from teaching creationism in the public schools, Edwards supra, did not address the question of a teacher's teaching creationism voluntarily, on his or her initiative, because at issue in that case was a Louisiana law that mandated that creationism be taught if evolution were taught. The Supreme Court found the purpose of that law to be "to restructure the science curriculum to conform with a particular religious viewpoint" (1075 S.Ct. at 2582); however, the following statement from the plurality opinion indicates that, under appropriate circumstances, creationism could be taught;

> "We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. Indeed, the Court acknowledged in Stone that its decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of western civilization. ... In a similar way, teaching a variety of scientific theories about the origins of humankind to school children might be validly done with the secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the [Louisiana] Creationism Act is to en-

> dorse a particular religious doctrine, the Act furthers religion in violation of establishment clause. [footnote omitted] (emphasis added)." 107 S.Ct. at 2583.

Accordingly, teaching creationism as a part of "...a variety of scientific theories about the origins of humankind to school children might be validly done with the clearly secular intent of enhancing the effectiveness of science instruction" (Id. at 2583); however, to be consistent with the First Amendment of the United States Constitution under the United States Supreme Court's "three-pronged Lemon test" , the teaching would have to have a secular purpose, have a principal or primary effect that neither advanced nor inhibited religion, and not result in an excessive entanglement of government with religion. Edwards, supra, at 2577 and 2578, citing Lemon v. Kurtzman, 403 U.S. 602, 612-613, 29 L.Ed.2d 745, 91 S.Ct. 2105-2111 (1971). Whether particular instruction by an individual teacher would be consistent with this test would involve fact-finding and adjudication of facts which would not fall within the scope of Opinions of this Office. Ops. Atty. Gen., April 5, 1987, and December 12, 1983).

The final question to be addressed is whether the resolution, if passed, would be consistent with the Establishment Clause of the First Amendment. The Resolution, if joint rather than concurrent, probably would carry the same force of law as an Act begun as a Bill. Ops. Atty. Gen., (June 17, 1987, September 27, 1976). Whether a court would find the law to be valid would be dependent upon the application of the three-pronged Lemon test.

Edwards held the Louisiana law to be invalid under the Lemon test's first prong in that it found that the Act was "...designed either to promote the theory of creation science which embodies a particular religious tenant by requiring that creation science be taught whenever evolution is taught or to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught." 107 S.Ct. at 2582. In his concurring opinion joined by Justice O'Connor, Justice Powell found that the limitation in the statute to scientific evidence supporting the theory of creation did not make the purpose of the statute secular because "[w]hatever the academic merit of particular subjects or theories, the Establishment Clause limits the discretion of state officials to pick and choose among them for the purpose of promoting a partic-

ular religious belief." 107 S.Ct. at 2588. He said that he was convinced "...that the Louisiana Legislature exercised its discretion for this purpose in this case." Id.

The Resolution in question is distinguishable from the Louisiana law in that it does not mandate that creationism, or any other scientific theory of evolution be taught. Instead, emphasis is upon the "freedom and flexibility ([teachers] presently possess) to supplement the (present science) curriculum with the presentation of various scientific theories about the origins of life." Although the proposed resolution does reference Edwards and supplementing the present curriculum, which a court arguably could interpret as indicating some purpose related to the teaching of creationism, the language of the resolution does not choose among various theories of the origins of life, and a court could, instead, interpret the reference to Edwards as merely assuring that the teaching of the theories of the origins of life do not conflict with the Establishment Clause. Although Edwards noted that no other provisions in the laws concerning the curriculum in Louisiana's public schools mandated "equal time" for opposing positions (Id. at 2579, n. 7) and that "[o]ut of many possible science subjects taught...the Legislature chose to affect the teaching of one scientific theory that historically has been opposed by certain religious sects,...." (Id. at 2582) the Resolution does not require the emphasis of any particular theory about the origins of life. Moreover, the following statements of the Court in Edwards could indicate that the Resolution would be upheld if reviewed by the Court as maximizing the comprehensiveness and effectiveness of science instruction and encouraging "academic freedom":

> "If the Louisiana Legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of human kind. [foot note omitted] But under the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so. Moreover, the Act fails even to ensure that creation science will be taught, but instead requires the teaching of this theory only when the theory of evolution is taught. Thus, we agree with the Court of Appeals' conclusion that the Act does not serve to protect academic freedom, but

> has the distinctly different purpose of discrediting 'evolution' by counter-balancing its teaching at every turn the teaching of creation science...." 107 S.Ct. at 2580.

Therefore, in neither choosing among nor requiring instruction in particular theories concerning the origins of life, this resolution is clearly different from the Louisiana law and 1979 proposed legislation in South Carolina concerning creationism that was found, in a previous Opinion of this Office, to be likely to violate the Establishment Clause. Ops. Atty. Gen., November 8, 1979. The 1979 Bill would have authorized and, under certain circumstances, required the inclusion of creationism in the public school curriculum. Id.

Although the Resolution appears to be valid on its face [valid in wording] in terms of its purpose, the courts have looked to other evidence of purpose including testimony as to legislative purpose. See Wallace v. Jaffree, 472 U.S. 38, 86 L.Ed.2d 29, 105 S.Ct. 2479 (1985); Edwards, supra, and Ops. Atty. Gen., April 11, 1988. Therefore, even though the resolution appears to be valid on its face, if other evidence were presented that the Bill's purpose was religious rather than secular, a court could find it to be unconstitutional under the First Amendment.

Edwards did not squarely address the other two prongs of the Lemon test, (But see 107 S.Ct. at 2584) which would be whether the law had the primary effect of promoting religion or cause excessive government entanglement with religion. Questions as to whether the implementation of the resolution would violate either of these prongs here would involve factual issues that have not yet arisen as to this Resolution because it has not yet been adopted by the Legislature. Ops. Atty. Gen., April 11, 1988. Moreover, as stated by Justice O'Connor in her concurring opinion in Wallace as to a Moment in Silence Statute, the question of the effect of the implementation of the law "...cannot be answered in the abstract, but instead [requires] courts to examine the history, language and administration of a particular Statute to determine whether it operates as an endorsement of religion." (emphasis added) 86 L.Ed.2d at 54, 55.

In conclusion, no law appears to prohibit South Carolina teachers from including, in a course, instruction as to creationism provided that the instruction does not come from disapproved textbooks or depart from the nature of the course being taught and provided that, consistently with the Establishment Clause of the First Amendment of the United States Constitution, such instruction by teachers has a secular purpose, does not have the primary

effect of advancing or inhibiting religion and does not foster an excessive government entanglement with religion. Questions of the extent of a teacher's academic freedom to teach creationism, in a dispute with school district authorities, and whether such instruction violates the Establishment Clause would involve factual issues that cannot be addressed by Opinions of this Office. The Resolution in question, appears to be valid on its face [in its wording] under the Establishment Clause and would be likely to be upheld unless evidence were presented to a court that would indicate that the Bill did not have a secular purpose, that it had the primary effect of promoting religion or that it fostered an excessive government entanglement with religion.

Yours very truly,

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JESjr/jps

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