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The Honorable Ron Slater
Idaho House of Representatives
Statehouse Mail

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL'S OPINION BUT IS
OFFERED AS LEGAL GUIDANCE ONLY.

Dear Representative Slater:

At the direction of Pat Kole, I am responding to your request concerning the constitutionality of the legislation designated as RS11739, which proposes to amend sections 33-512 and 33-1602, Idaho Code. The proposed amendment to section 33-512 would require each school board of trustees to exclude from its school libraries "all books, tracts, papers and catechisms. . . for or against any sectarian. . . or denominational doctrine."

The proposed amendment to section 33-1603 would prohibit the teaching of "instruction for or against sectarian or denominational doctrine. . . in the public schools." A new paragraph is added which proposes that

Any teacher or other employee of a school district who violates the provisions of this section shall have his teaching certificate revoked. The state board of education shall revoke the certificate pursuant to procedures contained in sections 33-1208 and 33-1209, Idaho Code. For the purpose of section 33-1208, Idaho Code, a violation of the provisions of this section shall be gross neglect of duty.

Sections 33-512 and 33-1603 as they are now written conform to the prohibitions contained within Article 9, Sub-section 6 of the Idaho Constitution which states

No sectarian or religious tenets or doctrines shall ever be taught in the public schools. . . .
No books, papers, tracts or documents of a political sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article. . . .

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Additionally, the statutes must meet the three-part test established by the United States Supreme Court in the case of Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 20 L.Ed. 2d 745 (1971). This test provides that in order to avoid a violation of the First Amendment, a state statute or state action must, 1) have a secular purpose; 2) have a primary effect which neither advances nor inhibits religion; and 3) not foster an excessive entanglement between church and state.

As I indicated, the language of the two sections as they are now written meet the tests established by both the federal and state constitutions. However, the addition of the language of "for or against any" and "or denominational doctrine" would not be a violation of the constitution.

However, the proposed changes to section 33-1603, raise some serious constitutional problems. The ability to teach and be certificated is a constitutionally and statutorily recognized property interest which is entitled to constitutional and statutory due process protections. These are the reasons for sections 33-1208 and 33-1209, Idaho Code, which cover revocation proceedings and sections 33-514 and 33-515, Idaho Code, which cover protections afforded annual and renewable contract (tenure) teachers.

First, teachers and others are entitled to notice as to the reasons for which they may be discharged. Those reasons cannot be susceptible to arbitrary and capricious application. That is, the reasons cannot be interpreted and applied on a basis of definition determined by the person(s) making the decision. The addition of the word "instruction" would raise this problem because of the variable meaning afforded to the word, which can range from mere innocent reference to an outright presentation of lessons on religious topics. The addition of "instruction" coupled with the prohibitions contained in the constitutions and the proposed mandated revocation would result in an arbitrary and capricious denial of a constitutionally protected interest.

The sanction imposed by the new language, mandated revocation of the teacher or administrator certificate, does not take into consideration the nature of the "instruction" such as the innocent reference and allow the mitigation of

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the sanction to something less such as suspension of the certificate or a reprimand. When dealing with a constitutionally protected interest such as the contract or certificate, a court would probably look with disfavor on the mandatory revocation without consideration of the mitigating circumstances and consider such a mandate arbitrary and capricious and a violation of due process and equal protection provisions of the federal and state constitutions. The only way to avoid this problem is to substitute the word "may" for the word "shall." The remainder of the proposed change appears to be constitutionally permissible.

Should you have further questions or should you need further assistance, please do not hesitate to contact me.

Sincerely,

Daniel G. Chadwick

DANIEL G. CHADWICK
Deputy Attorney General
Department of Education

DGC/s
cc: Pat Kole