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February 6, 1986

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The Honorable Liz Allan  
Idaho State Representative  
STATEHOUSE MAIL

Re: H.B. 484

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION  
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Allan:

By letter of February 3, 1986, you request our opinion regarding the constitutionality of H.B. 484. House Bill 484 has been commonly denominated the "Balanced Treatment for Creation Science and Evolution Science in Public School Instruction Act." For the reasons set forth below it is our conclusion that this bill is unlikely to survive a constitutional challenge.

ANALYSIS:

House Bill 484 is essentially identical to legislation enacted in the states of Arkansas and Louisiana. As in H.B. 484 both statutes enacted in those states did not mandate the teaching of creation science, but required, if evolution science were taught in the public schools, that creation science also be taught. Both the Arkansas and Louisiana Legislatures included in the legislative record and in their statements of purpose findings indicating that the purpose of the law was to give balanced treatment to creation science when evolution science was being taught in the classroom. Both legislatures also stated that there was no religious purpose behind the legislation. In McLean v. Arkansas Board of Education, 529 F.Supp. 1255 (E.D. Arkansas, 1982) and Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. Ca. 1985), each of these Balanced Treatments Acts was found to be unconstitutional.

While we have no doubt that the sponsors of this legislation as the sponsors of the corresponding laws, believe that no secular purpose is being served by promotion of the Balanced Treatment Act, the courts have not to date accepted that proposition. As stated by the Aguillard court:

We approach our decision in this appeal by recognizing that, irrespective of whether it is fully supported by scientific evidence, the theory of creation is a religious belief. Moreover, this case comes to us against a historical background that cannot be denied or ignored. 765 F.2d 1251 at 1253.

In framing the issue to be resolved the Aguillard court went on to state:

The sole issue for our resolution is whether the Balanced Treatment Act violates the first amendment of the United States Constitution. Although many affidavits have been filed by the state concerning the Act's purpose and effect, it is not necessary to detail the factual record. Our disposition requires only that we consider one threshold question, whether the Act has a secular legislative purpose. Id. at 1254.

The court pointed out that there are three issues that must be resolved to determine whether or not the statute will survive a constitutional challenge: (1) whether the statute has a secular legislative purpose; (2) whether the principal or primary effect of the statute advances or inhibits religion; or (3) whether the statute fosters an excessive entanglement with religion. The court concluded that because the statute had a secular legislative purpose, a review of the statute under the additional criteria was unnecessary. The court stated:

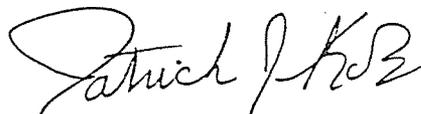
Our decision is not made in a vacuum nor do we write on a clean slate. We must recognize that the theory of creation is a religious belief. We cannot divorce ourselves from the historical fact that the controversy between the proponents of evolution and creationism has religious overtones. We do not, indeed cannot, say that the theory of creation is to all people solely and exclusively a religious tenet. We also do not deny that the underpinnings of creationism may be supported by scientific evidence. It is equally true, however, that the theory of creation is a theory embraced by many religions. Specifically, we must recognize that evolution has historically been offensive to

religious fundamentalists because the theory cannot be reconciled with the Biblical account of the origin of man. Nor can we ignore the fact that through the years religious fundamentalists have publicly scorned the theory of evolution and worked to discredit it. Id. at 1256.

The court proceeded to note that despite the fact that the legislative record reflected many statements by the sponsors and supporters of the Balanced Treatment Act disavowing any secular purposes, the theory of scientific creationism was so intertwined with religion as to make the theory impossible to distinguish. The court concluded by finding that the Act's intended effect was to discredit evolution by counter balancing its teaching at every turn by teaching scientific creationism, which it found to be a religious belief. The statute, therefore, was found to be a law respecting a particular religious belief and therefore unconstitutional.

Because of the time constraints involved in our research, we have not had the opportunity to fully research whether or not this Act would also run afoul of the Idaho Constitution. However, it appears likely that art. 9, § 6, of the Idaho Constitution would likewise mandate a finding that this statute is unconstitutional. Art. 9, § 5, which is a collateral provision to § 6 has been interpreted by the Idaho Supreme Court in a stricter fashion than the federal constitution. See, Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971), cert. denied 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972). It is more than probable that our court would find H.B. 484 violates our state constitution. If we can be of any further assistance, please advise.

Very truly yours,



PATRICK J. KOLE  
Chief, Legislative and  
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PJK/tg