



RECEIVED

FEB - 6 1986

Office of the Attorney
General

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

JIM JONES
ATTORNEY GENERAL

HEALTH AND WELFARE DIVISION
STATE OFFICE TOWER
450 W. STATE 10TH FLOOR
BOISE, IDAHO 83720
TELEPHONE: (208) 334-4006

February 6, 1986

The Honorable Dieter W. Bayer
House of Representatives
STATEHOUSE MAIL

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

RE: District Health Department Advertisements

Dear Representative Bayer:

You have asked whether a particular advertisement placed in several high school newspapers in the Boise area by the local District Health Department appears to violate any provisions of the Idaho Code. Upon review of the advertisement in question and two potentially relevant Idaho Code sections, it is our conclusion that there is no apparent violation of Idaho law.

ANALYSIS

The advertisement in question simply lists certain information and services available from the District Health Department in the Boise area, including: "contraceptive counseling and information"; "physical exams"; "pregnancy detection"; "teen services;" and "venereal disease screening." The advertisement states that "all information and services are confidential" and provides both the telephone number and address of the District Health Department. No other information is given and no statement is made that contraceptives or any care or treatment of venereal disease are available at the District Health Department.

Two sections of Idaho Code are potentially relevant. The first is Idaho Code § 39-701, which provides in relevant part that it is unlawful to refer by advertisement "to any person or persons from whom, or to any means by which, or to any office or place at which may be obtained any treatment or cure of syphilis, gonorrhea" and/or sexually related problems. The United States government, the State of Idaho, and any Idaho city are exempt from this prohibition by Idaho Code § 39-703. The advertisement only states that "venereal disease screening" is provided by the District Health Department, it does not state that any treatment or cure may be obtained at the District Health Department. Accordingly, the advertisement does not violate the precise prohibition of Idaho Code § 39-701. As a general rule, criminal or penal statutes such as this are strictly construed and are limited to cases clearly within the language used. State v. Thompson, 101 Idaho 430, 437 (1980).

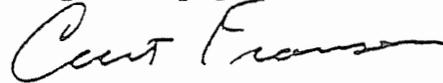
Even if the advertisement had appeared to violate Idaho Code § 39-701, at least two other legal questions would arise. In view of our conclusion above, we offer no final guidance on these issues, but raise them for your information. The first is whether the District Health Department would be exempt by virtue of Idaho Code § 39-703. The District Health Department could possibly be exempt, even though it is not actually a part of federal, state or city government. District Health Departments did not exist in Idaho at the time the exemption was enacted and the legislature may have intended to exempt all governmental agencies attempting to address these kinds of problems. Moreover, by delegation or contract from the Department of Health and Welfare, the District Health Departments do perform various services, including communicable disease programs, on behalf of the State of Idaho.

A second legal question which would arise, even if there were an apparent violation and the District Health Department was not exempt, is whether Idaho Code § 39-701 is constitutional. At least one similar state statute has been found unconstitutional by a federal court as a restriction of speech protected by the First and Fourteenth Amendments of the United States Constitution. Meadowbrook Women's Clinic v. State of Minnesota, 557 F. Supp. 1172 (1983).

A similar analysis applies to the second section of the Idaho Code that is relevant to your question. Idaho Code § 18-603 provides that every person "who willfully publishes any notice or advertisement of any medicine or means . . . for the prevention of conception, or who offers his services . . . to assist in the accomplishment of such purpose, is guilty of a felony." Physicians and licensed or registered health care providers acting under a physician's direct supervision or medical orders are exempt. The advertisement states only that the District Health Department provides "contraceptive counseling and information;" it neither mentions any specific means or medicine for the prevention of conception nor offers a service to provide such means or medicine. Accordingly, by necessarily strict construction, Idaho Code § 18-603 does not appear to have been violated. As above, two additional legal issues would arise, even if an apparent violation had been found. First, the District Health Departments might possibly be exempt under this statute by acting under the direction or order of a physician. Second, as above, this statute would raise serious federal constitutional questions.

I trust this letter is responsive to your concerns. Please call if we can provide additional information or guidance.

Very truly yours,



Curt Fransen
Deputy Attorney General