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The Honorable Terry Sverdsten
Chairman, Senate Education Committee
Idaho State Senate
STATEHOUSE MAIL

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

Re: Constitutionality of House Bill No. 523

Dear Senator Sverdsten:

Your letter requests guidance concerning the
constitutionality of House Bill No. 523. The bill prohibits:

any employee of a school district, to teach
during the employee's working hours in the school
district, that the manifestation of sexual desire
toward a member of one's own sex or that erotic
activity with a member of one's own sex is a
normal or acceptable form of behavior.

As a sanction, the bill provides:

Violation of the provisions of this section may
be grounds for immediate discharge. For
certificated professional personnel, discharge
shall be accomplished as provided in section 33-
513, Idaho Code. Discharge pursuant to this
section may also be grounds for revocation of a
certificate by the state board pursuant to
section 33-1208.

Your inquiry raises a basic constitutional question:

Is the prohibition against teaching that homosexuality
is normal or acceptable behavior so overbroad and
vague as to violate the First Amendment's prohibition
against restraint of free speech?

February 28, 1986

You also request our comments concerning problems of vagueness and due process raised by the bill.

Although the state may properly regulate conduct in the classroom, including presentation and content of curriculum, the prohibitions imposed by House Bill No. 523 address an area of law as yet unsettled by the courts. It is virtually certain that the bill would be the subject of protracted and costly litigation.

ANALYSIS:

House Bill No. 523 prohibits teaching during working hours that homosexual conduct is normal or acceptable behavior. The legislation is clearly designed to regulate speech since, by its terms, it outlaws advocating a specific point of view. The U.S. Supreme Court consistently holds that the espousal of a point of view, whether political or social, constitutes speech in its purest form. Brandenburg v. Ohio, 395 U.S. 444 (1969).

The context in which the right of speech is exercised is as important as the content of the speech. The Supreme Court addressed the question as it relates to public schools and teachers in Pickering v. Board of Education of Township High School District 205, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968). The Court there recognized that teachers do not lose their first amendment rights when they go through the schoolhouse door, but at the same time noted that "the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Pickering, 391 U.S. at 568. Therefore, the Court indicated that there can be circumstances when it is permissible to control the speech of school teachers.

The Court stated that the situation requires balancing the right of the teacher to free and unfettered expression granted by the first amendment against the right of the state, in this case the school district, to properly function. The balancing test includes the following factors: whether the teacher's or employee's action disturbs the orderly school administration, upsets the curricular policies of the institution, makes sexual advances towards the students, or otherwise engages in unprotected conduct or speech. Pickering, 391 U.S. at 570.

The school teacher's first amendment right to free speech in the classroom has often been labeled "academic freedom." Although academic freedom is not an enumerated right of the first amendment, the courts have emphasized that "the right to teach, to inquire, to evaluate and to study is fundamental to a

February 28, 1986

democratic society." Parducci v. Rutland, 316 F.Supp. 352, 355 (M.D. Ala. 1970). This court further stated that:

the safeguards of the First Amendment will quickly be brought into play to protect the right of academic freedom because any unwarranted invasion of this right will tend to have a chilling effect on the exercise of the right by other teachers.

Parducci at 355.

But, as Pickering instructs, this right is not absolute and must be balanced against the competing interests of society. State and local school districts have the obvious authority to control what goes on in the public schools including regulation of employee conduct, and course content or curriculum. Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). "A teacher works in a sensitive area in a schoolroom. There he shapes the attitudes of young minds towards the society in which they live. In this, the state has a vital concern." Shelton v. Tucker, 364 U.S. 479, 485, 81 S.Ct. 247, 250, 5 L.Ed.2d 231 (1960). Thus, "free speech does not grant teachers a license to say or write in class whatever they may feel like. . . ." Mailloux v. Kiley, 448 F.2d 1242, 1243 (1st Cir. 1971).

[Any] conduct [by a teacher] in class or out of it, which for any reason--whether it stems from time, place or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513, 89 S.Ct. 733, 740, 21 L.Ed.2d 731 (1969).

It follows that teachers do not have an absolute first amendment right to teach controversial subjects in the classroom. See, Adams v. Campbell County School District, 511 F.2d 1242 (10th Cir. 1975). Nor can a teacher teach in a manner that contravenes the valid dictates of the employer. Ahern v. Board of Education of the School District of Grand Island, 456 F.2d 399 (8th Cir. 1972). Although academic freedom as part of the first amendment is recognized, course content may be controlled by the state or the school district. Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).

February 28, 1986

In short, the time, place, manner, content, context and age of the student(s) must be considered. Several examples should clarify the importance of these factors.

A teacher was dismissed for cause in a Mississippi school district after taking time out from a spelling lesson to discuss the meaning of the word "queer." United States v. Coffeerville Consol. School District, 365 F.Supp. 990 (D.C. Miss. 1973). The incident occurred in a class of eighth grade boys. One boy asked, "What is a queer?" The teacher warned the student to be quiet and drop the subject, but was again asked and other boys joined in asking the question. The teacher then began a discussion of homosexuality which was dispassionate, without foul words and without reference to any personal experience. The discussion was a one-time occurrence. The court held that in no way was the conduct or content repulsive to minimum standards of decency appropriate to that particular classroom. Thus, the teacher could not be discharged.

Other courts have used the balancing test factors, with varying results. In the Keefe case mentioned above, a teacher could not be dismissed simply because a vulgar word was used in an article assigned to the class to read. However, in Pyle v. Washington County School Board, 238 So.2d 121 (Fla. App. 1970), the court held it was proper to dismiss a high school band instructor for making reference to sex, virginity and premarital sex, which had no relationship to the course content. See, also, Brubaker v. Board of Education, 502 F.2d 973, cert. den. 421 U.S. 965, 95 S.Ct. 1953, 44 L.Ed.2d 451 (7th Cir. 1974).

The uncertainty clouding our response to your question is best illustrated by the outcome of the closest case that has yet come before the federal courts. In National Gay Task Force v. The Board of Education of the City of Oklahoma City, 33 FEP Cases 1009 (No. CIV-8-1174-E, issued June 29, 1982), the U.S. district court for the Western District of Oklahoma upheld the constitutionality of a statute proscribing "public homosexual conduct," which the Oklahoma Legislature had defined as:

advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; . . .

On appeal, the Tenth Circuit Court of Appeals reversed the district court and held that the statute was unconstitutionally overbroad, in violation of the first amendment's guarantee of free speech. National Gay Task Force v. The Board of Education of the City of Oklahoma City, 729 F.2d 1270 (1984).

The U.S. Supreme Court, in a one-line 4-4 decision, affirmed the holding of the Tenth Circuit. Justice Powell did not participate and there is no way to predict how his tie-breaking vote will be cast when a similar issue again presents itself to our highest court.

It will suffice to review the opinions of the district and circuit courts in the National Gay Task Force case to show the continuing level of constitutional uncertainty that attends this issue. The uncertainty is not over the legal principles, but over the way they are applied.

For example, both the district and the circuit courts agreed on the test to be applied in judging whether the Oklahoma statute infringes upon constitutionally protected speech. The district court, relying on the Tinker case mentioned above, stated:

[T]he crucial question is whether the expression contemplated by the statute substantially or materially interferes with the operation of the school. Only when substantial disruption is present is the employee's right of free expression outweighed, and therefore not constitutionally protected.

33 FEP Cases at 1011-12. The district court found that the Oklahoma statute did not violate this standard and thus did not "affect any speech protected by the First Amendment." Id. at 1012.

The Tenth Circuit measured the statute against much the same standard:

[A] teacher's First Amendment rights may be restricted only if "the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee."

729 F.2d at 1274, quoting from Childers v. Independent School District No. 1, 676 F.2d 1338, 1341 (10th Cir. 1982). Applying this same test, however, the Tenth Circuit concluded that the statute was unconstitutional because the Oklahoma City school board had not succeeded in showing that the statutory prohibitions were necessary to prevent disruption of school functions.

Similarly, the district and circuit courts both agreed on the legal principle that if the Oklahoma statute would "chill" the free speech of teachers, it would be unconstitutional. The

district court ruled that "the only 'chilling' is caused by unreasonable fear." 33 FEP Cases at 1012. The Tenth Circuit disagreed and held that:

[T]he deterrent effect of [the statute] is both real and substantial. It applies to all teachers, substitute teachers and teachers' aides in Oklahoma. To protect their jobs they must restrict their expression.

729 F.2d at 1274.

Both the district and circuit courts also agreed that finding the Oklahoma statute facially unconstitutional for overbreadth would be "strong medicine" that should be used "sparingly and only as a last resort." Citing Broadrick v. Oklahoma, 413 U.S. 601, 613. The district court concluded that the statute was not overbroad because the offensive expression was only one factor in determining whether a teacher was "unfit." 33 FEP Cases 1013. The Tenth Circuit, on the contrary, held that the statute was overbroad because its prohibitions might ban "statements which are aimed at legal and social change [and which] are at the core of First Amendment protection." 729 F.2d at 1274.

In discussing the federal court opinions in the National Gay Task Force case, it is important to note that the Oklahoma statute was quite different from House Bill No. 523. Both the district and circuit courts alluded to the difference between the Oklahoma statute and the Idaho bill but reached opposite conclusions as to what the difference would mean. The Tenth Circuit struck down the Oklahoma statute at least partly because "the statute does not require that the teacher's public utterance occur in the classroom." 729 F.2d at 1275. The implication was that the appellate court might have sustained the constitutionality of a statute limited solely to speech in the classroom.

By contrast, the district court expressly held that a statute such as House Bill No. 523 would likely prove unconstitutional:

My study of this statute convinces me that many of plaintiff's fears are unwarranted. The Act does not, for example, allow a school board to discharge, declare unfit or otherwise discipline:

- a. a heterosexual or homosexual teacher who merely advocates equality for or tolerance of homosexuality;

February 28, 1986

- b. a teacher who openly discusses homosexuality;
- c. a teacher who assigns for class study articles and books written by advocates of gay rights;
- d. a teacher who expresses an opinion, publicly or privately on the subject of homosexuality; or
- e. a teacher who advocates the enactment of laws establishing civil rights for homosexuals.

If, under the Act, a school board could declare a teacher unfit for doing any of the foregoing or refuse to hire one for similar reasons, it would likely not meet constitutional muster.

33 FEP Cases 1017. Thus, the debate comes full circle. The district court, which upheld the constitutionality of the Oklahoma statute, would likely rule that House Bill No. 523 is unconstitutional. The Tenth Circuit Court of Appeals, which struck down the Oklahoma statute, seems inclined to look more favorably upon a statute limited to regulation of speech in the classroom. The debate is presided over by an as yet equally divided U.S. Supreme Court. Given this state of affairs, our opinion must obviously be that the constitutionality of House Bill No. 523 is uncertain. The only certainty is that litigation could surely follow in the wake of its passage.

Your letter also asks us to comment on whether House Bill No. 523 contains elements of vagueness. Two areas of concern are present. First, the bill refers to the conduct of "any employee" who would "teach" in the proscribed manner. It is not clear whether this proscription is limited to classroom teachers, substitute teachers, and teachers' aides, or whether it would extend to school administrators, guidance counselors, clerical help and other school employees, many of whom are "certificated professional personnel." Failure to identify the target class may cause a court to strike down the statute as void for vagueness.

Similarly, the questions of the Oklahoma district court are troubling. Does the proposed bill reach the classroom conduct of:

- b. a teacher who openly discusses homosexuality;
- c. a teacher who assigns for class study articles and books written by advocate of gay rights; . . .

February 28, 1986

- e. a teacher who advocates the enactment of laws establishing civil rights for homosexuals?

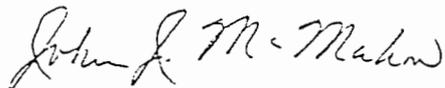
33 FEP Cases 1017.

A court will look at the language contained within a statute and consider the vagueness and overreaching effects of the prohibition as well as the limiting language of the statute. If the court determines that the language is too far reaching in its deterrence of protected speech or if it is vague as to its application, the statute could be struck down as unconstitutional. Broadrick v. Oklahoma, 413 U.S. 601. This could occur in a situation where other statutes are on the books or there are other less onerous alternatives to control the behavior addressed in the questionable statute. Such alternatives and standards are provided by Idaho Code §§ 33-515, 33-1208, and 33-1209, and The Code of Ethics of the Idaho Teaching Profession adopted and approved by the Idaho State Board of Education.

Finally, you have asked if House Bill No. 523 violates the due process clause of the U.S. Constitution. The bill provides that a school employee who teaches that homosexual activity is a normal and acceptable form of behavior may be subject to immediate discharge pursuant to the procedures set forth in Idaho Code § 33-513. Similarly, a certificated employee guilty of this offense could have his or her certificate revoked pursuant to the procedures set forth in Idaho Code § 33-1208. Each of the statutes guarantees full due process to a teacher threatened with discharge or certificate revocation. Thus, the proposed bill is not constitutionally infirm as regards its sanctions.

House Bill No. 523 attempts to regulate the speech of school district employees during their working hours. In addition, the bill attempts to define a standard of conduct, a violation of which may result in serious sanctions. While House Bill No. 523 raises serious constitutional and practical questions which will almost certainly result in litigation, we cannot conclude that a court would strike down House Bill No. 523 because of the unsettled nature of the area of law addressed in the bill.

Cordially,



JOHN J. McMAHON
Chief Deputy