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LAW LIBRARY

July 28, 1972

ARIZONA ATTORNEY GENERAL

DEPARTMENT OF LAW LETTER OPINION NO. 72-27-L (R-60)

REQUESTED BY: THE HONORABLE BOB STROTHER
Arizona State Representative

- QUESTIONS:**
1. Does current Arizona state law prohibit adoption by the State Board of Education, or any governing board, of textbooks containing any matter which reflects adversely upon persons because of their race, color, creed, national origin or ancestry?
 2. Do the Arizona Revised Statutes anywhere prevent or exclude references to religion or use of religious literature, art or music, when such references or uses do not constitute instruction in religious principles or aid to any religious sect, church, creed or sectarian purpose and when such references are incidental to or illustrative of matters properly included in the course of study?
 3. Do the Arizona Revised Statutes anywhere prohibit any sectarian or denominational doctrine being taught, or instruction being given, directly or indirectly in any common school?
 4. Are there now penalties for infractions of any of the above three points found in the Arizona Revised Statutes?
 5. Would such provisions as 1, 2 or 3 above, if in existing law, then apply to parochial schools given parochial aid, should such a bill pass?

ANSWERS: See body of opinion.

In the above questions four separate issues are raised-- religion, discrimination, penalties and "parochial aid". Because each of these issues is complex, and a simple yes or no answer to each of the questions could be seriously misleading,

we have chosen to cover each question as a separate category and explore each as it relates both to textbook selection and school curriculum.

1. Religion. The United States Supreme Court has prohibited the enforced exercise of religious worship in the public schools. This includes both the denominational or non-denominational prayer or ceremony from being included as a part of the daily school activity. The fact that a child is not required to participate in such activities does not exempt such activities from the First Amendment prohibition against the establishment of a religion. Engel v. Vitale, 370 U.S. 421 (1962).

The selection of textbooks is, by statute, delegated to the State Board of Education. A.R.S. § 15-102.18. The choice of textbooks is therefore within the sole discretion of the State Board. State v. Hendrix, 56 Ariz. 342, 107 P.2d 1078 (1940).

The Board is limited only by specific prohibition or flagrant abuse of discretion. The Board is specifically precluded from choosing texts which are sectarian or denominational or whose purpose is to advance a specific religious belief. Article 11, Section 7, Constitution of Arizona School District of Abington Township v. Schempp, 374 U.S. 203 (1963).

This prohibition against books of a denominational or sectarian nature is further imposed upon the local school boards. These boards are under an affirmative duty to remove any such book from the school libraries pursuant to A.R.S. § 15-450. A school district is further prevented from religious instruction by the cases cited above. A.R.S. § 15-203 prohibits teachers from instructing students on sectarian doctrine or conducting religious exercises. This prohibition against religious exercises or instruction is specifically prohibited by both statutory and case law.

The problem of what constitutes denominational or religious instruction is less rigorously defined than the ban against such activities. Consideration of the question of textbooks has occurred remarkably seldom. Without going into a detailed analysis, the courts have held that copies of Bibles used by different Christian faiths or copies of the Talmud or Koran are not sectarian books and may be placed in the school

library. Further, the courts have stated that the First Amendment does not preclude a bona fide study of comparative religion or any other course in which religion is a reasonable or integral part of the subject matter being studied.

Religion is not a forbidden word in our schools. Courses which require a knowledge of religion are not prohibited. It would be foolish to believe that man's knowledge and history must be ignored because it in some way deals with religious beliefs. If this were true, the subjects of history, literature, art, humanities, psychology, sociology and even the physical sciences would be reduced to a meaningless absurdity. Any course which has as its goal a true academic understanding of man and his works is permissible. A book or course to be prohibited must have as its basic purpose either the establishment of religious belief or the promotion of one religious faith at the expense of others. Within this framework the subjects taught and the books used are within the sound discretion of the appropriate educational agencies of the state.

2. Discrimination. Since Brown v. Board of Education, 349 U.S. 294, in 1954, there has been no question that the Fourteenth Amendment of the United States Constitution prohibits unequal treatment of persons for reasons of race, color or national origin. This doctrine has been refined by numerous federal statutes and case decisions. In spite of this, there are few cases or statutes which deal directly with either textbooks or curriculums and racial bias. There are none whatsoever in the State of Arizona. One can only hope that this is due to the good judgment of the educational institutions of our state.

While there is no specific statutory authority in this state, it is our opinion that a course of study or textbook which intentionally promotes racial bias is prohibited. We believe that such conduct or texts would constitute a flagrant violation of the Fourteenth Amendment, and would therefore be abuse of discretion by any agency permitting such actions.

Once again, while the general principle is clear, the operation within its perimeters is not. The mere fact that racial or national differences are noted or commented upon does not contravene an individual's civil liberties. As long as books are written by men, they will appear biased to other men.

In one of the few cases considered, the New York court in Rosenberg v. Board of Education, 92 N.Y.S.2d 344 (1949), stated:

Except where a book has been maliciously written for apparent purpose of promoting and fomenting a bigoted and intolerant hatred against a particular racial or religious group, public interest in a free and democratic society does not warrant suppression of any book in public schools merely because a character described in such book as belonging to a race or religion is portrayed in a derogatory or offensive manner. . . .

It should be noted that the books which were on trial in this case were Oliver Twist, by Charles Dickens, and A Merchant of Venice, by William Shakespeare. We believe that this case correctly states the law and clearly indicates the inherent danger of censorship. When two of English literature's classics are subject to attack and the matter is seriously considered worthy of prolonged litigation by a person who felt aggrieved, the possibility of thought suppression and a total paucity of creative reasoning is apparent. Therefore, the selection of books and curriculum is left to the agency charged by the Legislature with the duty to provide and select them, subject only to gross abuse of that duty.

3. Penalties. The only statutory penalty in Arizona concerning the subject matter herein is contained in A.R.S. § 15-204, which provides that a teacher who gives religious instruction in the public school system is guilty of unprofessional conduct and is subject to the revocation of his teaching certificate.

No other specific penalties are set forth in the statutes concerning any of the questions asked. This does not mean that no remedies exist. Civil action against specific behavior is possible. In a particularly aggravated fact situation, a complaint under one of the various federal civil rights acts might be appropriate.

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4. "Parochaid". This question cannot be answered except in the broadest of terms. A bill granting support to private schools would be unlikely to speak directly to the above issues. Any bill which attempted to impose religious standards on private schools would probably be unconstitutional. Lemon v. Kurtzman, 403 U.S. 602 (1971).

Tax aid to the parents of children in private schools would not impose religious bans upon the schools. Questions dealing with taxes and the Fourteenth Amendment are most likely to be answered by the Internal Revenue Service at the federal level. It is therefore not possible to theorize on the impact of "parochaid" on private schools at this time.

Respectfully submitted,


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