



ATTORNEY GENERAL OF TEXAS
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July 9, 2008

Mr. Don McLeroy
Chairman, Texas State Board of Education
c/o Texas Education Agency
1701 N. Congress Ave.
Austin, Texas 78701-1494

Dear Chairman McLeroy:

The State Board of Education (SBOE) recently submitted proposed rules regarding the new "religious literature" curriculum addition established by the Texas Legislature. TEX. EDUC. CODE ANN. § 28.011(e) (Vernon Supp. 2008). Pursuant to Section 28.011 of the Texas Education Code, I write to report the results of the Office of Attorney General's (OAG) statutorily required review of the SBOE's proposed rules.

As required by statute, you have submitted proposed essential knowledge and skills (known by the acronym "TEKS") of Hebrew Scriptures (Old Testament) and New Testament courses for review by the OAG. *Id.* § 28.011(a), (e). Section 28.011 requires the OAG to review the TEKS of a course offered under that section in order to ensure that the course complies with the First Amendment to the United States Constitution. *Id.* § 28.011(e). Specifically, "[a] course offered under this section shall . . . maintain[] religious neutrality and accommodate[] the diverse religious views, traditions, and perspectives of students" and refrain from endorsing "any particular religion or nonreligious faith." *Id.* § 28.011(d).

The SBOE approved proposed TEKS pursuant to section 28.011 in March of 2008. 33 Tex. Reg. 3111 (2008) (prefatory remarks to proposed 19 TEX. ADMIN. CODE § 74.36) (proposed April 18, 2008) (State Bd. Educ.). Accordingly, we review the proposed TEKS to determine whether they comply with the Constitution.

The Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. In evaluating whether a statute is constitutional within this amendment, the United States Supreme Court has stated that "[f]irst, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (internal quotation marks and citation omitted). The Court has also looked to whether a statute endorses religion, *see, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989), or coerces a religious exercise, *see, e.g., Lee v. Weisman*, 505 U.S. 577, 587 (1992).

The Supreme Court has indicated, however, that teaching about religion in a public school classroom would not run afoul of these tests:

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[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

School District of Abington Township v. Schempp, 374 U.S. 203, 225 (1963); see also *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (“[S]tudy of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment’s prohibition”); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (“[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”); *Hall v. Board of School Commissioners of Conecuh Cty.*, 656 F.2d 999, 1002-1003 (5th Cir. 1981) (even if a public school intends a course to be secular, it must not have the primary effect of advancing religion). Thus, the Constitution allows schools to offer a course about religion so long as the course complies with the First Amendment’s guarantee of religious liberty in having a secular purpose, being neutral toward religion, and not coercing any religious exercise.

The TEKS that the SBOE adopted pursuant to section 28.011 provide in part as follows:

[A] school district may offer to students in Grade 9 or above: an elective course on the Hebrew Scriptures (Old Testament) and its impact and an elective course on the New Testament and its impact; or an elective course that combines the courses on the Hebrew Scriptures (Old Testament) and its impact and on the New Testament and its impact. The purpose of a course under this section is to: teach - students knowledge of biblical content, characters, poetry, and narratives that are prerequisites to understanding contemporary society and culture, including literature, art, music, mores, oratory, and public policy; and familiarize students with, as applicable: the contents of the Hebrew Scriptures or New Testament; the history of the Hebrew Scriptures or New Testament; the literary style and structure of the Hebrew Scriptures or New Testament; and the influence of the Hebrew Scriptures or New Testament on law, history, government, literature, art, music, customs, morals, values, and culture.

33 Tex. Reg. 3111 (2008) (to be codified at 19 TEX. ADMIN. CODE § 74.36(a), (b)) (proposed April 18, 2008) (State Bd. Educ.) (internal notations omitted)). Moreover, the proposed TEKS expressly prohibit school districts from offering courses that would violate the First Amendment to the United States Constitution:

A course offered under this section shall follow applicable law and all federal and state guidelines in maintaining religious neutrality and accommodating the diverse religious views, traditions, and perspectives of students in their school district. A course under this section shall not endorse, favor, or promote, or disfavor or show hostility toward, any particular religion or nonreligious faith or religious perspective.

Id. at 3111 (to be codified at 19 TEX. ADMIN. CODE § 74.36 (c)) (emphasis added). Similarly, section 28.011 of the Texas Education Code contains the following provision:

A course offered under this section shall follow applicable law and all federal and state guidelines in maintaining religious neutrality and accommodating the diverse religious views, traditions, and perspectives of students in their school district. A course under this section shall not endorse, favor, or promote, or disfavor or show hostility toward, any particular religion or nonreligious faith or religious perspective. Nothing in this statute is intended to violate any provision of the United States Constitution or federal law, the Texas Constitution or any state law, or any rules or guidelines provided by the United States Department of Education or the Texas Education Agency.

TEX. EDUC. CODE ANN. § 28.011(d) (Vernon Supp. 2008). Thus, a course that complies with applicable Texas law and SBOE rules must also comport with U.S. constitutional law regarding religious neutrality. We believe that a court would find the proposed TEKS facially constitutional.

Because we have not reviewed curricula and courses proposed pursuant to the TEKS and section 28.011, we cannot conclude whether courses offered under that section will be constitutional. *See generally, id.* §§ 28.001,-002 (noting that TEKS are the objectives that courses in curricula must meet); *see also* 33 Tex. Reg. 3110, 3111 (2008) (prefatory remarks of proposed 19 TEX. ADMIN. CODE § 74.36) (proposed April 18, 2008) (State Bd. of Educ.) (noting that TEKS are requirements and objectives for courses). We can merely conclude that curricula and courses that follow section 28.011 and 19 TAC § 74.36 would be facially constitutional.

Additionally, we cannot ensure that the implementation of any particular curricula and courses in Texas schools are, or will be, constitutional. That is, we are unable to preclear individual courses offered under section 28.011 of the Texas Education Code by deeming them constitutional *as applied*. *See U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (noting that in a “facial” challenge to the constitutionality of an enactment, the challenger must establish that no set of circumstances exists under which the Act would be valid); *id.* n.3 (in an “as applied” challenge, the challenger must establish that an enactment is unconstitutional because of the way it was applied to the particular facts of the challenger’s case).

Nevertheless, by this letter we conclude that courses taught in accordance with applicable Texas law and the SBOE’s proposed TEKS for the religious literature curriculum appear to be facially valid under the First Amendment of the United States Constitution.

Sincerely,



Andrew Weber
Deputy Attorney General for Legal Counsel