S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 13-60

Civil Liability for Family Life Educators under Tenn. Code Ann. § 49-6-1306

QUESTION

What information may family life educators, who are employees of the Tennessee Department of Health ("TDH") or a county department of health, discuss with students without incurring liability under Tenn. Code Ann. § 49-6-1306?

OPINION

A family life educator teaching family life instruction in Tennessee's public schools may not endorse "student nonabstinence as an appropriate or acceptable behavior" or promote "gateway sexual activity," Tenn. Code Ann. § 49-6-1303(b), or provide any instruction on the topics listed in Tenn. Code Ann. § 49-6-1303(b). Family life educators who are employees of the TDH or a county health department generally would be immune from any cause of action commenced under Tenn. Code Ann. § 49-6-1306 unless the employee "willfully" or "maliciously" violated the parameters for family life instruction in Tennessee public schools established by Tenn. Code Ann. §§ 49-6-1301 to -1307.

ANALYSIS

Effective July 1, 2012, the Tennessee General Assembly refined the criteria for family life instruction in Tennessee's public schools. *See* Tenn. Code Ann. §§ 49-6-1301 to -1307; 2012 Tenn. Pub. Acts, ch. 973. These statutes require a local education agency ("LEA") in a county that exceeds certain pregnancy rates in females aged fifteen to seventeen years of age to establish a family life education program with defined curriculum. Tenn. Code Ann. § 49-6-1302(a)(1). An LEA that offers a program, course or instruction in sex education must also "develop and adopt" a family life education program with defined curriculum. Tenn. Code Ann. § 49-6-1302(a)(2). The curriculum may be developed by the LEA in accordance with the guidelines outlined in Tenn. Code Ann. §§ 49-6-1301 to -1307 or the LEA may adopt the family life curriculum developed by the Tennessee Board of Education. Tenn. Code Ann. § 49-6-1302(a). An LEA failing to comply with these provisions "shall subject the LEA to the withholding of state funds." Tenn. Code Ann. § 49-6-1302(a)(4).

The statutory guidelines for family life instruction prohibit the following topics from being discussed or included in the family life instruction curriculum:

> (b) Instruction of the family life curriculum shall not:
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> (1) Promote, implicitly or explicitly, any gateway sexual activity or health message that encourages students to experiment with noncoital sexual activity;
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> (2) Provide or distribute materials on school grounds that condone, encourage or promote student sexual activity among unmarried students;
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> (3) Display or conduct demonstrations with devices specifically manufactured for sexual stimulation; or
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> (4) Distribute contraception on school property; provided, however, medically-accurate information about contraception and condoms may be provided so long as it is presented in a manner consistent with the preceding provisions of this part and clearly informs students that while such methods may reduce the risk of acquiring sexually transmitted diseases or becoming pregnant, only abstinence removes all risk.

Tenn. Code Ann. § 49-6-1304(b). These provisions, however, do not preclude "the scientific study of the sexual reproductive system through coursework in biology, physiology, anatomy, health, or physical education." Tenn. Code Ann. § 49-6-1307.

Many of the terms used in these statutes are defined at Tenn. Code Ann. § 49-6-1301. "Gateway sexual activity," the promotion of which is prohibited by Tenn. Code Ann. § 49-6-1304(b)(1), is defined as

> sexual contact encouraging an individual to engage in a non-abstinent behavior. A person promotes a gateway sexual activity by encouraging, advocating, urging or condoning gateway sexual activities.

Tenn. Code Ann. § 49-6-1301(7).

An LEA may utilize the services of a qualified healthcare professional or social worker, which could include TDH or county health department employees, "to assist in teaching family life." Tenn. Code Ann. § 49-6-1303(a). However, an LEA

> shall not utilize the services of any individual or organization to assist in teaching family life if that individual or organization endorses student nonabstinence as an appropriate or acceptable behavior, or if that individual or organization promotes gateway sexual activity.

Tenn. Code Ann. § 49-6-1303(b).

Once a program for family life instruction is developed by an LEA, an LEA is required no less than thirty days prior to commencing instruction to notify parents or legal guardians of students who will attend the instruction that the LEA will be using a family life curriculum which may be reviewed by these parents or legal guardians. Tenn. Code Ann. § 49-6-1305(a). A parent or guardian may choose to excuse the student for which the parent or guardian is responsible from attending the family life instruction by following the process outlined in Tenn. Code Ann. §49-6-1305(b).

Finally, these statutes create for parents of public school students a private right of action against any instructor or organization who provides family life education that either promotes gateway sexual activity or demonstrates sexual activity in contravention of Tenn. Code Ann. §§ 49-6-1301 to -1307, stating:

> If a student receives instruction by an instructor or organization that promotes gateway sexual activity or demonstrates sexual activity, as prohibited under this part, then the parent or legal guardian shall have a cause of action against that instructor or organization for actual damages plus reasonable attorney's fees and court costs; provided, however, this subdivision (b)(1) shall not apply to instruction by teachers employed by the LEA.

Tenn. Code Ann. § 49-6-1306(b)(1).

Federal and state courts have recognized that, although constitutional limits do exist upon the power of a state to control curriculum taught in a classroom, generally courts accord great deference to the opinion and judgment of state and local school officials in their development and teaching of school curriculum. *See* Ronna Greff Schneider, *Education Law, First Amendment, Due Process and Discrimination Litigation*, § 2.8 *Curriculum* (Nov. 2012). *See also Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1998) (observing the Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges" unless an action taken directly implicates a constitutional right); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (stating that "[b]y and large, public education in our nation is committed to the control of state and local authorities"); *Evans-Marshall v. Board of Educ. of Tipp City Exempted Village School Dist.*, 624 F. 3d 332, 341 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 3068 (2011) (quoting *Boring v. Buncombe County Bd. of Educ.*, 136 F.2d 364, 371-72 (4th Cir. 1998) (en banc) (Wilkinson, C.J., concurring))(stating that "[t]he curricular choices of the schools should be presumptively their own—the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them").

The opinion request under review raises two distinct questions of statutory construction: (1) what may be discussed in family life instruction by TDH and county department of health employees under the guidelines of Tenn. Code Ann. §§ 49-6-1301 to -1307 and (2) what liability, if any, may exist for these employees under Tenn. Code Ann. § 49-6-1306 if they transgress the guidelines set by these statutes.

The initial question was in essence answered in a prior opinion in which this Office opined that an LEA requesting the assistance of a TDH or county health department employee would be responsible for ensuring that the curriculum taught complied with State and local guidelines. Tenn. Att'y Gen. Op. 92-17 at 5-7 (Feb. 26, 1992). As this Office explained:

> Your inquiry . . . asks whether the State Department of Health would have any influence over the manner or method of instruction used in the public school setting. As a general proposition, the Department of Health has no supervision or control over the curriculum in the public schools for the State of Tennessee. If a health care provider, outside the teachers and instructors normally employed by the school, is invited to give a lecture or to discuss a particular topic, it would appear that it would be up to the local school officials to see that the instruction complied with the curriculum and guidelines set forth by the local education agency. If the health care provider cannot conform his presentation to the requirements of the local family life curriculum, then he or she should not be used.
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> On the other hand, health care providers may present discussion regarding sex, pregnancy, and contraception that is not normally found in the public school setting. . . .
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> . . . .
>
> [A] public health provider, when invited to a school to speak about contraception or AIDS, may be prepared to use methods, demonstrations, or supplies that he or she would use or discuss in the health care setting. School board officials will have to determine whether such discussions regarding contraceptives, condoms, sex, or sexual activity are appropriate in their particular school setting. It should be noted that T.C.A. § 49–6–1302(a)(2) contemplates and allows local LEA's [sic] to adopt a plan which utilizes "the services of qualified health care professionals and social workers to assist in family life instruction. . . ."

Id. Thus, the responsibility for ensuring the curriculum taught complies with State and local requirements rests with the LEA and not the TDH or county health department employees asked to assist in teaching family life instruction.

Second, under Tennessee law, both TDH and county health department employees providing assistance as part of their State employment to an LEA under Tenn. Code Ann. § 49-6-1303(a) are immune from any action commenced under Tenn. Code Ann. § 49-6-1306 unless such employees willfully or maliciously act to violate Tenn. Code Ann. § 49-6-1306. State employees such as TDH employees "are absolutely immune from liability for acts or omissions within the scope of the . . . employee's office or employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain." Tenn. Code Ann. § 9-8-307(h). *See Shelburne v. Frontier Health*, 126 S.W.3d 838, 841-42 (Tenn. 2003); *Johnson v. LeBonheur Children's Medical Center*, 74 S.W.3d 338, 342-43 (2002). Likewise, under the Tennessee Governmental Tort Liability Act ("GTLA"), as a general rule in state law cases where

the county is immune "no judgment may be entered against the employee in any amount in excess of the amounts established for governmental entities under the GTLA unless his acts were willful, malicious, criminal or performed for personal financial gain." Tenn. Att'y Gen. Op. 09-47 at 1 (Apr. 2, 2009) (citing Tenn. Code Ann. § 29-20-310(c)).[1]

The cause of action created by Tenn. Code Ann. § 49-6-1306 does not explicitly or implicitly repeal the statutory immunity generally granted to State and county employees acting within the scope of their official employment. *See Hayes v. Gibson County*, 288 S.W.3d 334, 337-38 (Tenn. 2009) (quoting *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995)) (stating that "[r]epeals by implication . . . are disfavored in Tennessee," and therefore "will be recognized only when no fair and reasonable construction will permit the statutes to stand together.") *See also Hughes v. Metro Gov't of Nashville and Davidson Cnty.*, 340 S.W.3d 352, 361 (Tenn. 2011) (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)) (noting that "statutes which waive immunity of the [governmental entity] from suit are to be construed strictly in favor of the sovereign").

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

ADAM FUTRELL
Assistant Attorney General

[1] The GTLA does not appear to waive a county's immunity for any violation of Tenn. Code Ann. § 49-6-1306 by a county employee. *Compare* Tenn. Code Ann. § 29-20-201 (stating general rule that, except as otherwise provided in the GTLA, governmental entities "shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary") *with* Tenn. Code Ann. § 29-20-205(i) (removing a county's immunity for an injury proximately caused by a negligent act or omission of an employee within the scope of the employee's employment unless the injury arises from the "exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused"). In any event, even if the county was not immune, the GTLA "immunizes [county] employees against state law claims for which the county is liable." Tenn. Att'y Gen. Op. 09-47 at 1 (citing Tenn. Code Ann. § 29-20-310(b)).

Requested by:

The Honorable John J. Dreyzehner
Commissioner, Department of Health
3rd Floor Cordell Hull Building
Nashville, Tennessee 37243