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Alaska State Sen. Mike Dunleavy
c/o Christa McDonald

Re: SB 191

Dear Senator and Christa,

EXECUTIVE SUMMARY

Thank you for your calls and emails of the past few days. After further review of the proposed language in SB 191, I recommend the following:

1. **Keeping SB 191 intact, and not submitting a significantly trimmed-down committee substitute**;

2. **Allaying freedom of assembly fears by amending SB 191 to include"acting on behalf" and "health topic" language modeled from Louisiana's statute, viz.**:

SB0191A, page 3, lines 26-27:

(a) An employee or representative acting on behalf of an abortion services provider or of an affiliate of an abortion services provider may not

(1) present or deliver any instruction or program on any health topic, including but not limited to human sexuality or family planning, to students at a public school.

DISCUSSION

I. PRECEDENT AND RECOMMENDED AMENDMENTS.

In 2007, the State of Missouri passed legislation that banned abortion providers from marketing and teaching in public schools. (**Attachment A**). In 2014, the State of Louisiana passed similar legislation. (**Attachment B**). Both Missouri's and Louisiana's legislation specifically stated that abortion providers could not teach on health topics or human sexuality. Louisiana's legislation also included the phrase "acting on behalf of," as in "No employee of or representative **acting on behalf of** an organization, individual, or any other entity that performs elective abortions . . . shall engage in any of the following activities . . . ."

In 2014, the director of Sitka Planned Parenthood began teaching sex-ed in Sitka's public schools. (**Attachment C**). This resulted in Sitka parents proposing a school district policy to keep abortion providers out of Sitka public schools. Sitka School District hired a Juneau attorney, Ann Gifford, who opined that the policy was unconstitutional. In response to Ms. Gifford, the Sitka parents hired Anchorage attorney Kevin Clarkson to research issues in a memo dated August 23, 2014 ("the Clarkson memo"). (**Attachment D**). The Clarkson memo is both comprehensive and bases its reasoning, in part, on policy language lifted from the Louisiana statute, which includes the phrase "acting on behalf of."

The current version of SB191 is attached. (**Attachment E**). As written, it lacks two key phrases included in the Louisiana legislation: "acting on behalf of" and "health topic, including but not limited to human sexuality or family planning." These omissions may have been

unintentional. However, in this author's opinion, the sponsors should consider amending SB 191 to include these two phrases for two reasons: 1) it is supported by the Louisiana legislation (and by the Missouri legislation in part); and 2) it is further supported by the Clarkson memo, which is the best First Amendment legal analysis provided to date.

II. RECOMMENDATION AGAINST STREAMLINING SB 191.

Previously, we discussed the virtues of a "streamlined" version of SB 191, particularly one that was interpolated into AS 14.03.090. While I think the virtues of a simpler, more elegant bill are self-evident, upon reflection I think that following the precedents set by Missouri and Louisiana outweigh those virtues. As I wrote previously, I am unsure about the implications of grafting a prohibition on abortion advocacy onto a prohibition on denominational and sectarian instruction, particularly because the term "abortion advocacy" is not defined. Instead, I think that AS 14.03.090 is best left alone, and used to bolster the case that the removal of funds from teachers or school districts is a legal and constitutional option.

III. KATE GLOVER'S MEMO TO BERTA GARDNER.

Finally, I have reviewed Kate Glover's memo to Senator Berta Gardner on the constitutionality of SB 191. (**Attachment F**). Her memo raises three potential constitutional problems: 1) free speech and association rights, 2) bill of attainder, and 3) equal protection.

With regard to free speech and association rights for teachers, the recommended amendments – which narrow the scope of persons who are banned ("acting on behalf of" abortion providers), as well as the type of activity which is banned (instruction on "health,

human sexuality, family planning" topics)--address any lingering concerns.

With regard to free speech and association rights for abortion providers, Ms. Glover notes that "the broad prohibition in the bill would implicate the first amendment rights of abortion services providers and their employees and representatives because it bans them from presenting instruction or distributing materials on any topic in a public school." Two points here: first, the suggested amendments forestall this concern by narrowing the prohibition for "any" topic to "health and human sexuality" topics. Second, I share Mr. Clarkson's observation that "there is absolutely no legal authority to be found–not from any court of any jurisdiction in this Nation–that will support Ms. [Glover's] novel idea that person or entities outside of a school district can claim that a public school classroom is a First Amendment 'forum' to which they are entitled to have access."

With regard to bill of attainder concerns, there is no specific person or organization identified in SB 191. That was the problem in the case cited by Ms. Glover, *Planned Parenthood of Central N. Carol. v. Cansler*, 804 F.Supp. 2d 482, 495 (M.D.N.C. 2011). An injunction was granted in that case because the North Carolina legislature singled-out Planned Parenthood explicitly. As a result, the Republican-led North Carolina legislature revised their 2012 budget without explicitly singling out "Planned Parenthood," and thus ended the legal challenge. (**Attachment G**).

With regard to equal protection concerns, these seem to be the flimsiest arguments of the lot. As previously noted, a public school classroom is not a forum to which abortion providers

are entitled to have equal access as a teacher, administrator, or school board member. As Mr. Clarkson noted in 2014, the proposed language "simply direct[s] that abortion providers and their employees and representative have no access to . . . students within the classroom." This is something already required of religious and denominational instructors under AS 14.03.090.

CONCLUSION

In sum, this author recommends amending SB191 to include the language used by the Louisiana legislature in 2014, to wit,

> (a) An employee or representative acting on behalf of an abortion services provider or of an affiliate of an abortion services provider may not
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> (1) present or deliver any instruction or program on any health topic, including but not limited to human sexuality or family planning, to students at a public school.

These amendments have the virtues of precedent and the support of the Clarkson memo. Second, this author does not recommend streamlining SB191 and hardwiring it to AS 14.03.090, as prohibiting abortion advocacy alongside denominational instruction has unknown implications. Third, and final, the memo written for Berta Gardner proffers a parade of horribles that are either forestalled by the suggested amendments, or else the products of a mind singularly devoted to allowing abortion providers free rein in public schools.

Sincerely,
Ross, Miner & Bird, PC
/s/
Mario L. Bird

cc: client/file