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MEMORANDUM April 6, 2016

SUBJECT: Constitutional issues (HCS CSSB 89(EDC); Work Order No. 29-LS0735\L)

TO: Senator Mike Dunleavy
Attn: Christa McDonald

FROM: Kate S. Glover
Legislative Counsel

Ms. McDonald asked me to provide a more detailed memorandum analyzing the effect of the amendment made to HCS CSSB 89(EDC) with respect to the constitutional issues identified in previous memoranda to your office and in a memorandum to Representative Seaton dated March 14, 2016 (posted on BASIS). The amendment narrows the scope of sec. 5 by changing the language to read "A school district may not permit an abortion services provider or an employee or volunteer of an abortion services provider *who is acting on behalf of the abortion services provider* to offer, sponsor, furnish course materials, or provide instruction relating to human sexuality or sexually transmitted diseases."[1] No changes were made to sec. 3, which prohibits school districts and educational services organizations that have contracts with school districts from contracting with abortion services providers. The amended language in sec. 5 reduces the risk that the bill, if enacted and challenged, would be found to violate the First Amendment, but does not entirely eliminate the risk. It does not affect the analysis of the bills of attainder and equal protection issues raised by the bill. Whether secs. 3 and 5 of the bill would be found unconstitutional depends, in part, on the state interest the legislature describes to support the provisions.

First Amendment

As explained in previous memoranda to your office, restricting abortion services providers and their employees from presenting instruction and materials in schools implicates the amendment in at least two ways.[2] First, it directly restricts certain

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[1] The language from the amendment appears in italics.

[2] For reference, the issues described in this memorandum are discussed in more detail in the following memoranda provided to your office: Work Order No. 29-LS0735\S (Feb. 4, 2016); Work Order No. 29-LS0488\A.1 (April 1, 2015); Work Order No. 29-LS0735\F (Mar. 21, 2016); Work Order No. 29-LS0735\F.A (Mar. 1, 2016). Closely related issues

individuals from speaking on a particular topic in schools. Second, it restricts abortion services providers from contracting with school districts, which implicates the unconstitutional conditions doctrine under the First Amendment.

Restrictions on speech in schools. With respect to the direct restrictions on speech, the amended language provides that an employee or volunteer of an abortion services provider is prohibited from providing instruction relating to human sexuality only if the person is acting on behalf of the abortion services provider. This means the restriction applies primarily to classroom instruction. This is an area where the state has greater authority to regulate content, and as long as the legislature provides a legitimate pedagogical interest -- in other words, an interest related to the purpose of education -- to support the legislation, it is likely constitutional. That interest must be supported with factual information in the legislative record demonstrating the interest the bill serves.[3]

Unconstitutional conditions. With respect to the unconstitutional conditions doctrine, the bill restricts abortion services providers from contracting with school districts. The unconstitutional conditions doctrine applies when public benefits (i.e. government contracts) are conditioned on the relinquishment of a constitutional right.[4] In this case, it could be argued that the bill unconstitutionally conditions contracts on relinquishing the

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are also discussed in the following memoranda: Work Order No. 29-LS1269\A (Jan. 6, 2016), 29-LS1553\A (Mar. 9, 2016); Work Order No. 29-LS1269\A.1 (Mar. 14, 2016).

[3] Although it does not establish binding precedent in Alaska, the following decision by a federal district court in Arizona provides a helpful summary of the standards that federal courts apply in reviewing challenges to restrictions on speech in schools: *Seidman v. Paradise Valley Unified Schl. Dist. No. 69*, 327 F. Supp. 2d 1098, 1104 – 07 (D. Ariz. 2004). For more information regarding the First Amendment and curriculum regulations, you may want to review Ronna Greff Schneider, *Freedom of Expression Issues and Public Education*, Education Law: First Amendment, Due Process and Discrimination Litigation § 2:8 (March 2016 update). For a discussion of constitutional issues related to health and sex education, you may want to review Ronna Greff Schneider, *Religion Issues and Public Education*, Education Law: First Amendment, Due Process and Discrimination Litigation § 1:12 (March 2016 update).

[4] *See, e.g.*, *Planned Parenthood of Kansas & Mid-Missouri v. Moser*, 747 F.3d 814, 838 – 39 (10th Cir. 2014) ("First, the doctrine has been applied when the condition acts prospectively in statutes or regulations that limit a government-provided benefit—typically a subsidy or tax break— to those who refrain from or engage in certain expression or association. . . . . Second, the unconstitutional-conditions doctrine has been applied when the condition acts retrospectively in a discretionary executive action that terminates a government-provided benefit—typically public employment, a government contract, or eligibility for either—in retaliation for prior protected speech or association.").

right to associate with entities that provide abortions, or to advocate for the right to a lawful abortion. For purposes of the unconstitutional conditions analysis, it does not matter that the regulation is related to education in public schools. The protected activity is not free speech in public schools, but free association with abortion services providers. The amendments to sec. 5 does not cure this issue, because abortion services providers are prohibited from contracting with a public school under sec. 3.

As discussed in previous memoranda to your office, I am not sure how a court would decide this issue. It is not clear whether a court would consider affiliation with providers of abortions services to be protected activity under the First Amendment. It is also unclear whether an abortion services provider is required to relinquish that right under the bill in order to receive contracts, or whether a contract would be considered a benefit if the contract contains no fee for the provider. Under HCS CSSB 89(EDC), it may be possible for an abortion services provider to set up an affiliate that does not provide abortion services. The affiliate may then qualify for contracts and be able to provide instruction related to human sexuality. In similar situations, courts have found it persuasive that it is possible for an entity to qualify for funding or contracts through an affiliate.[5] By contrast, where a condition restricts activities beyond the scope of the government program and it is not possible for an entity to qualify for the program without restricting its protected activities, courts will find the condition unconstitutional.[6]

Bills of attainder

The amendment to sec. 5 of the bill does not change the bill of attainder analysis described in previous memoranda to your office. For purposes of the constitutional prohibition against bills of attainder, there are likely two questions: 1) whether the class of persons specified is sufficiently narrow, and 2) whether the bill imposes punishment. HCS CSSB 89(EDC) appears to specify a narrow class (abortion services providers). Whether the bill imposes punishment depends, in part, on whether the legislature asserts a nonpunitive purpose for the bill.

Equal protection

The amendment to sec. 5 of the bill does not affect the analysis under the equal protection clause, because the bill still singles out abortion services providers for differential treatment. If the bill is enacted and challenged under the equal protection clause, the legislature must, at a minimum, provide a legitimate reason for the differential treatment and demonstrate that the classification "bears a fair and substantial relationship to that reason."[7] However, a court could conclude that sec. 5 of HCS CSSB 89(EDC) burdens a

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[5] *See Rust v. Sullivan*, 500 U.S. 173, 196 – 200 (1991). However, if a provider is an individual, affiliating with another person for the sake of being awarded a contract may not work.

[6] *Id.*

[7] *Griswold v. City of Homer*, 252 P.2d 1020 (Alaska 2011).

fundamental right (freedom of speech and association). In that case, the legislature would need to provide a compelling interest and show that no narrower means could be used to meet that interest.[8]

If I may be of further assistance, please advise.

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[8] *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 265 – 66 (Alaska 2004).