WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE July 24, 2023

TO Joint Education Interim Committee

FROM Tania Hytrek, Operations Administrator, Legislative Service Office

SUBJECT Privileged and Confidential: 24LSO-0076 (WD 0.2), Parental rights in education-1.

Summary:

The purpose of this memo is to outline constitutional concerns with 24LSO-0076, Parental rights in education-1. Specifically, LSO has identified potential constitutional concerns related to: 1) impermissibly prohibiting protected speech under the First Amendment of the United States Constitution and Article 1, Section 20 of the Wyoming Constitution; 2) overbroad under the First Amendment of the United States Constitution; 3) void for vagueness on due process grounds; and, 4) discriminatory under the Fourteenth Amendment of the United States Constitution.

LSO cannot predict the outcome if 24LSO-0076 were enacted and challenged in court and offers no opinion on the constitutionality or legality of this bill draft should it be enacted into law.

Legal Analysis and Explanation:

A. First Amendment/Protected Speech

As currently drafted, the bill would restrict certain speech (classroom instruction on sexual orientation and gender identity in grades K-3) that may impermissibly prohibit protected speech. The First Amendment prohibits any law that, among other things, abridges the freedom of speech. The Fourteenth Amendment to the United States Constitution makes the First Amendment applicable to the states. *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). Similarly, Article 1, Section 20 of the Wyoming Constitution provides that every person may freely speak and write on all subjects and goes further to provide a broader protection by protecting the right to publish (that is, the right to make your speech and writing known). *Tate v. Akers*,409 F. Supp. 978, 981-82 (D. Wyo. 1976).

Generally, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Animal Legal Def. Fund v. Kelly*, 9F 4th 1219, 1227 (10th Cir. 2021). While the First Amendment's freedom-of-speech guarantee provides important protections that allow citizens to speak freely, the right of free speech is not absolute at all times and under all circumstances. *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979); *Chaplinsky v. N.H.* 315 U.S. 568, 571-72 (1942). A governmental entity may impose reasonable restrictions on the time, place, or manner of protected speech, provided that the restrictions are "justified without reference to the

content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A law that targets protected speech in a content-based manner is "presumptively unconstitutional" unless the law is narrowly tailored to serve that significant—or "compelling"—state interest. *Animal Legal Def. Fund,* 9 F. 4th at 1227; *Nat'l Inst. of Family & Life Advocs. v. Becerra,* 138 S. Ct. 2361, 2371 (2018).

Here, it is possible that the bill draft may be challenged as violating the First Amendment by impermissibly restricting protected speech and expression based on content and viewpoint by: (1) chilling students, school personnel, and others from disclosing their sexual orientation or gender identity; and (2) chilling students, school personnel, and others from using speech that reveals or conforms with a person's sexual orientation or gender identity. For example, a student (or the student's family) may challenge the law as prohibiting the completion of assignments (i.e., a family tree) or as prohibiting the student from saying anything about the student's family structure. While students do not "shed their constitutional rights" to free speech at the school door, the rights of students must be applied in light of the special characteristics of the school environment. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *Morse v. Frederick*, 551 U.S. 393, 396-397 (2007). Ultimately, schools may restrict school speech only if the speech would substantially and materially disrupt the school's activities or impinge on the rights of other students. *CI. G. v. Siegfried*, 38 F. 4th 1270, 1276 (10th Cir. 2022); *Tinker,* 393 U.S. at 509.

Various courts have held that speech relating to sexual orientation or gender identity, whether spoken or unspoken, is speech falling within the protection of the First Amendment. *Young v. Giles Cty. Bd. of Educ.*, 181 F. Supp. 3d 459, 464 (M.D. Tenn. 2015); *Gillman v. Sch. Bd for Holmes Cty.,* 567 F. Supp. 2d. 1359, 1369-75 (N.D. Fla. 2008); *Chambers v. Babbitt,* 145 F. Supp. 2d. 1068, 1072 (D. Minn. 2001). But other courts have held that a school can regulate speech that is inconsistent with its basic educational mission (even if that speech could not be regulated outside of the school). *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 264-267 (1988). For example, a court held that a school district's abstinence-only policy—one that applied to all matters concerning sexual activity—did not violate the constitution and permitted the school district to refuse permission to a student group, the Gay-Straight Alliance, to post fliers or make announcements about their off-campus group meetings. *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d. 550, 556, 562-64 (N.D. Tex. 2004).

It is important to note that the courts that have opined on the specific issues mentioned or cited here are not in the Tenth Circuit. The decisions discussed here would not be binding on that court or a district court in Wyoming should the bill draft be challenged.

B. First Amendment/Unconstitutionally Overbroad

As drafted, the bill would prohibit "classroom instruction" on sexual orientation and gender identity. It is unclear what "classroom instruction" refers to for purposes of the prohibition, and as a result, it is possible that the bill draft may be challenged as unconstitutionally overbroad under the First Amendment.

Under the overbreadth doctrine, a statute is invalid if the statute prohibits a "substantial" amount of protected speech "judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks,* 539 U.S. 113, 118-19 (2003). A state cannot justify restrictions on constitutionally protected speech on the basis that the restrictions are necessary to effectively suppress constitutionally unprotected speech. *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 255 (2002).

Depending on what a school district includes or considers as classroom instruction, the bill draft may prohibit a substantial amount of protected speech in addition to any "plainly legitimate sweep" of speech that would be permissible to exclude. *Hicks,* 539 at 118-19.

C. Due Process/Void for Vagueness

For the same reasons as described in the section above, is possible that the bill draft may be challenged on due-process grounds as being void for vagueness because the draft may not provide sufficient notice of what instruction is prohibited. In Wyoming, a statute is void for vagueness "if it fails to give a person of ordinary sensibility fair notice that the contemplated conduct is forbidden."*Keser v. State,* 706 P.2d 263, 265-266 (Wyo. 1985). A statute violates due process if people "must necessarily guess at its meaning and differ as to its application." *Id.* at 266. A statute may be challenged as void for vagueness as a facial challenge (which is available only when the statute reaches a substantial amount of constitutionally protected conduct or when the statute specifies no standard of conduct at all) or an as-applied challenge. *Giles v. State,* 2004 WY 101, ¶ 15, 96 P.3d 1027, 1031-32 (Wyo. 2004).

While this bill draft does not criminalize a violation of the classroom-instruction prohibition, the bill draft does contemplate that a school district may have discretion to determine what conduct is prohibited. In light of the uncertainty in terms of what conduct may or may not be considered "classroom instruction," it is possible that the bill draft may be challenged as being void for vagueness.

D. Equal Protection

The Fourteenth Amendment of the United States Constitution, commonly referred to as the Equal Protection Clause, provides that no state shall "deny to any person within its jurisdiction the equal protection of laws." The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike" and is a protection against not only state-imposed classifications, but also from intentional and arbitrary discrimination. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Willowbrook v. Olech,* 528 U.S. 562, 564 (2000). A law that limits classroom instruction on sexual orientation and gender identity and is challenged on equal-protection grounds may be upheld if the governmental interest associated with the law is sufficient; how sufficient a law and the stated interest must be depend on the level of scrutiny a court applies to the law. The level of scrutiny applied depends on whether the law's classification involves a suspect class or implicates a fundamental right; if a suspect classification or fundamental right is implicated, a court will apply a higher level (intermediate or strict) of scrutiny. *Riddle v. Hickenlooper,* 742 F.3d 922, 927 (10th Cir. 2014). A distinction that involves a classification based on sex is subject to an intermediate level of scrutiny, and the distinction can be sustained only if it is "substantially related to an important governmental objective." *Clark v. Jeter,* 486 U.S. 456, 461 (1988).

While sex-based discrimination challenges are subject to intermediate scrutiny, it is not clear whether sexual orientation or gender identity are subject to that level of scrutiny or a lower level of scrutiny. Some courts of appeals have applied intermediate scrutiny to classifications based on sexual orientation and transgender status. *Baskin v. Bogan,* 766 F.3d 648, 656 (7th Cir. 2014); *Karnoski v. Trump,* 926 F.3d 1180, 1199-1201 (9th Cir. 2019). If intermediate scrutiny applies, the burden of justifying that the policy is substantially related to an important governmental objective "rests entirely on the State" and is a "demanding" burden. *United States v. Virginia,* 518 U.S. 515, 533 (1996). This justification must be "genuine," not hypothesized or invented in response to litigation, and cannot rely on overbroad generalizations about the different capacities or preferences of males and females. *Id.*

One federal court of appeals recently reviewed a school's dress-code requirement that, among other things, required female students to wear skirts. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 124-25 (4th Cir. 2022). In that case, the school argued that the dress code was justified by the need to "help to instill discipline and keep order" and by the need to embody "traditional values." *Id.* at 125-126. The court rejected both justifications, concluding that neither was an important governmental objective. *Id*. Instead, the court concluded that the rationales were "based on impermissible gender stereotypes" and rested on "nothing more than conventional notions about the proper station in society for males and females." *Id*. While this case considered the legitimacy of traditional values as an important governmental objective, it is important to note that the Equal Protection analysis addressed a sex-based classification, not one concerning sexual orientation or gender identity.

Conclusion:

The issues raised in this memorandum are issues that plaintiffs have raised in their lawsuit challenging the constitutionality of Florida's law (from which this bill draft is based). As of the date of this memorandum, the district court has not ruled on the merits of the case and the parties are engaged in discovery. *Cousins v. Sch. Bd. of Orange Cty.*, No. 6-22-cv-1312-WWB-LHP (M.D. Fla. 2022).

This memo provides information on possible challenges that may arise should the proposed constitutional language (declaring two binary genders) be enacted and then applied. LSO takes no position on the legality or constitutionality of the bill draft or its subsequent application should the bill be adopted.

If you have questions or would like additional research, please let me know.

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