

MEMORANDUM

TO: School Districts of Mauston, Necedah, New Lisbon, Royall & Wonewoc-Center
FROM: Larry Dupuis, ACLU-WIF Legal Director
DATE: May 27, 2010
SUBJECT: Purported Criminal Liability for Teaching Comprehensive Human Growth and Development Under the Health Youth Act

This memorandum responds to a March 24, 2010 memorandum from Juneau County District Attorney Scott Southworth to several school districts, asserting, among other things,¹ that teaching about contraception “promotes sexual assault of children” and exposes teachers to criminal prosecution for “contributing to the delinquency of a child.” Although Mr. Southworth has every right to express his political views about the appropriateness of human growth and development education, his legal analysis does not withstand scrutiny. Any attempt to prosecute teachers for providing the education specified in the Act almost certainly would be dismissed by a judge before trial.²

BACKGROUND

On March 11, 2009, the Governor signed the Healthy Youth Act, 2009 Wis. Act 134. The Act encourages schools to move away from “abstinence-only” sex education in their human growth and development curricula toward “comprehensive” and “medically accurate” sex education, which includes, when age-appropriate, information on contraception and prevention of sexually transmitted disease. Research has generally found more comprehensive sex education to be more effective at delaying sexual activity and, among those who are sexually active, increasing use of contraception and safe-sex practices, which help prevent sexually transmitted disease and teen pregnancy. See Douglas Kirby, *Emerging Answers 2007: Research Findings on Programs to Reduce Teen Pregnancy & Sexually Transmitted Diseases* 15-16, 109.³ The legislation was opposed by supporters of abstinence-only sex education and a number of socially conservative groups.

The Act provides, in relevant part, that a “school board may provide an instructional program in human growth and development in grades kindergarten to 12. If provided, the instructional program shall do all of the following:

¹ For example, Mr. Southworth also asserts that the Healthy Youth Act will “undermine parental authority,” “require school districts to condone controversial sexual behavior,” and “provide access to our children by the contraceptive industry.” These are not legal conclusions, but political positions. This memorandum focuses only on Mr. Southworth’s *legal* assertion that teaching comprehensive sex education will subject educators to possible criminal liability.

² This memorandum is not intended as legal advice and does not create an attorney-client relationship. A person facing actual or directly threatened criminal prosecution should consult an attorney about the specifics of his or her case.

³ This study can be found at: http://www.thenationalcampaign.org/EA2007/EA2007_full.pdf.

(a) Present medically accurate information to pupils and, when *age-appropriate*,⁴ ... address the following topics:

1. The importance of communication about sexuality and decision making about sexual behavior *between the pupil and the pupil's parents, guardians, or other family members.*

2. Reproductive and sexual anatomy and physiology . . .

3. Puberty, pregnancy, parenting, body image, and gender stereotypes.

4. The skills needed to make responsible decisions about sexuality or sexual behavior *throughout the pupil's life ...*

5. The benefits of and reasons for abstaining from sexual activity.

Instruction under this subdivision shall stress the value of abstinence as the most reliable way to prevent pregnancy and sexually transmitted infections.

6. The health benefits, side effects, and proper use of contraceptives and barrier methods approved by the federal food and drug administration ...”

2009 Wis. Act 134, § 4, creating Wis. Stat. § 118.019(2).

The Act also requires that a “school board that provides an instructional program in human growth and development under this section shall, when age-appropriate, instruct pupils about all of the following:

(a) The criminal penalties for engaging in sexual activities involving a child under ch. 948.

(b) The sex offender registration requirements under s. 301.45. . . .”

2009 Wis. Act 134, § 5t, creating Wis. Stat. § 118.019(2r).

Prior to the Healthy Youth Act, a number of school districts throughout the State of Wisconsin already taught comprehensive sex education, including contraceptive topics. To my knowledge, no teacher has ever been prosecuted for teaching about contraceptive use.

ANALYSIS

Any attempted prosecution of a teacher of comprehensive human growth and development topics under the Healthy Youth Act almost certainly would be quickly dismissed for at least three reasons.⁵

First, teaching students how to properly use contraception does not satisfy the basic elements of the crime of contributing to the delinquency of a minor. Wis. Stat. § 948.40 provides that “[n]o person may *intentionally* encourage or contribute to the delinquency of a

⁴ “‘Age-appropriate’ means suitable to a particular age group of pupils based on the developing cognitive and emotional capacity of and behaviors typical for the age group.” Wis. Stat. § 118.019(1m)(a).

⁵ This is not to say that a prosecutor could not file frivolous criminal charges or even that a misguided judge might not allow such frivolous charges to go forward. However, those scenarios are extremely unlikely and it is almost inconceivable that a jury would convict or that an appellate court would allow such charges to stand.

child.” A person may be found to have contributed to the delinquency of a minor, even if the minor does not actually engage in a criminal act, if “the natural and probable consequences of the person’s actions” would be to cause the child to engage in a criminal act. Wis. Stat. § 939.23 defines “intentionally” to mean that “the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.”

An attempted prosecution of a sex-ed teacher under Wis. Stat. § 948.40 would fail on the elements of intent and causation. The “delinquency” to which Mr. Southworth believes the teachers would “contribute” by teaching how to use contraception is sexual activity by the minor student with another minor.⁶ In order to “contribute” to sexual activity by a minor, a teacher would have to “have the purpose” of causing children to engage in sexual activity or know that children who hear a lecture on how to use a condom would be “practically certain” to engage in sexual activity as a result. Even assuming that teaching about using contraception might increase the statistical probability of sexual behavior among teenagers (an assumption belied by the research), it does not follow that the teacher intends that his or her students actually engage in sexual behavior or that it is “practically certain” that any child in the class will engage in sexual activity as a result. Teachers may know that some students are already engaged in sexual activity, but they cannot be “practically certain” that teaching about contraception will cause others who would otherwise not engage in sexual activity to do so. They teach about contraception and prevention of sexually-transmitted disease in hopes of minimizing the harm to those who already engage in sexual activity and to enable each student to “make responsible decisions about sexuality and sexual behavior throughout the pupil’s life,” including adulthood⁷ when he or she can legally engage in sexual activity. They do not teach about contraception to encourage younger teens to start having sex. To the extent that a teacher knows it is “practically certain” that a student is *already* sexually active, the teacher cannot be said to have caused that delinquent behavior by teaching that student about using contraception.

In fact, the information that the Act requires teachers to include in their sex-ed curricula makes it even less likely that a teacher could be prosecuted for contributing to the delinquency of a minor. The teacher must teach about sexually transmitted diseases, “stress the value of abstinence as the most reliable way to prevent pregnancy and sexually transmitted infections” and explain the “criminal penalties” and “sex offender registration requirements” for sexual activity with minors. These components of comprehensive sex education undoubtedly *discourage* sexual activity, not encourage delinquent behavior.

Second, there is a more specific criminal statute that governs permissible and impermissible communication of sexual information to children. In general, when there are two

⁶ Under Wisconsin law, “sexual intercourse” (*i.e.*, physical penetration of or by the genitals) with anyone under the age of 18 is a crime, regardless of the age of the defendant or the consent of the child. Wis. Stat. § 948.09. The broader category of “sexual contact” (including touching, directly or through clothing, of the child’s “intimate parts”) is a crime if the child is younger than 16 years of age, again, regardless of the age of the perpetrator or consent of the victim. Wis. Stat. § 948.02.

⁷ It should at least be noted that some high school students are 18 years of age and therefore may legally engage in sexual activity with other adults. Even if sex education in any way “encourages” such activity among these older students, it is not encouraging delinquent behavior.

statutes that govern similar subject matter, the more specific statute controls. *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 20, 316 Wis. 2d 47, 63; *State v. Anthony*, 2000 WI 94, ¶ 11, 237 Wis. 2d 1; *State v. Machgan*, 2007 WI App 263, ¶ 7, 306 Wis. 2d 752, 758. Wis. Stat. § 948.11 prohibits “exposing a child to harmful . . . descriptions,” including any “explicit and detailed description . . . of . . . sexually explicit conduct . . . that, taken as a whole, is harmful to children.” So descriptions of how to use contraceptives or barrier methods, to the extent they constitute a detailed description of sexual conduct, as Mr. Southworth seems to believe, would be governed by this statute, not Wis. Stat. § 948.40. However, such information is “harmful to children” only if it “[p]redominantly appeals to the prurient, shameful or morbid interest of children; . . . [i]s patently offensive to prevailing standards . . . and [l]acks serious literary, artistic, political, scientific or *educational value* for children, when taken as a whole.” Wis. Stat. § 948.11(1)(b). A description of how to use a condom clearly has educational value, as the legislature’s enactment of Act 134 demonstrates. Moreover, Wis. Stat. § 948.11(4)(b) specifically provides that “no person who is an employee . . . of any of the following is liable to prosecution for violation of this section for acts or omissions while in his or her capacity as an employee: 1. A public or elementary or secondary school . . .” If a teacher cannot be prosecuted for the more specific crime of “exposing a child to . . . harmful descriptions,” he or she certainly cannot be prosecuted for the more ambiguous crime of contributing to the delinquency of a minor.

Third, the Act itself authorizes the teaching of the very topics that Mr. Southworth contends are criminal acts. Behavior that is expressly permitted by the law cannot also be prosecuted as criminal behavior without violating the most fundamental principle of due process: the “principle of legality,” under which one can be convicted of a crime only if the statutes give fair warning that one’s actions are prohibited. *United States v. Lanier*, 520 U.S. 259, 265 & n.5 (1997). Under this principle, “no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *Id.* (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)). This principle is manifested in three rules that apply to the construction of criminal statutes: the “vagueness doctrine,” which bars enforcement of a statute that is so vague that people of common intelligence have to guess at its meaning; the “rule of lenity” or “rule of strict construction,” which requires that ambiguity in criminal statutes be resolved by narrowing the coverage of the law in favor of the defendant; and the rule that changes in the criminal law must be applied only prospectively. *Id.* at 266; *see also State v. Kittilstad*, 231 Wis. 2d 245, 262 (1999). Punishing a person for conduct that is expressly and particularly authorized by one statute – teaching about contraceptive use – by stretching the meaning of a more general statute – the prohibition on “contributing to the delinquency of a minor” – would violate these most basic principles of fairness.⁸

CONCLUSION

Any attempt to prosecute teachers for implementing comprehensive sex education under

⁸ A similar principle animates the defense to prosecution that is available when a defendant relies upon the legal advice of a government official authorized to give such advice that his or her conduct is lawful. *See State v. Davis*, 63 Wis. 2d 75, 216 N.W.2d 31, 34 (1974).

the Healthy Youth Act would almost certainly fail.⁹ Teaching sex education under the Act does not satisfy the elements of the crime of contributing to the delinquency of a child. Moreover, descriptions of how to use contraceptives would be governed by a more specific statute, which prohibits “exposing a child to . . . harmful descriptions,” and descriptions by teachers in a classroom setting of how to use contraceptives are clearly exempt from prosecution under the terms of that statute. If a teacher cannot be punished under the more specific statute, he or she cannot be prosecuted for the more ambiguous crime of contributing to the delinquency of a minor. It would also offend basic notions of due process to prosecute a person for doing something that is expressly permitted by a legislative enactment.

⁹ Of course, a teacher who actually *does* intentionally urge children to engage in illegal sexual activity or facilitate such activity, as opposed to teaching children the facts about sexuality and contraception, *could* be prosecuted and convicted for contributing to the delinquency of a child. The Healthy Youth Act does not authorize or condone pushing teenagers (or anyone else, for that matter) to engage in sexual activity.