



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

February 9, 2016

The Honorable Sheryl L. Nuxoll  
Idaho State Senator  
Statehouse  
VIA HAND DELIVERY

Re: DRMPN297—Use of the Bible in Public Schools – Our File No. 16-53818

Dear Senator Nuxoll:

You have requested this office's review of the referenced draft bill. If introduced and enacted, the bill would repeal the current Idaho Code § 33-1604 and replace it with the following:

**USE OF THE BIBLE IN PUBLIC SCHOOLS.** The Bible is expressly permitted to be used in Idaho public schools for reference purposes to further the study of literature, comparative religion, English and foreign languages, United States and world history, comparative government, law, philosophy, ethics, astronomy, biology, geology, world geography, archaeology, music, sociology, and other topics where an understanding of the Bible may be useful or relevant. No student will be required to use any religious texts for reference purposes is the student or parents of the student object.

The draft bill, as a facial matter, likely presents no significant constitutional issue under the Establishment Clause of the First Amendment to the United States Constitution. However, it may raise a religious preference issue under art. I, sec. 4, but, in any event, is specifically prohibited by art. IX, sec. 6 of the Idaho Constitution.

**I. UNITED STATES CONSTITUTION: ESTABLISHMENT CLAUSE ANALYSIS**

The United States Supreme Court held in *Stone v. Graham*, 449 U.S. 39 (1981) (per curiam), that "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative relief, or the like." *Id.* at 194 (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)); accord *Grove v. Mead Sch. Dist. No. 354*, 753 F.3d 1528, 1534 (9th Cir. 1985). This result flows from application of *Lemon v. Kurzman*, 403 U.S. 602 (1971), that prescribed a three-factor test for determining Establishment Clause consistency: "[A]

statute or practice which touches upon religion must (1) have a secular purpose; (2) must neither advance nor inhibit religion in its principal or primary effect; and (3) must not foster an excessive entanglement with religion.” *Cal. Parents for Equalization of Educ. Materials v. Noonan*, 600 F. Supp. 2d 1088, 1155 (E.D. Cal. 2009). On its face, the draft bill satisfies these criteria.

## II. IDAHO CONSTITUTION: ART. I, SEC. 4 AND ART. IX, SEC. 6 ANALYSIS

Art. I, sec. 4 provides in part that no “preference be given by law to any religious denomination or mode of worship.” The Idaho Supreme Court has held that the Idaho constitutional provision “is an even greater guardian of religious liberty” than the First Amendment (*Osteraas v. Osterass*, 124 Idaho 350, 355, 859 P.2d 948, 953 (1993)), but it has not held that art. I, sec. 4 creates an Establishment Clause-like barrier more stringent than that imposed under the *Lemon* test. Nevertheless, insofar as the draft bill carves out the Bible from other religious texts for special statutory treatment, it may raise the question whether Judeo-Christian values are being given preference. This potential issue need not be resolved in view of the specific prohibition in art. IX, sec. 6 discussed immediately below.

Art. IX, sec. 6 provides:

No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. *No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article*, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article.

[Emphasis added.] The italicized prohibition is unambiguous. See *Nampa Classical Academy v. Goesling*, 714 F. Supp. 2d 1079, 1084 (D. Idaho 2010) (upholding Idaho Public Charter School Commission’s adoption of the “Attorney General’s position that the use of religious documents or texts in public school curriculum would violate art. IX, sec. 6”), *aff’d per mem.*, 47 Fed. Appx. 776 (9th Cir. 2011). As the analysis by this Office referred to in *Nampa Classical Academy* reasoned, the Idaho Supreme Court “would conclude that the Bible cannot be used in a public school classroom” if it “relie[d] on the literal meaning of the language of the Idaho Constitution.” See Aug. 13, 2009 J. Swartz Mem. at 5 (attached hereto). Under settled principles of constitutional and statutory construction, the Supreme Court will give art. IX, sec. 6 its plain meaning. *Verska v. St. Alphonsus Reg’l Med. Ctr.*, 151 Idaho 889, 983, 265 P.3d 502, 506 (2011) (“[i]f the statute is not ambiguous, this Court does not construe it, but simply follows the law as written”); see *Higer v. Hansen*, 67 Idaho 45, 52, 170 P.2d 411, 415 (1946) (“[t]he same rules apply to the construction of provisions of the Constitution as apply to construction of

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statutes”) (internal quotation marks omitted). Art. IX, sec. 6 therefore would invalidate the draft bill if enacted.

Please contact me with any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read 'BK', with a long horizontal line extending to the right.

BRIAN KANE  
Assistant Chief Deputy

BK/tjn

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MEMORANDUM

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TO: BILL GOESLING, CHAIRMAN, PUBLIC CHARTER SCHOOL COMMISSION;  
COMMISSIONERS, PUBLIC CHARTER SCHOOL COMMISSION

FROM: JENNIFER SWARTZ, DEPUTY ATTORNEY GENERAL

SUBJECT: USE OF RELIGIOUS TEXTS IN PUBLIC CHARTER SCHOOLS

DATE: AUGUST 13, 2009

CC: TAMARA BAYSINGER, PUBLIC CHARTER SCHOOL PROGRAM MANAGER

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A question regarding the use of the Bible as a text in public school classrooms was raised during the Public Charter School Commission (Commission) meeting on July 22, 2009. In its pre-opening update presentation, Nampa Classical Academy (NCA), a Commission authorized school, discussed its intention to use the Bible and other religious texts in its curriculum. As discussed in the July 22 meeting, use of any religious texts within Idaho's classrooms, would likely violate of the Idaho State Constitution. For your reference, this issue is analyzed more fully below.

**IDAHO'S CONSTITUTION LIMITS USE OF RELIGIOUS TEXTS EXPRESSLY**

Article IX, § 6 of the Idaho Constitution provides as follows:

Religious test and teaching in schools prohibited. No religious test or qualification shall ever be required of any person as a condition of admission into any public education institution of the State, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious services whatever. No sectarian or religious tenants or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provision of the article.

(Emphasis added.)

NCA has explained that it does not intend to use any religious text for the purpose of teaching or promoting religion, but rather in the context of its cultural, historical, and literary significance. However, the express language of the above referenced provision of our state constitution does not provide an exception based upon *how* the text is intended to be used. Instead, § 6 prohibits *any* use of sectarian or denominational texts in a public school classroom. That this interpretation was indeed the intent of the drafters of the Idaho Constitution is expressly demonstrated in documentation of the State's Constitutional Convention. During the Idaho Constitutional Convention of 1889, an amendment to § 6 (then § 8) was proposed as follows: "Provided, that nothing herein contained shall be construed to forbid the reading of the Bible in public schools in any commonly received version, nor to enjoin its use." Hart, I.N. *Proceedings and Debates of the Constitutional Convention of Idaho 1889, Vol. 1 at pp. 684-702*. That amendment was defeated, and therefore not incorporated in the Idaho Constitution. *Id.*, at 702.

#### THE FEDERAL CONSTITUTION MAY PERMIT CERTAIN LIMITED USES BASED ON A VARIETY OF FACTORS

With respect to the United States Constitution, no doubt exists that under current U.S. Supreme court cases interpreting the First Amendment, the Bible cannot be used in public schools for any sectarian or religious purpose. *Abington School District v. Schempp*, 374 US 203, 224, 83 S. Ct. 1560, 1572 (1963). The First Amendment to the US Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. The prohibition against using the Bible for religious purposes in public schools holds true whether the use is by student choice, is student led, or whether student attendance is voluntary. *Id.* However, the *Schempp* case gave rise to oft-quoted language regarding the secular use of the Bible in an educational setting:

[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with First Amendment. But the exercises here did not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the government maintain strict neutrality, neither aiding nor opposing religion.

*Schempp* 374 US at 225, 83 S. Ct. at 1573 (emphasis added). The difficulty under the First Amendment lies in the details – developing a course that is truly non-sectarian in nature, rather than one that is only an excuse to use the Bible to promote a religious purpose. Perhaps for that reason, case law upholding the use of the Bible as a text in a public school is rare if not nonexistent. A number of courts have made note of the *Schempp* comment regarding the literary and historic significant of the Bible. However, even while doing so, those same courts were finding that Bible-related or religious programs in public schools violated the first Amendment.<sup>1</sup>

### IDAHO'S MORE LIMITED CONSTITUTIONAL PROVISION IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

The Idaho Constitution and Idaho courts are consistently more restrictive with respect to the separation of church and state in connection with public schools. For example, in *Epeldi v. Engelking*, 94 Idaho 390, 395, 488 p. 2d 860, 865 (1971), the Idaho Supreme Court specifically held that providing public funds to parents of students attending parochial schools to aid the students' attendance at those schools violated Article IX, § 5<sup>2</sup> of the Idaho Constitution, despite the fact that the provision of such funds did not violate the first Amendment of the U.S. Constitution.

This section in explicit terms prohibits any appropriation by the legislature or others (city, county, etc.) or payment from any public fund, anything in aid of any

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<sup>1</sup> See, *Stone v. Graham*, 449 US 39, 101 S. Ct. 192 (1981)(posting of ten commandment in classroom found unconstitutional); *Illinois ex rel. McCollum v. Board of Education*, 333 US 203, 68 S. Ct. 461 (1940) (public school buildings cannot be used for religious purposes); *Berger v. Rensselaer Central School Corporation*, 982 F. 2d 1160 (7<sup>th</sup> Cir 1993) (distribution of Bibles in public schools unconstitutional); *Herdahl v. Pontotoc County School District*, 933 F. Supp 582 (ND Miss. 1996) (bible class violates First Amendment); *Hall v. Board of School Commissioners of Conecuh County*, 656 F. 2d 999 (DC Ala. 1981) (elective Bible class unconstitutional); *Mangold v. Albert Gallatin Area School District*, Payette County, Pa., 438 F. 2d 1194 (3<sup>rd</sup> Cir. 1971) (Bible reading and prayer in school unconstitutional); *Doe v. Potter*, 188 F. Supp. 2d 904 (ED Tenn. 2002) (teaching from the bible as religious truth unconstitutional); *Chandler v. James*, 985 F. Supp 1068 (MD Ala. 1997) (prayer and distribution of bibles in public schools unconstitutional); *Crockett v. Sorenson*, 568 F. Supp 1422 (WD Va. 1983) (bible class in public school unconstitutional); *Vaughn v. Reed*, 313 F. Supp. 431 (WD. Va. 1983) (religious education program in elementary public schools unconstitutional); *Johns v. Allen*, 231 F. Supp. 852 (DC Del. 1964) (reading of Bible verses in public school unconstitutional).

<sup>2</sup> Sectarian appropriations prohibited – neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church or for any sectarian or religious purpose.

church or to help support or sustain any sectarian school, etc. By the phraseology and diction of this provision it is our conclusion that the framers of our constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution. Had that not been their intention there would have been no need for this particular provision, because under Idaho Const. art. 1, § 3, the exercise and enjoyment of religious faith was guaranteed (comparable to the free exercise of religion guaranteed by First Amendment of the United States Constitution) and it further provides no person could be required to attend religious services or support any particular religion, or pay tithes against his consent (comparable to the establishment clause of the First Amendment).

*Epeldi*, 94 Idaho at 395-96 (emphasis added).

In fact, the courts holding in *Epeldi* stands in direct contrast to that of the U.S. Supreme court on the same issue when it held that public tax dollars could be used to bus pupils to parochial schools in New Jersey under a First Amendment analysis. *Everson v. Board of Education of Ewing Township*, 330 US 1, 675 S. Ct. 504 (1947). Further, in holding that busing parochial students violated Article IX, § 5 of the Idaho Constitution, the Idaho Supreme court also rejected the argument that doing so violated the equal protection rights of the parochial students and their parents under the Fourteenth Amendment to the US Constitution of the Free Exercise of the First Amendment of the US Constitution. *Epeldi*, 94 Idaho at 396, 488 p. 2d at 866.

The Idaho Supreme Court has emphasized the more restrictive nature of the Idaho Constitution<sup>3</sup> as compared to the U.S. Constitution with respect to the separation of church and state in other cases as well.<sup>4</sup>

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<sup>3</sup> Within published accounts of the discussion of this issue, NCA has publicly stated that federalism and preemption prohibit the Idaho's Constitution's express limitation on the use of religious texts. This analysis is incorrect. Generally, federalism prohibits a state from making permissive that which the Federal Constitution prohibits, but permits the state to regulate within the area provided it does not allow at the state level those things which are prohibited at the Federal level. A preemption analysis of Idaho's Constitutional provisions would likely be found to be well within the province of state regulation

<sup>4</sup> See, *Doolittle v. Meridian Joint School District No. 2, Ada County*, 128 Idaho 805, 813, 919 p. 2d 334, 342, (1996) (The Idaho constitution has been held to provide greater restriction on the State's involvement in parochial activities than the Establishment clause of the First Amendment."); *Board of County Commissioners of Twin Falls County v. Idaho Health Facility Authority*, 96 Idaho 498, 509, 531, p. 2d 588, 599 (1975) ("The Idaho Constitution places much greater restriction upon the power of state government to aid activities undertaken by religious sects than does the First Amendment to the Constitution of the United States.")

The rejection by the *Epeldi* court of the First Amendment standards established by the U.S. Supreme Court is significant given the fact that religious activities including use of the Bible in public school instruction have been struck down as unconstitutional under the First Amendment according to the standards articulated in federal cases such those cited above.<sup>5</sup> It is therefore difficult to imagine that NCA's proposed use of the Bible and other religious texts would survive the prescriptions of the First Amendment, let alone Article IX § 5 or Article IX § 6 of the Idaho Constitution.

### CONCLUSION

The Idaho Supreme Court has not specifically ruled on this issue. Article IX § 6 of the Idaho Constitution specifically states that "no books... papers, tracts or documents of a political, sectarian, or denominational character shall be used or introduced in any schools established under the provisions of this article..." Assuming that the Idaho Supreme Court follows the approach set forth in *Epeldi v. Engleking, supra*, and relies on the literal meaning of the language of the Idaho Constitution, it would conclude that the Bible cannot be used in a public school classroom. However, based on federal and state case law, as well as the strict language of the Idaho Constitution, it is likely that any effort to use the Bible as a text in an Idaho public school would be found unconstitutional under the Idaho constitution.

This memorandum is provided to assist you. It is an informal and unofficial response of the Office of the Attorney General based upon the research of the author.

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<sup>5</sup> See, *Stone v. Graham, supra*; *Illinois ex rel. McCollum v. Board of Education, supra*; *Berger v. Rensselaer Central School Corporation, supra*; *Herdahl v. Pontotoc County School District, supra*; *Hall v. Board of School Commissioners of Conecuh County, supra*; *Mangold v. Albert Gallatin Area School District, supra*; *Doe v. Potter, supra*; *Chandler v. James, supra*; *Crockett v. Sorenson, supra*; *Vaughn v. Reed, supra*; *Johns v. Allen, supra*.