

1974 WL 27650 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 27, 1974

\*1 Mr. Richard S. Wallace  
Vice President for Administration  
Francis Marion College  
Florence, South Carolina 29501

Dear Mr. Wallace:

I sincerely apologize for my tardiness in responding to your inquiries. At the outset may I say that my knowledge of the law as it related to the matter of education is minimal and that my experience in the obscenity area has been with regard to commercial distribution and exhibition. I, therefore, have discussed the subject of your inquiry with others in this office more versed in the matters of education.

#### 1. WHAT LEGAL RESTRICTIONS EXIST RELATING TO THE SELECTION OF COURSE MATERIALS BY THE INDIVIDUAL PROFESSOR?

While State law requires the teaching of certain subjects, Sections 21-411, et seq., CODE OF LAWS OF SOUTH CAROLINA (1962) and establishes an uniform textbook system, Sections 21-451, et seq., CODE OF LAWS OF SOUTH CAROLINA (1962), the legal restrictions relating to the selection of course materials are minimal. Other than Section 21-458 which makes it unlawful to use in any school or college within this State a textbook which has been condemned or disapproved by the State Board of Education, the only other law which would regulate the content of books and other materials would be the State obscenity statutes, Sections 16-414.1 et seq., CODE OF LAWS OF SOUTH CAROLINA (1962), as amended. Section 16-414.2 provides,

It shall be unlawful for any person knowingly to send or cause to be sent, or to bring or cause to be brought into South Carolina for sale or distribution, or to prepare, publish, print, exhibit, distribute, or to offer to distribute in the State, or to have in his possession with intent to distribute, or to exhibit or to offer to distribute, any obscene matter.

The term 'obscene' is defined in Section 16.414.1(a) and has been recently construed by the South Carolina Supreme Court 'to apply hard core sexual conduct, such as patently offensive representations of ultimate sex acts, normal or perverted, actual or simulated; and such as patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals'. State v. Watkins (Opinion Number 19727, decided November 26, 1973)

The most recent decisions of the United States Supreme Court have recognized that the issue of obscenity is necessarily a jury question. That Court concluded:

The basic guidelines for the triers of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . , (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable State law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. [Miller v. California 413 U.S. 15, 37 L. Ed. 2nd 419, 431 \(1973\)](#)

Determining whether a particular book or publication meets the above stated test is obviously a difficult questions It is, however, a paramount requirement that to be outlawed a work must depict or describe sexual conduct in a patently

offensive manner. Vulgarity or nudity will not alone suffice. I might add that this office is currently drafting a proposed obscenity statute to incorporate the latest decisions of the United States Supreme Court. Serious thought is being given to exempting from any criminal proscriptions materials placed, utilized or available in libraries, museums, educational institutions, etc., in order to avoid incidents such as occurred in McBee.

\*2 The question of limitations on the methods and materials to be used by teachers and professors is still an unsettled one in the law. I have enclosed an article appearing in the Journal of Law and Education, Volume 2, No. 2 entitling 'A Legal Look at Style and Substance in the Classroom' which you may find to be of interest.

**2. IF A STUDENT WERE TO CHARGE A PROFESSOR WITH USE OF PORNOGRAPHIC MATERIALS IN A PARTICULAR COURSE, WHAT ACTIONS SHOULD THE COLLEGE ADMINISTRATION TAKE?**

It is at best difficult to advise anyone in a vacuum, that is without knowing the particular facts and circumstances which give rise to the need for advice. Other than to familiarize itself with the facts in the event of such an incident, the College administration should take no action whatsoever. No public statements should be made nor disciplinary action considered or taken against the person charged until the matter has been concluded in the courts. The only advice that can be given at this time is to advise this office or your legal advisor immediately.

**3. IN THE EVENT THAT A CHARGE IS BROUGHT, WHO WOULD BE LIABLE?**

Inasmuch as the South Carolina obscenity statute is a penal law, only those persons directly involved in the exhibition and distribution of the material would be criminally responsible. The concept of respondeat superior, whereby the master is held liable for the acts of his servant, is not applicable in criminal law.

**4. WHAT, IF ANY, ARE THE RESTRICTIONS ON THE USE OF STATE MONIES TO MEET SUCH A PROBLEM?**

While I do not clearly understand this question, please be advised of Section 1-234, CODE OF LAWS OF SOUTH CAROLINA (1962) which provides:

In the event that any officer or employee of the State, or of any political subdivision thereof, be prosecuted in any action, civil or criminal, or special proceeding in the courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the Attorney General, when requested in writing by any such officer or employee, to appear and defend the action or proceeding in his behalf. Such appearance may be by any member of his staff or by any solicitor or assistant solicitor when directed to do so by the Attorney General.

**5. WHAT PRECAUTIONARY ACTIONS ON OUR PART WOULD YOU RECOMMEND TO 'INSURE' AGAINST SUCH A DIFFICULTY?**

I can think of no action that could be taken that can insure against complaints or charges being brought by shocked, frustrated, or publicity seeking students or parents. Any serious efforts by an administration to regulate the methods or materials which an instructor might use will necessarily jeopardize academic freedom and the benefits which flow therefrom. As I am sure you are aware, the greater safeguards lay in the selection and screening of personnel prior to hiring.

I regret any lack of precision in my responses, but the questions posed and the problems raised do not admit to simple or clear cut answers. I am satisfied that in time the questions of students' and teachers' rights and academic freedom will be resolved by the courts as have other thorny and complex matters. In the interim, however, it is necessary to proceed on a case by case basis using a common sense and reasonable approach.

\*3 I hope that the foregoing and the enclosed will be of some assistance to you. In the event that an incident develops requiring further assistance of this office, please do not hesitate to call upon me.

With warm personal regards,  
Yours very truly,

John P. Wilson  
Senior Assistant Attorney General

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