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SCHOOLS: Sex Education, guidelines for.
CONSTITUTIONAL LAW: Compulsory education.

It is the public policy of the state to encourage and provide for sex education in the state's schools.

Under present law, sex education classes may not include specific instruction in birth control although they may include other general family planning information such as the social, economic and psychological implications of various sized family units, the effects of population growth upon our natural environment and natural resources, population studies, and birth and death rates.

The provision of law requiring that students be excused from sex education classes upon parental request is not in conflict with U.S. Supreme Court decisions.

No. 4699 April 7, 1970.

Dr. John W. Porter
Superintendent of Public Instruction
Department of Education
Lansing, Michigan

Hon. James F. O'Neil
State Board of Education
Lansing, Michigan

You have requested my opinion concerning the following two questions:

"1. Does the term 'family planning' as used in Act 44, P.A. 1968, encompass teaching of birth control methods and (does the use of this term) thus supersede the previous prohibition in Act 226, P.A. 1949, or is this prohibition still in effect?

"2. As provided in Act 44, P.A. 1968, is the provision for excusing children from classes where sex education is taught contrary to the recent Supreme Court decisions concerning the illegality of excusing pupils during prayer?"

To answer your first question, it is necessary to examine the statutory developments regarding birth control instruction in Michigan public schools. The prohibition you refer to is now contained in Section 782 of Act 269, P.A. 1955, as amended, being M.C.L.A. § 340.1 et seq.; MSA 1968 Rev. Vol. § 15.3001 et seq., which provides:

"It shall be the duty of boards in all school districts having a population of more than 3,000 to engage competent instructors of physical education and to provide the necessary place and equipment for instruction and training in health and physical education; and other boards may make such provision: Provided, That nothing in this chapter shall be construed or operate to authorize compulsory physical examination or compulsory medical treatment of school children. The board of any school district may provide for the teaching of health and physical education and kindred subjects in the

public schools of the said districts by qualified instructors in the field of physical education: Provided, That any program of instruction in sex hygiene be supervised by a registered physician, a registered nurse or a person holding a teacher's certificate, qualifying such person as supervisor in this field: Provided, however, That it is not the intention or purpose of this act to give the right of instruction in birth control and it is hereby expressly prohibited to any person to offer or give any instruction in said subject of birth control or offer any advice or information with respect to said subject: Provided further, That any child upon the written request of parent or guardian shall be excused from attending classes in which the subject of sex hygiene or the symptoms of disease is under discussion and no penalties as to credits or graduation shall result therefrom."

In 1968 the Michigan legislature approved two amendments to Act 269, P.A. 1955, as amended, supra, that are relevant to your inquiry. One of these amendments, Enrolled Senate Bill No. 416, would have amended Section 782, quoted above, to read as follows:

"Boards in all school districts having a population of more than 3,000 shall engage competent instructors of physical education and provide the necessary place and equipment for instruction and training in health and physical education; and other boards may make such provision. Nothing in this chapter shall be construed or operate to authorize compulsory physical examination or compulsory medical treatment of school children. The board of any school district may provide for the teaching of health and physical education and kindred subjects in the public schools of the districts by qualified instructors in the field of physical education."

However, Enrolled Senate Bill No. 416, which would have amended Section 782 by deleting the prohibition against birth control instruction, was vetoed by the Governor on May 28, 1968.

The other relevant amendment was contained in Act 44, P.A. 1968, which became law without the Governor's signature and added Sections 789 through 789c to Act 269, P.A. 1955, as amended, supra. In these sections the legislature provided the following:

"Sec. 789. Sex education is the preparation for personal relationships between the sexes by providing appropriate educational opportunities designed to help the individual develop understanding, acceptance, respect and trust for himself and others. Sex education includes the knowledge of physical, emotional and social growth and maturation, and understanding of the individual needs. It involves an examination of man's and woman's roles in society, how they relate and react to supplement each other, the responsibilities of each towards the other throughout life and the development of responsible use of human sexuality as a positive and creative force.

"Sec. 789a. Any school district may engage competent instructors and provide facilities and equipment for instruction in sex education, including emotional, physical, psychological, physiological, hygienic,

economic and social aspects of family life and sexual relations, as well as, socially deviant sexual behavior.

"Sec. 789b. The department of education shall:

(a) Aid in the establishment of educational programs designed to provide pupils in elementary and secondary schools, institutions of higher education and adult education, wholesome and comprehensive education and instruction in sex education.

(b) Establish a library of motion pictures, tapes, literature and other education materials concerning sex education available to school districts authorized to receive the materials under rules of the department.

(c) Aid in the establishment of educational programs within colleges and universities of the state and inservice programs for instruction of teachers and related personnel to enable them to conduct effectively classes in sex education.

(d) Recommend and provide leadership for sex education instruction established by the local school district, *including guidelines for family planning information.* [Emphasis supplied]

"Sec. 789c. *Any student upon the written request of parent or guardian shall be excused from attending classes in which the subject of sex education is under discussion and no penalties as to credits or graduation shall result therefrom.*" [Emphasis supplied]

It is clear from the above that it is the public policy of the State of Michigan to encourage and provide for sex education within the schools of this state.

As to the specific responses to your inquiries, the answer to your first question is dependent upon resolving the question as to whether the express prohibition against birth control instruction contained in Section 782 of Act 269, P.A. 1955, as amended, supra, has been impliedly repealed by the language, requiring the Department of Education to provide school districts with guidelines for family planning information, found in Section 789b (d) of the same act. In resolving this question, resort should be made to settled principles of statutory construction enunciated by the Michigan Supreme Court.

Both Act 44, P.A. 1968 and Enrolled Senate Bill No. 416 were passed by the legislature in 1968. The legislature is presumed to have been aware of the contents of both enactments. *Reichert v. Peoples State Bank for Savings* (1934), 265 Mich. 668, 672. If the legislature had contemplated that the family planning language contained in Act 44, P.A. 1968 was sufficient, standing alone, to impliedly repeal the prior prohibition against birth control instruction contained in Section 782 of Act 269, P.A. 1955, as amended, supra, there would have been no need to enact Enrolled Senate Bill No. 416, thus attempting to delete the birth control instruction prohibition from Section 782. Consequently, the passage of Enrolled Senate Bill No. 416 is some indication of legislative intent that Act 44, P.A. 1968 did not, by itself, repeal the prohibition against birth control instruction contained in Section 782 of Act 269, P.A. 1955, as amended, supra.

In addition, every word of a statute must be given effect, if possible, so that no portion will be inoperative or void. *King v. Second Injury Fund* (1969), 382 Mich. 480, 492. Further, repeals by implication are not permitted if, by any reasonable construction, the two statutory provisions may be reconciled so that each provision serves some purpose. *Valentine v. Redford Township Supervisor* (1963), 371 Mich. 138, 144.

Applying these sound canons of statutory construction, it is readily apparent that the statutory provisions here under consideration may be reconciled in such a manner that both serve a purpose. Pursuant to Section 782 of Act 269, P.A. 1955, as amended, supra, the express prohibition against birth control instruction remains in full force and effect.

However, pursuant to Section 789b (d) of the same act, it is important to note that sex education instruction may include family planning information other than birth control instruction. Illustrative examples of such information are population studies, birth and death rates, the effects of population growth upon our natural environment and natural resources, and the social, economic, and psychological implications of various sized family units. This kind of information is both relevant to the question of family planning and in conformity with the prohibition against birth control instruction.

Thus, based upon the language of the existing statutory provisions, interpreted in light of established canons of statutory construction set forth by the Michigan Supreme Court, the conclusion is compelled that the statutory provision regarding family planning information does not repeal by implication the birth control instruction prohibition. Consequently, in answer to your first question, it must be the opinion of the Attorney General that the express prohibition against birth control instruction contained in Section 782 of Act 269, P.A. 1955, as amended, supra, has not been superseded by the provisions of Section 789b (d) of the same act concerning family planning information.

Turning to your second question, it should first be observed that the recent United States Supreme Court decisions prohibiting prayer in the public schools did not hold that excusing pupils upon request during the prayers was constitutionally invalid. Rather, in both *Engel, et al v. Vitale, et al* (1962), 370 U.S. 421, 430, and *School District of Abington Township, Pennsylvania, et al v. Schempp, et al* (1963), 374 U.S. 203, 224 and 225, the Court ruled that excusing children upon request during the period of prayer in the public school was not a valid defense to the claimed unconstitutionality of such prayers under the Establishment Clause of the First Amendment to the Federal Constitution. Therefore, it is abundantly clear that the statutory provisions requiring that students be excused from sex education classes upon parental request are not in conflict with the two prayer cases cited above.

In answer to your second question, it is my opinion that the provisions of Section 789c of Act 269, P.A. 1955, as amended, supra, requiring that students be excused from sex education classes upon parental request, are not in conflict with the decisions of the United States Supreme Court regarding the constitutional invalidity of prayers in the public schools. Further, Section 789c is a valid exception to the compulsory school attend-

ance provisions contained in Section 731 of Act 269, P.A. 1955, as amended, supra, and well within the competence of the legislature to enact. *Messmore v. Kracht* (1912), 172 Mich. 120, 125.

In summary:

1. There can be no doubt that it is the public policy of the state to encourage and provide for sex education within the schools of this state. However, under present laws, sex education classes may not include specific instruction in birth control although they may include other family planning information such as the social, economic, and psychological implications of various sized family units, the effects of population growth upon our natural environment and natural resources, population studies, and birth and death rates.

2. The provision of law requiring that students be excused from sex education classes upon parental request is not in conflict with United States Supreme Court decisions.

FRANK J. KELLEY,
Attorney General.

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RULES & REGULATIONS: Administrative Agencies—Joint Rules.
HEALTH, DEPARTMENT OF: Public health standards.
LABOR, DEPARTMENT OF: Occupational safety standards commission.
STATE: Administrative Agencies—Rules and Regulations.

Power of department of public health to promulgate rules to protect public health is superior to and precludes exercise of rule-making power in duplicating subject areas by the occupational safety standards commission in the department of labor. But the two agencies should prevent overlapping rules by jointly adopting rules. Dispute as to content, if irreconcilable by the agencies, should be resolved by the Governor.

No. 4697 June 17,1970

Mr. Barry Brown, Director
Department of Labor
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Detroit, Michigan

You ask whether the occupational safety standards commission established by Act 282, P.A. 1967,[1] can promulgate rules on health standards, and, if so, whether and to what extent rules adopted by the Michigan department of public health would pre-empt any rules that the occupational safety standards commission may promulgate.

Act 267, P.A. 1967, provides in pertinent part as follows:

> "Sec. 2. Each employer shall establish and maintain conditions of work which are reasonably safe and healthful for employees. Each employer's methods, processes, devices and safeguards, including

[1] M.C.L.A. § 408.851 et seq.; M.S.A. 1968 Rev. Vol. § 17.49(1) et seq.