



ACLU Urges “NO” Vote on HB 3686 A-Eng.

ACLU of Oregon urges the legislature to postpone consideration of HB 3686 to allow more time to deliberate and fully consider this issue in 2011. The ACLU of Oregon Board of Directors is committed to examining the many legal and policy issues raised. Without that opportunity to address these complex issues, we must oppose HB 3686.

Public schools have a special obligation to ensure an atmosphere that is welcoming to all students and their families regardless of their religious beliefs. Repeal of this law and amending ORS Chapter 659A raise complicated legal issues. Because of the unique religious liberty and free expression protections of the Oregon Bill of Rights, HB 3686 is likely to have unintended consequences that could result in many more controversies over religion in our public schools.

“Parents and lawmakers may and do assume that the hours, days, and years spent in school are the time and the place when a young person is most impressionable by the expressed and implicit orthodoxies of the adult community and most sensitive to being perceived as different from the majority of his or her peers; famous constitutional cases have involved this socializing rather than intellectual function of the schools. **In excluding teachers whose dress is a constant and inescapable visual reminder of their religious commitment, laws like ORS 342.650 respect and contribute to the child’s right to the free exercise and enjoyment of its religious opinions or heritage, untroubled by being out of step with those of the teacher.”** *Cooper v. Eugene School District*, 301 Or 358, 376 (1986).

HB 3686 A-Eng. allows for 17 months of rulemaking. The statutory language in HB 3686 is flawed and that *cannot be fixed by rulemaking*. **As Attorney General Kroger stated:**

“**We have also concluded that if the statute is amended or repealed, there is a significant risk that the new law will be challenged** in court by parents who believe that the wearing of religious dress in the classroom violates their constitutional rights or those of their children. For that reason, we urge you to make any changes with great care, with an eye to the potential liability that may be incurred by state or local school districts....**The policy choices implicated by ORS 342.650 are complex and challenging.**”¹

New Section 4(f) raises complex legal questions: schools will evaluate an accommodation request by considering “**the degree to which an accommodation may constrain the obligation of a school district . . . to maintain a *religiously neutral work environment.***”

Why is the focus on the “work environment” rather than the “school environment” and the perspective of students and parents? How is this obligation new? How can a constitutional obligation be violated in “degrees”? Why is subsection (4)(f) not a determinative factor but just one of six? And how does Oregon’s Constitution, analyzed differently than the U.S. Constitution, affect all of this?

¹ Letter to Rep. Sara Gelsler, January 13, 2010.

Rules cannot resolve these issues – teachers will challenge denial of accommodation or parents will challenge approval of accommodation, resulting in litigation.

When upholding the law in 1986, the Oregon Supreme Court explained the *modern* rationale for the law:

“There is no reason to believe that when the Legislative Assembly enacted ORS 342.650 in its present form in 1965, it had any aim other than to maintain the religious neutrality of the public schools, to avoid giving children or their parents the impression that the school, through its teacher, approves and shares the religious commitment of one group and perhaps finds that of others less worthy.” *Cooper* at 373.

Following the *Cooper* ruling, in 1987, the legislature once again amended the law, rather than repealing it.

While many proponents of repeal acknowledge the need to prohibit religious proselytizing in the public schools, clothing, just like words, can communicate a message. Even if the wearer does not intend to proselytize, a message is conveyed:

“[The] concern is that the teacher’s appearance in religious garb may leave a conscious or unconscious impression among young people and their parents that the school endorses the particular religious commitment of the person to whom it has assigned the public role of teacher. This is what makes the otherwise privileged display of a teacher’s religious commitment by her dress incompatible with the atmosphere of religious neutrality that ORS 342.650 aims to preserve.” *Cooper* at 380-381.

If HB 3686 is approved, schools will not be allowed to regulate religious dress, assuming the teacher is otherwise properly attired. Case law clearly provides that as long as the teacher has a sincerely held belief (which need not be tied to a particular religion or written tenets), all “religious” dress must be treated the same.

During the school day, public school teachers are representatives of the government and, in this context, need to ensure religious neutrality. The government restricts teachers’ free speech rights, particularly with regards to political speech. The same principle applies to religious expression that would compromise the educational process and interfere with the religious freedom rights of students and their families. The government has a duty to ensure that all children are safe and respected in the public school system.

For all these reasons, ACLU of Oregon urges a “NO” vote on HB 3686 A-Eng. If this bill fails to pass, the ACLU of Oregon is committed to further dialogue with proponents to explore other options to accommodate the religious dress of school employees while still maintaining the religious neutrality of public schools.

As Attorney General Kroger stated, this is a complex issue. Let’s take the necessary time, allowing for thorough consideration of the legal issues that are unique to Oregon.