

# OFFICE OF THE ATTORNEY GENERAL

92-00212



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Honorable Perry O. Hooper, Jr.  
Member, House of Representatives  
73rd District  
456 South Court Street  
Montgomery, AL 36104

Colleges and Universities -  
State Funds - Sexual Misconduct

Public monies may not be used  
to fund the activities of an  
organization which supports  
behavior which directly or  
indirectly encourages sexual  
misconduct.

Dear Representative Hooper:

This opinion is issued in response to your request for an  
opinion from the Attorney General.

## QUESTION

May an organization that professes to  
be comprised of homosexual and lesbian  
individuals use state funding or state-  
supported facilities to foster or promote  
sexually deviate activities as set forth in  
Sections 13A-6-60, et seq., Code of Alabama  
1975, as last amended, and in particular  
Section 13A-6-65(a)(3), supra?

FACTS, LAW AND ANALYSIS

In the context of your question as it is framed, your facts reflect that the homosexual or lesbian organization under consideration fosters or promotes activities that violate Alabama statutes prohibiting sodomy and sexual misconduct, i.e., the organization encourages its members or others to engage in sodomy or deviate sexual intercourse within the State of Alabama.

As a general rule, public funds and facilities may not be used to incite, promote, or advocate conduct which is a violation of Alabama criminal law. In rendering this opinion, we understand your question to be, and answer it as, a use of state funds or facilities related to unlawful conduct and not First Amendment protected-speech activities.

There are a number of federal circuit court cases which touch upon this question which were generally based upon the Supreme Court case of Healy v. James, 408 U.S. 169 (1972). There is no United States Supreme Court ruling on the issue of homosexual rights as discussed in the federal circuit court cases. However, Healy v. James, supra, clearly sets the standard to be as follows:

"The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'" 408 U.S. 188.

Consequently, a distinction must necessarily be made between things that an organization may advocate concerning changes in laws as opposed to advocating the actual breaking of existing laws.

In Bowers v. Hardwick, 478 U.S. 186, 92 L.Ed.2d 140, 106 S.Ct. 2841, Justice White, writing for the majority, observed:

"Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the

Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 25 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. [Cite omitted.] Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." 92 L.Ed.2d at 147.

The criminal acts that you refer to in your question are the Alabama laws prohibiting sodomy and sexual misconduct. Sections 13A-6-63 and -64 deal with sodomy in the first and second degrees respectively, being aggravated criminal acts. Both involve forcible compulsion, incapacity, or sexual contact within certain age limits of children. While such acts could possibly be those fostered and promoted by the organizations to which you refer, it is more likely that the statute most commonly violated would be Section 13A-6-65(a)(3). This section states as follows:

"(a) A person commits the crime of sexual misconduct if:

. . .

"(3) He or she engages in deviate sexual intercourse with another person under circumstances other than those covered by Sections 13A-6-63 and 13A-6-64. Consent is no defense to a prosecution under this subdivision."

"Deviate sexual intercourse" is defined at Section 13A-6-60 as follows:

"(2) DEVIATE SEXUAL INTERCOURSE. Any act or sexual gratification between persons not married to each other, involving the sex organs of one person and the mouth or anus of another."

The several cases define and describe these actions as including any carnal copulation, unnatural carnal copulation, sodomy, bestiality, homosexuality, buggery, cunnilingus, or

  
JAMES R. SOLOMON, JR.  
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Honorable Perry O. Hooper, Jr.  
Page 4

92-00212

otherwise. That any one of these single terms may not be used in the statute, as such, does not indicate that it is not a prohibited act.

The legality of such laws was upheld by the United States Supreme Court in Bowers v. Hardwick, supra. Therefore, the State of Alabama is free to enforce such laws and to prohibit activities that would be in violation of them.

The State of Alabama Criminal Code provides that an attempt to commit an act prohibited by law is a lesser-included offense. Section 13A-1-9(a)(2), Code of Alabama 1975. Therefore, if an organization is promoting, encouraging, demonstrating, making provisions for, fostering, or otherwise actively engaging in activities that are "likely to incite or produce such action," it would be a violation of State criminal law.

Obviously, state funds or facilities cannot be knowingly used for the commission of crime. If members of a homosexual or lesbian organization, in the college context as observed in the reported cases noted above, or in another context where state support is involved, are engaged in attempts to incite or produce unlawful action, or are actually engaged in unlawful action, there is a violation of state law, and state funds or facilities, directly or indirectly, may not be used to foster or promote such unlawful activities.

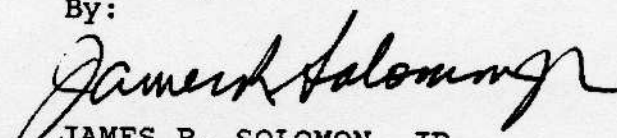
CONCLUSION

It is our opinion that an organization that professes to be comprised of homosexuals and/or lesbians may not receive state funding or use state-supported facilities to foster or promote those illegal, sexually deviate activities defined in the sodomy and sexual misconduct laws under Sections 13A-6-63, 13A-6-64, and 13A-6-65 of the Code of Alabama 1975.

I hope this sufficiently answers your question. If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

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By:



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Chief, Opinions Division