

TRANSCRIPT PREPARED BY THE CLERK OF THE LEGISLATURE
Transcriber's Office
FLOOR DEBATE

March 6, 2002

LB 1172

Attorney General's Opinion in part says the Legislature can do whatever it wants, but then is very careful kind of at the end to say, but anything you do will be reviewed by the Supreme Court and they will decide, not us, whether what was enacted is constitutional. And, of course, that's what the law is, and Senator Kristensen acknowledges that, in part. Now the risk is if the Legislature tries to define what is a permissible fee, we affect all school districts in the state. We could have a statute that was unconstitutional and affect every school district in the state. The approach that is suggested in the committee amendments is much more conservative in the context of the legal risk that we would be taking. It confines that legal risk to a school district, not to the state. The risk would not be on the state. The risk would be on a school district. And where is it more appropriate to have that risk? Isn't it the school district that presumably would be the beneficiary of the fee? Isn't this the school district's decision that would have caused the liability? Isn't it the patrons of the school district who, after a public discussion, would have presumably adopted the fee? Isn't that the more appropriate place to place the risk of litigation, and the eventual results if you are not successful in the litigation rather than on the state, or in this case through the statutes?

SENATOR CUDABACK: One minute.

SENATOR WICKERSHAM: I don't believe that that approach is irresponsible. If that issue is litigated and the court rules on a case by case basis, they will eventually tell us what the free instruction clause of the constitution means, and at that point we will all know, but right now we don't. And if we pass a statute and we have a list, even the kind of limited list that Senator Kristensen has in his bill, and you might look at his bill and you think, well, that's perfectly reasonable, that does not mean it is reasonable to the Supreme Court. The Supreme Court will ultimately determine what the phrase "free instruction" means and it does not have to mean what Senator Kristensen has in his amendment.

SENATOR CUDABACK: Thank you, Senator Wickersham. Senator Raikes, on the Kristensen amendment.