

School Libraries and the First Amendment

AN ANGRY PARENT demands the removal of what she calls “un-American” books from the high school library. Your own school board directs you to eliminate books with diversity/equity/inclusion or LGBTQ themes.

So what are the First Amendment rights of students, librarians, teachers, board members and even the books’ authors? The U.S. Supreme Court took a stab at settling the issue in its 1982 decision in *Board of Education v. Pico*, involving a constitutional challenge to a New York school board’s removal of certain books it deemed anti-American, anti-Christian, anti-Semitic and “just plain filthy.”

A majority of the justices hearing the case could not agree on how much (or even if) the First Amendment restricted school officials’ discretion, so the decision has no binding precedential effect and, since then, the lower federal courts have been left to develop their own standards. This means that, even though the First Amendment is federal law that one would hope to be applied uniformly nationwide, the interpretation you’re bound by may vary depending on which of 12 federal appeals courts has jurisdiction over your school district.

Disparate Court Views

Some courts look for guidance in Justice William Brennan’s opinion on behalf of the four-member plurality in *Pico*, concluding that school boards enjoy considerable latitude in the selection of books to stock in their libraries, but removal driven by political or ideological opposition to a book’s viewpoint is constitutionally suspect.

Other courts apply a standard drawn from the Supreme Court’s 1988 decision in *Hazelwood School District v. Kuhlmeier*, a school newspaper censorship case, holding that schools have discretion to regulate school-sponsored speech as long as it’s “reasonably related to legitimate pedagogical concerns.”

Still others hedge their bets and apply both tests, and more recently, some have rejected these standards completely, finding that the selection and removal of library books in a public school is speech by the government itself, so the First Amendment does not apply at all.

The disagreement among the federal courts stems largely from their different views on the

essential nature and purpose of K-12 public school libraries. Courts adopting the *Pico* plurality’s approach view them as oases of intellectual freedom where students are encouraged to broaden their horizons. Others, accepting the government speech argument, consider them as simply reflecting government officials’ own curricular choices. A Florida-based federal judge, in a recent decision, didn’t feel the need to go even that far, observing that “school officials decide what books to have in the library, just as they decide what furniture to have in the classroom and what food to provide for school lunch.”

Action Measures

So what are the takeaways from this legal morass?

First, consult legal counsel about the federal case law currently in effect in your jurisdiction. Even though the law is in disarray nationwide, precedents binding on your state may provide clear answers.

Second, virtually all courts agree there is no constitutional bar to considering age-appropriateness, profanity, vulgarity, sexually explicit content and other legitimate pedagogical factors in determining whether to remove a particular book.

Third, employ a deliberative process with input from experienced educators. Constitutionality aside, your school district’s actions may be independently challengeable on grounds of arbitrariness, so be able to demonstrate thoughtful consideration rather than a knee-jerk reaction.

And fourth, be mindful of your own state legislation, which may expand or restrict the breadth of your discretion. New Jersey’s Freedom to Read Act establishes a rigorous process for reviewing complaints that explicitly prohibits viewpoint discrimination. Similar laws are also on the books in Minnesota, Washington, Illinois and several other states. On the other hand, several states, including Florida and Texas, have laws specifically targeting inappropriate content for removal from library shelves.

Bottom line: Don’t be misled by general information circulating online and consult your district’s legal counsel for any late-breaking developments on this contentious front.

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