

YOUR RIGHTS TO OPPOSE BOOK BANS

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Attempts to ban books are on the rise nationally, and Pennsylvania is no exception. Since 2021, there have been more than 1,500 decisions to ban books in public schools nationally and 456 book bans in Pennsylvania.¹ This worrisome trend is already negatively impacting Pennsylvania students, who have less access to the diverse viewpoints and ideas expressed in the books being banned. While school districts have the power to select and, in some cases, remove books from public schools, there are important limitations on a school board's ability to ban books. There are also actions that students, parents, and community members can take to fight back against these harmful policies.

WHAT IS A BOOK BAN?

A book ban occurs when a school administrator or other personnel removes or restricts student access to a book that was previously available, based on the content of that book. According to PEN America, an organization devoted to protecting free expression rights in this country, a book ban is an “action taken against a book based on its content and as a result of parent or community challenges, administrative decisions, or in response to **direct or threatened** action by lawmakers or other governmental officials.”² The initial decisions made by schools over which books to purchase or assign to students are not considered “book bans.”

WHAT BOOKS ARE BEING TARGETED AND BANNED?

In the past year, the number of books challenged has grown exponentially. Parents or community members are raising objections to books in school libraries and asking administrators to review and/or remove the books from circulation based on content the individual finds objectionable. The targeted books range from those with “sexual conduct” or even “implied depictions of sexual acts” to books with language some people find offensive.³ The objectors may ignore the educational or literary merit of the book, focusing only on certain words or passages. People promoting a book ban often claim they are “protecting” students from harmful ideas or information.”⁴

In practice, individuals are targeting books based on ideas that some people find controversial, such as references to race and racism or books that focus on LGBTQ+ characters or themes. Among the 1,500 books that have been banned nationwide since July 2021, 41% contain protagonists or prominent secondary characters of color, 22% directly address issues of race and racism, and 33% explicitly address LGBTQ+ themes.⁵ The fifth most banned book during this period, for example, was *The Bluest Eye* by the Pulitzer and Nobel-prize winning author Toni Morrison, a novel that addresses, among other themes, the intergenerational harm caused by racism and sexual assault.

WHAT IS THE SCHOOL BOARD'S AUTHORITY REGARDING BOOK BANS?

In Pennsylvania, school boards have the power to remove books so long as they comply with federal and state law, including the First Amendment. Students have a First Amendment right to read and receive information, and school boards cannot target certain viewpoints to be prohibited. School boards have far greater authority to select or remove books that are part of the curriculum, with less latitude over books that are optional, including library books. School districts also have policies related to selection and removal of books, and districts should follow those policies.

BOOKS ASSIGNED AS PART OF THE CURRICULUM: Pennsylvania school boards have broad discretion over curricular decisions under Pennsylvania law, with responsibility to adopt a “course of study” that is adapted to the “age, development, and needs of the pupils” in school.⁶ Typically, a school board delegates the details of these decisions to superintendents, who work with teachers and other school personnel to select or recommend curricular materials. Together, school boards and superintendents have the authority to select the textbooks and other curricular materials used by teachers and students in public schools.

Federal courts have largely affirmed the discretion of school boards under the First Amendment to make these choices. The Supreme Court has recognized that school boards have a “duty to inculcate community values” and may make curricular decisions to reflect those values.⁷ This discretion is not limitless, and school boards may not impose, for example, “an identifiable religious creed” or “otherwise impair permanently the student’s ability to investigate matters that arise in the natural course of intellectual inquiry,” but their discretion is broad.⁸ For example, federal courts have affirmed the ability of a school board to remove previously approved curricular materials so long as the decision is “reasonably related” to the “legitimate pedagogical concern” of denying students access to “potentially sensitive topics.”⁹

This low bar makes difficult legal challenges to the actions of a school board on their choice of curricular materials. Courts have found that legitimate pedagogical concerns include regulating student access to books for being “pervasively vulgar,” for containing sexually explicit content or “factual inaccuracies,” or for “educational unsuitability.”¹⁰ By claiming certain books are “sexually explicit,” book ban proponents attempt to argue that school boards are operating within constitutional limits.

LIBRARY BOOKS NOT PART OF CURRICULUM: Pennsylvania school boards have less discretion in restricting noncurricular materials in schools, such as library books. The Supreme Court has held that “the special characteristics of the school library” create additional First Amendment protections for students.¹¹

In 1982, the U.S. Supreme Court ruled in *Board of Education, Island Tree Free School District No. 26 v. Pico*, 457 U.S. 853 (1982) that books in libraries are different from mandatory school curricula, as libraries are intended as a “place to test or expand upon ideas presented to [a student], in or

out of the classroom” and are distinct from materials proscribed in the school’s curriculum, over which the board has greater discretion.¹² The court agreed that though school boards have discretion to transmit community values, that discretion is not unfettered, and libraries have a unique role different and separate from mandatory school curriculum.¹³ A school board “may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge”¹⁴ by proscribing a narrow view of “community values” that limit the books available in a school library where the “opportunity at self-education and individual enrichment ... is wholly optional.”¹⁵ The First Amendment requires that “students must always remain free to inquire” and “the school library is the principal locus of such freedom.”¹⁶

This higher standard offers additional protections for students. The Supreme Court has held that school boards may not remove books from a school library “simply because they dislike the ideas contained in those books” or in an effort “to prescribe what must be orthodox in politics, nationalism, religion, or other matters of opinion.”¹⁷ In practice, this means that school boards may not remove a library book because it is “too concerned with racial matters and too controversial.”¹⁸ School boards also may not remove a book simply because it depicts gay or lesbian relationships.¹⁹ Further, school boards may not remove or restrict a library book based on an unfounded “concern that the books might promote disobedience and disrespect for authority” or because a book deals with “witchcraft”—a common complaint against the *Harry Potter* series.²⁰

Additionally, board policies, including book policies, are unlawful if they are deemed impermissibly vague or arbitrary and capricious.²¹ See ELC’s [fact sheet about the powers of school boards](#) authority for more information. Vague language and overbroad prohibitions may be challenged as having a chilling effect on book choices and speech protected by the First Amendment. The reliance on vague, subjective criteria and failure to require consideration of a book in its entirety, including whether it has received critical acclaim, may be evidence that the policy is not tailored to be objective and to identify “educational suitability” but instead serves to impermissibly enforce a particular viewpoint.²²

Courts also consider the context of proposed policies and the motivation of policymakers to determine if animus toward a particular population is a motivating factor.²³

ARE THERE PROCEDURES THAT SCHOOL BOARDS MUST FOLLOW TO REMOVE BOOKS?

The First Amendment requires school districts to have “established, regular, and facially unbiased procedures” governing the removal of noncurricular books.²⁴ Book removals by school districts that rely on irregular procedures without standards or a review process are more likely to violate the First Amendment. For example, courts have found that the removal of noncurricular books by school districts violated the First Amendment when those schools failed to provide a standard or review process regarding book removal,²⁵ where districts failed to follow their own policy and procedures regarding book removal,²⁶ or where that policy merely amounted to a disapproval of the ideas contained in certain books.²⁷

School boards also must follow relevant state laws governing the addition or removal of books from schools. In Pennsylvania, any school district's decision to adopt a new textbook or course of study requires an affirmative vote by a majority of all members of the school board. This vote must be recorded, showing how each member voted.²⁸ Pennsylvania law also requires a recommendation from the superintendent before a change in textbooks is made. A change in textbooks cannot be made without the superintendent's approval, unless two thirds or more of the school board votes for it.²⁹

HOW CAN PARENTS, STUDENTS, OR COMMUNITY MEMBERS CHALLENGE BOOK BANS?

The first step is to become familiar with your district's policies, which you can find on your district's website. Many districts use a standard numbering format for their policy manuals, placing curricular policies in the 100 category. Check to see that your school district has a policy and is following its approved policy.

You can file a Freedom of Information request to determine if your district has removed books from circulation or has received complaints about any books. You can also ask in public meetings or by requesting information from your superintendent.

Attend your school board meeting and speak out if you believe that the board is taking actions that are inappropriate or illegal. As parents and taxpayers your opinion is very important.

A group of parents may want to consider bringing a legal challenge to a school district that is banning books. During a school board election cycle, parents and community members can most forcefully advocate by voting. School boards are democratically elected and accountable bodies and community members can fight against book bans by voting out school board members who endorse book bans and supporting candidates who oppose them.

The National Coalition Against Censorship has collected a range of resources for students, parents, and even school staff to advocate against and protest book bans, including sample letters that can be sent to school boards by students or parents.³⁰ Students especially should understand their rights to protest.³¹ The National Coalition Against Censorship has collected a number of [advocacy tools and resources](#) for students and others. Check out ELC's webpage, [Advocating for Inclusive Schools and Honest Education](#), for more information.

The Education Law Center-PA (ELC) is a nonprofit, legal advocacy organization with offices in Philadelphia and Pittsburgh, dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through legal representation, impact litigation, community engagement, and policy advocacy, ELC advances the rights of underserved children, including children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, multilingual learners, LGBTQ students, and children experiencing homelessness.

ELC's publications provide a general statement of the law. However, each situation is different. If questions remain about how the law applies to a particular situation, contact ELC's Helpline for information and advice – visit www.elc-pa.org/contact or call 215-238-6970 (Eastern and Central PA) or 412-258-2120 (Western PA) – or contact another attorney of your choice.

¹ PEN America’s Index of School Book Bans, https://docs.google.com/spreadsheets/d/1hTs_PB7KuTMBtNMESFEGuK-OabzhNxBv4tgpI5-iKe8/edit#gid=660619424.

² *Banned in the USA: Rising School Book Bans Threaten Free Expression and Student’s First Amendment Rights*, PEN AMERICA (June 28, 2022), <https://pen.org/banned-in-the-usa/> (last visited Aug. 17, 2022) (emphasis added).

³ For example, see Central Bucks School District Policy 109.2 Library Resource Materials, <https://go.boarddocs.com/pa/cbuc/Board.nsf/goto?open&id=ARZJQC4C9A95>, and ELC’s letter opposing the vague undefined terms among other problems, <https://www.elc-pa.org/wp-content/uploads/2022/05/2022.05.19-Open-Letter-to-Central-Bucks-re-book-ban-antiLGBT.pdf>. Proposed legislation Pennsylvania SB 1277 (Printer’s No. 1832) uses similar language and poses the same problems. See ELC’s letter opposing the bill, <https://www.elc-pa.org/wp-content/uploads/2022/06/ELC-SB-1277-SB-1278-letter-06282022.pdf>.

⁴ *Banned and Challenged Books: Banned Book FAQ*, AM. LIBR. ASS’N, <https://www.ala.org/advocacy/bbooks/banned-books-ga>. The three most common reasons provided by individuals attempting to ban books are “sexually explicit” material, “offensive language,” or books that are “unsuited to any age group.”

⁵ *Banned in the USA: Rising School Book Bans Threaten Free Expression and Student’s First Amendment Rights*, PEN AMERICA (June 28, 2022), <https://pen.org/banned-in-the-usa/>.

⁶ 24 PA. CONS. STAT. § 5-510.2 (1949) (School boards have the power to adopt “courses of study.”); 24 Pa. Cons. Stat §15-1512 (1949) (Courses of study may be adapted to age, development and need of pupils).

⁷ *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853 (1982).

⁸ *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F. 2d 1300 (7th Cir. 1980).

⁹ *Virgil v. Sch. Bd. of Columbia Cnty.*, 862 F.2d 1517 (11th Cir. 1989)(finding school board’s actions of removing certain materials from high school curriculum while allowing the same books to remain in school library was reasonably related to Boards legitimate concern regarding the appropriateness of materials for the age of students). See also *Pratt v. Independent School District*, 670 F.2d 771 (8th Cir. 1982) (ordering reinstatement to high school curriculum of films which had been removed by school board because of alleged violence and effect on students’ religious and family values).

¹⁰ *Pico*, 457 U.S. 853, 871 (1982) (“pervasively vulgar” and “educational unsuitability”); *ACLU v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, (11th Cir. 2009) (“factual inaccuracies”).

¹¹ *Pico*, 457 U.S. at 868 (“the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students”).

¹² *Pico*, 457 U.S. at 868-69.

¹³ *Pico*, 457 U.S. at 869.

¹⁴ *Pico*, 457 U.S. at 866.

¹⁵ *Pico*, 457 U.S. at 869.

¹⁶ *Pico*, 457 U.S. 853 (1982).

¹⁷ *Id.*

¹⁸ *Loewen v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss. 1980).

¹⁹ *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864 (D. Kan. 1995).

²⁰ *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996 (W.D. Ark. 2003).

²¹ See e.g., *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp.2d 698, 704 (W.D. Pa. 2003) (holding a policy that prohibited “abuse, offense, and harassment” was overly vague because the terms were not defined in any way); *Bender v. Exeter Twp. Sch. Dist.*, 63 Pa. D. & C.4th 414, 425 (Berks Cty. Ct. C.P. July 18, 2003), *aff’d mem.*, 839 A.2d 486 (Pa. Commw. Ct. 2003) (holding that a transfer to an alternative school for minor misbehavior was arbitrary and capricious).

²² *Pico*, 457 U.S. at 874-75.

²³ See e.g., *Case v. Unified Sch. Dist. No. 233*, 895 F.Supp.1463, 1470 (D. Kan. 1995) (ordering case to proceed to trial where the school officials’ motivations for removing books with LGBTQ themes from school libraries was a genuine issue of fact); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (law is unconstitutional under the Equal Protection Clause if race, sex or gender is a motivating factor in its enactment).

²⁴ *Pico*, 457 U.S. at 874.

²⁵ See *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530 (N.D. Texas, 2000).

²⁶ See *Case v Unified Sch. Dist. No. 233*, 908 F. Supp. 864 (D. Kan. 1995).

²⁷ *Case*, 908 F. Supp. 864 (D. Kan. 1995).

²⁸ 24 P.S 5-508.

²⁹ 24 P.S 8-803.

³⁰ *School Book Challenge Resource Center*, National Coalition Against Censorship, <https://ncac.org/resource/book-challenge-resource-center> (last visited Aug. 9, 2022).

³¹ KAI TEXEL, NATIONAL COALITION AGAINST CENSORSHIP, BE HEARD! PROTECTING YOUR PROTEST RIGHTS (2021) <https://ncac.org/wp-content/uploads/2021/12/Be-Heard-2021.pdf>.