

## EDUCATION LAW CENTER (ELC) POLICY STATEMENT

### ELC URGES SCHOOL BOARDS AND DISTRICTS TO UPHOLD THE FIRST AMENDMENT RIGHTS OF STUDENTS AND REJECT POLICIES THAT UNLAWFULLY BAN SCHOOL LIBRARY BOOKS

#### *Impact of Book Bans*

Welcoming and inclusive schools foster a sense of belonging among all students and provide books and resources that allow them to learn and explore the world and consider and empathize with the experiences of others. The purpose of a school library is to help prepare young people for critical thinking and engagement in an “information-rich society” and to encourage students to “explore questions of personal and academic relevance.”<sup>1</sup>

Book bans are on the rise across the nation, and Pennsylvania ranks third among the states in terms of most books banned.<sup>2</sup> The targeted books range from those that allegedly include “sexual conduct” or even “implied depictions of sexual acts” to books with language some people find offensive. In practice, a few parents and school board members are targeting books that are written by Black, Brown, Latinx, and LGBTQ+ authors, books that reference race and racism, books that include main characters of color, or books that focus on LGBTQ+ characters or themes. Book bans not only deprive students of important learning opportunities; they directly undermine student self-esteem, further erase historically marginalized identities, and treat students of color and students who identify as LGBTQ+ as inferior and unwelcome. Moreover, as discussed below, the Supreme Court has held that “the First Amendment rights of students may be directly and sharply implicated by removal of books from the shelves of a school library” and “the Constitution protects the right to receive information and ideas.”<sup>3</sup>

#### *The U.S. Constitution Limits School Boards’ Ability to Ban Books in School Libraries*

In 1982, the U.S. Supreme Court ruled in *Board of Education, Island Tree Free School District No. 26 et al. v. Pico* 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 included in the school’s curriculum, over which

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<sup>1</sup> See Role of the School Library, American Assoc. of School Librarians, at [https://www.ala.org/aasl/sites/ala.org.aasl/files/content/advocacy/statements/docs/AASL\\_Role\\_of\\_the\\_School\\_Library.pdf](https://www.ala.org/aasl/sites/ala.org.aasl/files/content/advocacy/statements/docs/AASL_Role_of_the_School_Library.pdf)

<sup>2</sup> <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/> PEN America’s Index of School Book Bans, [https://docs.google.com/spreadsheets/d/1hTs\\_PB7KuTMBtNMESFEGuK-0abzhNxVv4tgpI5-iKe8/edit#gid=660619424](https://docs.google.com/spreadsheets/d/1hTs_PB7KuTMBtNMESFEGuK-0abzhNxVv4tgpI5-iKe8/edit#gid=660619424).

<sup>3</sup> *Board of Education, Island Trees Union Free School District No. 26 et al. v. Pico*, 457 U.S. 853, 866 (1982).

the board has greater discretion.<sup>4</sup> The court agreed that while 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.<sup>5</sup> A school board “may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge”<sup>6</sup> by imposing a narrow view of “community values” that limits the books available in a school library where the “opportunity at self-education and individual enrichment ... is wholly optional.”<sup>7</sup> The First Amendment requires that “students must always remain free to inquire,” and “the school library is the principal locus of such freedom.”<sup>8</sup>

This higher standard in place for school libraries offers additional protections for students before any censorship of materials is permissible. 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.”<sup>9</sup> In practice, this means that school boards may not remove a library book because it does not agree with what is discussed, such as “controversial racial issues.” School boards also may not remove a book simply because it depicts gay or lesbian relationships.<sup>10</sup> 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.<sup>11</sup>

### ***School Boards Must Follow Lawful Procedures to Remove Books from School Libraries***

Board policies, including library book policies, are unlawful if they are deemed impermissibly vague or arbitrary and capricious.<sup>12</sup> 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.<sup>13</sup> Moreover, focusing only on specific words or passages under the guise of “protecting” students from ideas or information ignores the educational or literary merit of books in their entirety and impermissibly permits school board members to impose their viewpoint and idea of “what shall be orthodox” on materials available to students in school libraries.

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<sup>4</sup> *Pico*, 457 U.S. at 868-69 citing *Right to Read Defense Committee v. School Committee*, 454 F.Supp. 703, 715 (Mass. 1978).

<sup>5</sup> *Pico*, 457 U.S. at 869.

<sup>6</sup> *Pico*, 457 U.S. at 866 citing *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

<sup>7</sup> *Pico*, 457 U.S. at 869.

<sup>8</sup> *Pico*, 457 U.S. at 868-69 citing *Keyishian v. Board of Regents*, 385 U.S. 589, (1967).

<sup>9</sup> *Pico*, 457 U.S. at 872 citing *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>10</sup> *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864 (D. Kan. 1995).

<sup>11</sup> *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 1002 (W.D. Ark. 2003).

<sup>12</sup> 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).

<sup>13</sup> *Pico*, 457 U.S. at 874-75.

The First Amendment requires school districts to have “established, regular, and facially unbiased procedures” governing the removal of noncurricular books.<sup>14</sup> Book removals by school districts that rely on irregular procedures without standards or vague subjective standards as part of its 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 schools failed to provide a standard or review process regarding book removal,<sup>15</sup> where districts failed to follow their own policy and procedures regarding book removal,<sup>16</sup> or where the policy merely amounted to a disapproval of the ideas contained in certain books.<sup>17</sup>

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.<sup>18</sup> And in a recent investigation by the U.S. Department of Education’s Office for Civil Rights (OCR), the agency found that Forsyth County (Ga.) Schools’ book removal policy for sexually explicit content created a hostile environment for LGBTQ students and students of color, with an underlying motivation of targeting books due to gender identity, sexual orientation, or racial orientation.<sup>19</sup>

Moreover, many schools have policies that have been in place for years that afford parents the opportunity and a process through which to request their children not be allowed to access certain library books. This allows parents to determine which books their own children will access but does not deny access to books for all students whose parents may not object to the books at issue.

ELC urges school boards to uphold the First Amendment and to reject policies that unlawfully remove books from school libraries.

Visit [our resources page](#) for additional information about ELC’s efforts in advocating for inclusive schools and honest education.

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<sup>14</sup> *Pico*, 457 U.S. at 874.

<sup>15</sup> See *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 552-53 (N.D. Texas, 2000).

<sup>16</sup> See *Case v Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 876 (D. Kan. 1995).

<sup>17</sup> *Case*, 908 F. Supp.at 875-76.

<sup>18</sup> 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).

<sup>19</sup> Off. of Civil Rts., U.S Dep. Of Ed., Letter to Forsyth County Schools Re: OCR Complaint No. 04-22-1281 (2023), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04221281-a.pdf>. (OCR investigated Forsyth County Schools in Georgia for the school district's policy removing select books that depicted sexual explicit content. Through comments made at school board meetings, OCR found that the policy had an underlying motivation of targeting books due to gender identity, sexual orientation, or racial orientation, and therefore created a hostile environment for students of certain racial and gender identities.)