6787 Library

STATE of SOUTH CAROLINA

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ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211
September 24, 1999

The Honorable Harry C. Stille
Member, House of Representatives
9 Dogwood Drive
Due West, South Carolina 29639-0203

Dear Representative Stille:

You have asked that we advise you as to what constitutional standards govern school authorities as well as school boards regarding the removal of a book from the shelves of a high school library. Your particular question focuses upon a book by Norma Klein, entitled Beginner's Love. This book is currently part of the Chester High School Library. The book has generated considerable controversy throughout the Chester and surrounding community. Many concerned parents and citizens strongly believe that the book is lewd, vulgar and unfit for exposure to teenagers in a high school library setting.

The question you have raised is what are the limits which the First Amendment imposes upon school officials and/or a local school board in determining that the book in question should be removed from the high school library.

Law / Analysis

The leading case concerning the removal of books from a school library is the United States Supreme Court decision of Bd. of Ed. v. Pico, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). In Pico, the Island Trees, New York School Board removed nine books from the schools' libraries and proscribed their use in school curricula. Respondent students sued in federal District Court claiming that the Board's removal of the books violated the First Amendment of the United States Constitution. Respondents sought a preliminary and permanent injunction ordering the Board to return the nine books to the school libraries and to refrain from interfering with the use of those books in the schools' curricula. 102 S.Ct. At 2804. The District Court granted summary judgment in favor of the School Board, but the Second Circuit Court of Appeals reversed on various grounds.

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Request Letter

The United States Supreme Court, in a plurality opinion, affirmed the Second Circuit. The Court stressed that "[t]he Court has long recognized that local school boards have broad discretion in the management of school affairs." Thus, the Court said that it was

> ... in full agreement with petitioners that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political.

102 S.Ct. at 2806. On the other hand, the Court found that the removal of books from the school library by the School Board "directly and sharply" implicated "the First Amendment rights of students." Summarizing, the Court was of the view that

> ... just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members. Of course all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment." Tinker v. DesMoines School Dist., 393 U.S., at 506, 89 S.Ct. at 736. But the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students.

Id. at 2808-2809.

Thus, in the plurality's mind, under the First Amendment, school districts do not possess an "absolute discretion to remove books from their school libraries ...." By the same token, the local governing authorities "have a substantial legitimate role to play in the determination of school library content." Thus, in order to address this balancing of competing interests, the Court enunciated the following constitutional analysis:

> [with respect to the present case, the message of these precedents is clear. Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of ideas. Thus, whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, ... then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned .... On the other hand, respondents implicitly concede that an unconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar ... . And again, respondents concede that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible." .... In other words, in respondents' view such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights. (Emphasis added)

Id., at 2810. In other words, the Court held that "school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and

seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.'"

In concluding that the evidence did not allow judgment in favor of the respondents as a matter of law, and thus summary judgment was not warranted, the plurality was unconvinced that the evidence decisively showed the removal of the books to be for a constitutionally permissible reason. In the plurality's view.

> [t]he evidence plainly does not foreclose the possibility that petitioners' decision to remove the books rested decisively upon constitutionally protected ideas in those books, or upon a desire on petitioners' part to impose upon the students of the Island Trees High School and Junior High School a political orthodoxy to which petitioners and their constituents adhered.

What made the plurality particularly suspicious of the school board's motives in Pico was the fact that "respondents' allegations and some of the evidentiary materials presented below do not rule out the possibility that petitioners' removal procedures were highly irregular and ad hoc - the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivations." Id., at 2812.

In concurrence, Justice Blackmon concluded that the issue before the Court involved "a narrow principle" - school officials may constitutionally "choose one book over another, without outside interference" when a "politically neutral" reason is present. In his view, "First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language ... or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are 'manifestly inimical to the public welfare.'"

Justice White, in concurrence, thought the plurality opinion went too far in articulating First Amendment standards. He believed the Court should merely affirm the Court of Appeals in overturning the District Court's grant of summary judgment and say no more.

Chief Justice Burger and Justices Rehnquist and O'Connor dissented. The dissent cautioned against the court becoming a "'super censor' of school board library decisions." The task of educating school children is, in the dissent's view, left primarily to the elected school board. Chief Justice Burger wrote in dissent that :

> [h]ow are "fundamental values" to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum. In order to fulfill its function, an elected school board must express its views on the subjects which are taught to its students. In doing so, those elected officials express the views of their community; they may err, of course, and the voters may remove them.

The dissent sharply criticized the plurality opinion for applying such terms as "pervasively vulgar" or "educational suitability" to determine whether or not a school board could constitutionally remove a book from a library. In terms of a book being educationally unsuitable, Chief Justice Burger said that "[this conclusion will undoubtedly be drawn in many - if not most - instances because of the decisionmaker's content-based judgment that the ideas contained in the book or the idea expressed from the author's method of communication are inappropriate for teenage pupils." Id. at 2820.

With respect to the "pervasively vulgar" standard, the dissent noted that "[v]ulgarity might be concentrated in a single poem or a single chapter or a single page, yet still be inappropriate." Even "'random'" vulgarity might reasonable be deemed by a school board as "inappropriate for teenage school students" and a "school board might also reasonably conclude that the school board's retention of such books gives those books an implicit endorsement."

In a separate dissent, Justice (now Chief Justice) Rehnquist perceptively analyzed the issue in terms of the First Amendment providing much greater leeway to the government as educator than to the government as sovereign. Justice Rehnquist wrote:

> I think the Court will far better serve the cause of First Amendment jurisprudence by candidly recognizing that the role of government as sovereign is subject to more stringent limitations than is the role of government as employer, property owner, or educator. It must also be recognized that the government as educator is subject to fewer strictures when operating an elementary or secondary school system than when operating an institution of higher learning .... With respect to the education of children in elementary and secondary schools,

> the school board may properly determine in many cases that a particular book, a particular course, or even a particular area of knowledge is not educationally suitable for inclusion within the body of knowledge which the school seeks to impart. Without more, this is not a condemnation of the book or the course; it is only a determination akin to that referred to by the Court in Village of Euclid v. Ambder Realty Co., 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (9126): "A nuisance may be merely a right thing in the wrong place, – like a pig in the parlor instead of the barnyard."

Id., at 2835.

The case of Bicknell v. Vergennes Union High School Board of Directors, 638 F.2d 438 (2d Cir. 1980) is an example of a lower federal court applying the basic Pico standard to uphold the removal of books from a high school library. There, the Second Circuit Court of Appeals (the very same court which on the same day had decided Pico and which the United States Supreme Court later affirmed) concluded that the school board's action in removing these books because of vulgarity was constitutional.

Under the Bicknell facts, parents complained to the school board regarding Dog Day Afternoon and The Wanderers. The basis for the objection was the vulgarity and indecency of the books' language. The board voted to remove The Wanderers from the library altogether and to place Dog Day Afternoon on a restricted shelf. In upholding the board's decision, the Second Circuit found as follows:

> In Pico, a majority of the Court [Second Circuit] recognized a First Amendment right of members of a school community to be free of the inhibiting effects upon free expression that result when the circumstances surrounding the removal of books create a risk of suppressing ideas. In this case there are no allegations of any facts to indicate that such a risk was created by the circumstances under which the two books were removed. The attention of the Board was first directed to the two books by complaint about their vulgar and indecent language. There is no suggestion that the books were complained about or removed because of their ideas, nor that the

> Board members acted because of political motivation. On the contrary, appellants acknowledge that the books were removed because of vulgarity and obscenity ... . Nor is there any claim that the passages found objectionable were beyond the allowable scope accorded school authorities to regulate vulgarity and explicit sexual content. See Thomas v. Board of Education, 607 F.2d 1043, 1053 (2d Cir. 1979) (Newman, J., concurring); Frison v. Franklin County Board of Education, 596 F.2d 1192 (4th Cir. 1979); Brubaker v. Board of Education, 502 F.2d 973 (7th Cir. 1974), cert. denied 421 U.S. 965; 95 S.Ct. 1953, 44 L.Ed.2d 451 (1975).

In the Thomas case, referenced by the Court in Bicknell, Judge Newman in his concurring opinion, stated the following as a succinct guidepost:

> [w]hen, as in this case, the audience at which a publication is specifically directed consists, solely of high school students, ... and distribution is demanded at a school building attended by students down to the age of 11, ... First Amendment protection is not available for language that is indisputably indecent. If the F.C.C. can act to keep indecent language off the afternoon airwaves [in Federal Comm. Commission v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978)], a school can act to keep indecent language from circulating on high school grounds.

607 F.2d at 1057.

Likewise, in Frison, the Fourth Circuit found that the demotion of a teacher for using vulgar language in the classroom does not violate the First Amendment.

Other cases reach the same conclusion. For example, in Campbell v. St. Tammany Parish School Bd., 64 F.3d 184 (5th Cir. 1995), a group of parents brought suit against a school board for having removed all copies of a book, Voodoo and Hoodoo, from the parish school libraries. The District Court entered summary judgment in favor of the parents, concluding that the book removal violated the First Amendment. However, the Fifth Circuit

Court of Appeals reversed, finding that a grant of summary judgment was inappropriate. Referencing the Pico decision, the Court stated the following:

> [t]he Supreme Court has held ... that the key inquiry in a book removal case is the school official's substantial motivation in arriving at the removal decision. ... We find that the record evidence before us, comprising the depositions of eight of the twelve School Board members who voted to remove the Book and the transcript of the meeting at which the vote took place, is not sufficiently developed to permit a summary judgment determination.
>
> Our careful consideration of the School Board member's statements as contained in the record leaves us unable to declare, as a matter of law, that the School Board's vote to remove Voodoo and Hoodoo from all the parish public school libraries was substantially based on an unconstitutional motivation. At this stage, we simply do not have a full picture of the reasons why the School Board members constituting the majority voted to remove the Book. Our examination of the eight depositions reveals varying reasons for the individual School Board members' decisions to remove the Book; moreover, our only view into the motivations of the four remaining School Board members who voted to remove the Book are their short remarks at the meeting.
>
> A trial, requiring testimony of all the School Board members and permitting cross-examination probing their justifications for removing the Book, will enable the finder of fact to determine the genuine issue of material fact that is at the heart of this First Amendment case – the true, decisive motivation behind the School Board's decision. We therefore hold that summary judgment for the Parents was inappropriate, as the evidence did not, when viewed in the light most favorable to the School Board, foreclose the possibility that the School Board exercised its discretion within the confines of the First Amendment.

64 F.3d at 189-190.

The United States Supreme Court decision of Bethel School Dist. v. Fraser, 478 U.S. 675, 106 S.Ct.. 3159, 92 L.Ed.2d 549 (1986) is also analogous. There, the Court concluded that a school district acted entirely within its permissible authority in imposing sanctions upon a student who used lewd and indecent speech. The Court concluded that

> [t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.

Id. at 685. The Court quoted with approval from Justice Black's dissenting opinion in Tinker v. Des Moines Ind. Comm. Sch. Dist. 393 U.S. 503, 526, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) wherein Justice Black stated that

> I wish therefore ... to disclaim any purpose ... to hold that the Federal Constitution compels the teachers, parents and elected school officials to surrender control of the American public school system to public school students.

Similarly, in Lopez v. Tulare Joint Union High School District Bd. of Trustees, 34 Cal. App. 4th 1302, 40 Cal. Reptr. 2d 762 (1995), the California Court of Appeal found that a school's requirement that students remove profanity from a student-produced film did not infringe upon First Amendment protections. The film in question used a number of four-letter words of profanity throughout the film. The Court, relied principally upon Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) which had concluded that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonablely related to legitimate pedagogical concerns." 483 U.S. at 273. Accordingly, the Court in Lopez found that

> [t]eaching students to avoid vulgar and profane language is obviously a legitimate pedagogical concern. Therefore, the Board's prior restraint was proper under the First Amendment.

40 Cal. Reptr. At 777.

In upholding the removal of a book from a junior high school library, the Court in President's Council v. Community School Board, 457 F.2d 289 (2d Cir. 1972) warned against "a constraint intrusion of the judiciary into the internal affairs of the school."

And in Zykan v. Warsaw Comm. School Corp., 631 F.2d 1300 (7th Cir. 1980), the Seventh Circuit, in validating the removal of certain books from a high school library against a First Amendment challenge, said that

> [s]econdary school students certainly retain an interest in some freedom of the classroom, if only through the qualified "freedom to hear" that has lately emerged as a constitutional concept. See Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346. But two factors tend to limit the relevance of "academic freedom" at the secondary school level. First, the student's right to and need for such freedom is bounded by the level of his or her intellectual development. A high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices. Second, the importance of secondary schools in the development of intellectual faculties is only one part of a broad formative role encompassing the encouragement and nurturing of those fundamental social, political, and moral values that will permit a student to take his place in the community. Ambach v. Norwick, 441 U.S. 68, 76-77, 99 S.Ct. 1589, 1594-95, 60 L.Ed.2d 49; James v. Board of Education, 461 F.2d 566, 573 (2d Cir. 1972), certiorari denied, 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 491. As a result, the community has a legitimate, even a vital and compelling interest in "the choice (of) and adherence to a suitable curriculum for the benefit of our young citizens ***. Palmer v. Board of Education, 603 F.2d 1271, 1274 (7th Cir. 1979), certiorari denied, 444 U.S.1026, 100 S.Ct. 689, 62 L.Ed.2d 659.

The book in question, Beginner's Love, is a novel by Norma Klein. Beginner's Love concerns the sexual relationship between the 17 year old Joel and the 15 year old Leda. The "F" word is used in the book repeatedly. Other offensive or lewd language relating to masturbation, explicit sexual activity and genitalia is sprinkled throughout the book. The book includes one scene depicting oral sex.

A customer reviewer of the work who was favorably impressed with the book described it in the following way on the Amazon.com web site:

> I read this when I was in the 8th grade, and oh my lord it was too hot for my virgin eyes. A lot of graphic sex and language is in store for you, so beware .... I loved this book, and I still read it today. I recommend it only to those ages 15 and up.

Over 800 parents and others signed a petition requesting the removal of Beginner's Love from the Chester High School Library. However, it is our understanding that the School Board decided not to remove the book, but instead to allow parents or guardians who found the book offensive to send a written request to the school asking that their child not be allowed to check the book out of the library. It is unclear whether the School Board specifically concluded that the book was not "pervasively vulgar" or was not "educationally unsuitable."

News reports indicate that this book is not contained in school libraries in the surrounding area.

Conclusion

The First Amendment protects against censorship of the school library, but does not prohibit removal of indecent or offensive material from the school library. If the motivation of school officials is not to suppress ideas, but to remove a "pervasively vulgar" book or a book which is deemed "educationally unsuitable," then the removal is constitutionally valid. School officials have a duty under the law to protect school children from indecency and lewdness. The fact that a student may be exposed or have access to the very same book or offensive material outside of school cannot justify school officials abdicating their responsibilities.

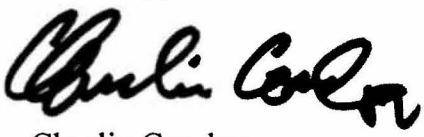
In short, there is a big constitutional difference between the removal of books motivated by unconstitutional censorship and the constitutionally valid removal of material not appropriate for school children. School officials cannot censor books in a school library based upon their ideas, but can remove books pervaded by vulgar or filthy language. Our schools should be safe havens for our children. Common sense and community values have an important and permanent place on the shelf of the school library.

Of course, this Office cannot supplant school board members in making the decision as to whether the book Beginner's Love is "pervasively vulgar" or "educationally unsuitable." The motivation of school officials is a factual question to be determined by all circumstances. We would point out, however, that apparently other school libraries in the area do not have this book in their library. The book contains numerous uses of the "F" word as well as other vulgar language. There is graphic sex, including oral sex, contained therein. Moreover, even a customer reviewer favorable to the book warns that it is "too hot" for a young teenager, contains "a lot of graphic sex and language" and should not be exposed to those under the age of 15.

Many parents reading this book would blush bright red. This book would, in our view, thus clearly meet the legal standard established by the United States Supreme Court. A book does not require filthy words or offensive language on every page or in every sentence to be "pervasively vulgar." The First Amendment allows school officials to be the gatekeeper for school children against vulgar materials.

Accordingly, in our opinion the Chester School Board would not violate the First Amendment by removing the book Beginner's Love from the Chester High School Library.

Sincerely,



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