



# CURRICULUM CONTENT AND PARENTAL PROTESTS

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# INTRODUCTION

DURING THE TIME OF THE COVID-19 PANDEMIC IN MANY SCHOOL COMMUNITIES THERE HAS BEEN TENSION BETWEEN GROUPS OF PARENTS OVER ISSUES WELL BEYOND WHETHER OR NOT STUDENTS SHOULD BE MASKED. THE CONTROVERSY OVER CURRICULUM CONTENT THAT WAS IGNITED BY LOCAL SCHOOL BOARDS' DIVERSITY, EQUITY AND INCLUSION INITIATIVES WILL UNDOUBTEDLY PERSIST WELL BEYOND THE DECLARED END OF THE PANDEMIC.

THIS PRESENTATION WILL ANALYZE THE LEGAL CONTOURS OF CURRICULUM CONTROL IN NEW YORK AS INFORMED BY FEDERAL CONSTITUTIONAL LAW.

# CONTROL OF EDUCATION IN NEW YORK STATE

- ❖ The right to education in New York State is derived from the New York State Constitution at Article XI(1)
- ❖ The State Constitution, at Article XI(2) establishes the oversight of the education system of the University of the State of New York (of which every school district and BOCES is a component).
- ❖ The Education Law provides for the empowerment of the Board of Regents as a governance authority pursuant to Education Law §§101 & 207, with the power to legislate policy and the Commissioner of Education who serves as the Chief Executive Officer of the State Education Department and the Board of Regents, pursuant to Education Law §305.
- ❖ Students are subject to compulsory education between the ages of 6-16 and a right to an education at state/local expense between the ages of 5-21.

# CURRICULAR REQUIREMENTS

- ❖ The mandated courses of study are set forth in the Education Law at §3204(3) and the local discretion is vested in the board of education pursuant to Education Law 1709(3).
- ❖ The syllabus for the courses of study must be compliant with the State's Learning Standards set forth at 8 NYCRR §100.(1)(t).
- ❖ If local curriculum is not compliant with the State Learning Standards state aid will be at risk 8 NYCRR § 3.35.

# LOCAL INSTRUCTIONAL MATERIALS

EDUCATION LAW §701 VESTS THE DECISION MAKING OVER TEXTBOOKS IN THE BOARD OF EDUCATION, AS RECOMMENDED BY THE SUPERINTENDENT OF SCHOOLS.

The Authority to designate text-books; purchase and loan of text-books; purchase of supplies

1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.

2. A text-book, for the purposes of this section shall mean: (i) any book, or a book substitute, which shall include hard covered or paperback books, work books, or manuals and instructional materials in an electronic format.

# CURRICULUM DEVELOPMENT

- ❖ There is no mandate that a particular curriculum be approved by the Board of Education and typically is prepared by teachers under the supervision of school administrators.
- ❖ Lesson plans developed to implement the curriculum are typically an individual teacher's choice (although educational materials prepared for work are the intellectual property of the school district (*Shaul v. Cherry Valley-Springfield CSD*, 363 F.3d 177 [2d. Cir. 2004])).
- ❖ Comprehensive lesson plans are considered by the Commissioner of Education and the courts to be essential to effective instruction *Meyer v. Bd. of Educ.* 182 A.D.2d 873 (3<sup>rd</sup> Dept. 1992).

# THE BOUNDARIES OF TEACHER ACADEMIC FREEDOM

## ***Harris v. Mechanicville District*, 45 N.Y.2d 279 (1978)**

- ❖ A New York high school teacher was the subject of parental complaints regarding how he instructed from the novel *Catcher in the Rye*. The teacher agreed not to include the book in future classes and then, without consulting with administration, did so again. The teacher had also walked-out from a conference with administrators.
- ❖ The Court determined that discipline under these circumstances was warranted, but not termination from employment. A penalty between a letter of reprimand and a one year suspension without pay was suggested by the court upon remand.

# GATEKEEPING THE CURRICULAR MATERIALS

- ❖ Should the Board of Education approve all curriculum?
- ❖ Textbook Selection is a matter within the authority of the Board of Education (Education Law §1709[4])
- ❖ The Superintendent of Schools is required to recommend courses for students and textbooks for each course of study. (Education Law §1711)
- ❖ A Textbook may not be replaced within five years of its adoption for use by the Board of Education except by a supermajority vote of 3/4<sup>th</sup> of the seats on the board voting in favor of the replacement book.



# IS THERE A CONSTITUTIONAL RIGHT AT ISSUE REGARDING COURSE AND SCHOOL LIBRARY CONTENT ?

- ❖ Does the First Amendment of the U.S. Constitution that protects free speech extend to the right to receive information contained in books within the school libraries?
- ❖ *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982).
- ❖ *Bicknell v. Vergennes Union High Sch. Bd. of Directors*, 638 F.2d 438 (2nd Cir. 1980).

## *BOARD OF EDUCATION V. PICO, ET AL., 457 U.S. 853 (1982)*

- ❖ Some members of the BOE attended a conference and were made aware of some controversial books several of which were in their secondary school libraries. In response, they created a book review committee to review said books. The committee recommended that most remain in the library, one can be checked out with parental permission, and could not agree as to what should happen with two of the books.
- ❖ The Board ultimately directed that all of the books be removed from the library, characterizing them as “anti-America, anti-Christian, anti-Semitic, and just plain filthy.”
- ❖ Litigation ensued with the Plaintiffs claiming that the removal of the books violated their First Amendment rights.

## PICO CONTINUED...

- ❖ This case dealt with the issue of removing library books that were previously shelved in the school libraries, not decision making with respect to either curriculum or the acquisition of books.
- ❖ The Court acknowledged the right of a local school district to establish and apply their curriculum in such a way as to transmit community values, there being a substantial community interest in “promoting respect for authority and traditional values, be they social, moral or political.”
- ❖ Local educational decision making, the Court opined had to “comport with the transcendent imperatives of the First Amendment.”

## PICO CONTINUED...

- ❖ The Court recognized that First Amendment speech rights included both the right of the sender to disseminate ideas and the right of the reader to receive the same.
- ❖ The Court drew a distinction between the content of curricular information imparted in the classrooms from the resources that would be available to students on a voluntary basis when accessing books from the school library.
- ❖ The Court opined that: “Our Constitution does not permit the official suppression of ideas”...a finding of a denial of Constitutional Rights would depend upon the intent behind the book removal.

## PICO CONTINUED...

- ❖ The Constitutionally permissible basis for the removal of library books from library shelves was stated as: “A determination regarding educational suitability” and not merely the viewpoints of Board members about a controversial matter “to prescribe what shall be orthodox in politics nationalism, religion or other matters of opinion.” (Citing *West Virginia Board of Education v. Barnette*, 319 U.S. 624 [1943]).
- ❖ While in *Pico* the Board formed a committee to review the books and then rejected the recommendations, a legitimate pre-library book removal review process based upon policy is now common place in New York’s public schools.

## *BICKNELL V. VERGENNES UNION HIGH SCHOOL BD. OF DIRECTORS, 638 F.2D 438 (2D CIR. 1980)*

- ❖ The Board of Education made a determination to remove two books from the school library based upon the content containing vulgar and indecent language. The Board also established policy restricting the purchase of future books in general must be based upon prior review by the School Administration and the Board.
- ❖ The Plaintiffs, student, parents and the librarian admitted that the content of the books contained the objectionable language that was vulgar and obscene.
- ❖ The Court, applying the Pico standards to its analysis determined that the removal was not based upon the ideas expressed in the books, but, rather the Board's right to regulate "vulgarity and explicit sexual content" (Citing *Thomas v. Board of Education*, 607 F.2d 1043 [2d Cir. 1979])

## VERGENNES CONTINUED...

- ❖ Prior to the filing of the Plaintiffs' lawsuit, the Board also voted to:
  - (a) restrict the professional discretion of the school librarian in the selection/acquisition of materials;
  
  - (b) prohibited the librarian from purchasing any additional major fictional works until further vote of the board other than those in the category of Dorothy Canfield Fisher; science fiction and high interest-low vocabulary be reviewed by the school administration with the assistance of the board.

## VERGENNES CONTINUED...

- ❖ The Court noted that state and local authorities are responsible for public education, and the courts cannot intervene in the resolution of conflicts regarding the daily operation of school systems unless there is a direct impact on constitutional rights.
- ❖ So long as the materials are permissibly considered vulgar or indecent, it is not unlawful for board members to use their own standards of taste about vulgarity.



## VERGENNES CONTINUED...

- ❖ The teachers and librarians asserted that the actions of the BOE infringed upon their rights under the First Amendment. The Court ruled to the contrary.
- ❖ The Court noted that the Board acted within its legitimate discretion in removing certain functions from the librarian – that in general, an employee of a government agency has no constitutionally protected interest in the particular duties of a job assignment.
- ❖ The Court also determined that a pre-removal due process proceeding is not warranted based upon the claimed First Amendment right.
- ❖ With respect to one of the books, the Board had it placed in a restricted area of the library.

# RESTRICTED ACCESS TO SCHOOL LIBRARY BOOKS

- ❖ In dissenting from a decision by the Supreme Court denying a writ of certiorari in the case of *President's Council District 25 v. Community School Board No. 25*, 409 U.S. 998(1972), Justice William O. Douglas opined:

“The first amendment is a preferred right and is of great importance in the schools ....Are we sending children to school to be educated by the norms of the School Board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems?”

- ❖ In this case the lower court let stand a school board's decision to restrict the availability of a controversial book shelved in the school library to students with parental permission to access the book – *Down These Mean Streets*.

# SCHOOL LIBRARY BILL OF RIGHTS

## **American Library Association**

School libraries are concerned with generating understanding of American freedoms and with the preservation of these freedoms through the development of informed and responsible citizens. To this end, the American Association of School Librarians reaffirms the Library Bill of Rights of the American Library Association and asserts that the responsibility of the school library is:

To provide materials that will enrich and support the curriculum, taking into consideration the varied interests, abilities, and maturity levels of the pupils served

To provide materials that will stimulate growth in factual knowledge, literary appreciation, aesthetic values, and ethical standards

To provide a background of information which will enable pupils to make intelligent judgements in their daily life

To provide materials representative of the many religious, ethnic, and cultural groups and their contributions to our American heritage

To provide materials on opposing side of controversial issues so that young citizens may develop under guidance the practice of critical reading and thinking

To place principle above personal opinion and reason above prejudice in the selection of materials of the highest quality in order to assure a comprehensive collection appropriate for the users of the library.

# PARENTAL RIGHTS TO INSPECT AND REVIEW CURRICULUM

- ❖ One of the features of the Family Educational Rights and Privacy Act (“FERPA”) is the right of parents to view materials that inform what their children are learning:

“All instructional materials, including teacher’s manuals, films, tapes, or other supplementary material which will be used in connection with any survey analysis, or evaluation as part of any applicable program shall be available for inspection by the parents or guardians of the children.” (20 U.S.C. § 1232-h(a))

“to inspect, upon request, any instructional material used as part of the educational curriculum for the student” (20 USC § 1232h [c] [1][C][i]).

# RIGHT TO F.O.I.L. LESSON PLANS AND CURRICULUM

- ❖ In light of parental rights to review and inspect lesson plans and curricular materials under FERPA, the question has been raised regarding access to copies of these materials under the New York State Freedom of Information Law.
- ❖ The Committee on Open Government considers lesson plans to be accessible subject to the rules governing intra-agency records. (FOIL-AO-7992)
- ❖ The Committee on Open Government has opined that intellectual property that is copyrighted may nevertheless be subject to disclosure based upon a F.O.I.L. request, unless there would be a loss of competitive advantage caused by the disclosure. (FOIL-AO-19246[2015])
- ❖ Our state's highest court ruled that a film strip used in the classroom is not exempt from F.O.I.L. disclosure. (*Russo v. Nassau County Community College*, 81 N.Y.2d 690[1993])