No. 18402

The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of MOMS FOR LIBERTY OF WAYNE COUNTY and REV. JACOB MARCHITELL from action of the Board of Education of the Clyde-Savannah Central School District regarding challenged library materials.

American Center for Law & Justice, attorneys for petitioners, Jeff Ballabon and Abigail A. Southerland, Esqs., of counsel

Ferrara Fiorenza PC, attorneys for respondent, Lindsay A.G. Plantholt, Esq., of counsel

Robert T. Reilly, Esq., attorneys for *amicus curiae* New York State United Teachers, Christina M. French, Esq., of counsel

The Law Office of Stephanie Adams, PLLC, attorneys for *amicus curiae* New York State Library Association, Stephanie A. Adams, Esq.

Petitioners appeal the determination of the Board of Education of the Clyde-Savannah Central School District ("respondent") to retain five challenged books within its library collection. The appeal must be dismissed.

Respondent has, through board policy, "delegate[d] its authority to designate library materials to be used in the [d]istrict to the school library media specialist(s)." The materials at issue herein were acquired under that authority.

Respondent's policy entitled "Objection to Instructional Materials and Controversial Issues" encourages community members to raise concerns about library materials to district staff. Under this policy, community members may submit a formal complaint to the superintendent. Upon receipt, the

superintendent convenes a review committee, which then has 60 days to review the challenged materials and submit a report to the superintendent. The committee's findings may then be appealed to the board.

In two separate requests in spring 2023, petitioner Marchitell challenged five books within respondent's junior/senior school library collection: (1) *People Kill People* by Ellen Hopkins; (2) *It Ends With Us* by Colleen Hoover; (3) *All Boys Aren't Blue* by George M. Johnson; (4) *Jesus Land: A Memoir* by Julia Scheeres; and (5) *Red Hood* by Elana K. Arnold. Petitioner Marchitell generally alleged that the books contained sexually explicit material inappropriate for school-age students.

In accordance with its policy, the district convened a committee to review the books. The committee was composed of the director of curriculum, instruction, and educational services; high school principal; junior high school principal; library media specialist; chair of the English department; and a "[p]rocess [c]onsultant." Each member of the committee read and discussed the challenged books. After completing evaluation forms for each book, the committee unanimously recommended that each book be retained in the school library, designated as either Young Adult (*People Kill People*, *All Boys Aren't Blue*, and *Red Hood*) or Adult (*Jesus Land* and *It Ends With Us*). Petitioner Marchitell appealed this determination to respondent.

At a board meeting on August 9, 2023, respondent sustained petitioner Marchitell's appeal. This determination was the subject of an appeal to the Commissioner, commenced on September 8, 2023 (the "prior appeal").

During the pendency of the prior appeal, respondent reconsidered its determination and received legal advice in connection therewith. At a board meeting on September 13, 2023, respondent rescinded its previous resolution and voted, 6-2, to deny petitioner Marchitell's appeal (the "September vote").[1] As a result, the challenged books remained in respondent's collection. This appeal ensued. Petitioners' request for interim relief was denied on October 27, 2023.

Petitioners seek annulment of the September vote, arguing that respondent abused its discretion by voting to retain the challenged books. Petitioners assert that the books are *per se* inappropriate as they are "pornographic," "serve[] no educational purpose," and are "potentially illegal obscenity." Petitioners further argue that the board "fail[ed] to apply proper pedagogical and ethical standards" and "relied on a mischaracterization of the First Amendment" in voting to retain the materials in its library collection.

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[1] The prior appeal was withdrawn shortly after the September vote.

Respondent argues that the board acted reasonably in following its policy for review of challenged materials.[2]

First, I must address two preliminary matters. The New York State United Teachers (NYSUT) and the New York Library Association (NYLA) have submitted proposed *amicus curiae* memoranda for consideration. Section 275.17 of the Commissioner's regulations permits interested persons to submit memoranda *amicus curiae* upon written application to, and approval by, the Commissioner. In considering whether to grant such applications, the Commissioner has historically applied the standard adopted by the Court of Appeals, which requires satisfaction of at least one of the following criteria: (1) that the parties are not capable of a full and adequate presentation and that the interested non-party could remedy this deficiency; (2) that the interested non-party could identify law or arguments that might otherwise escape consideration; or (3) that the proposed *amicus curiae* brief would otherwise be of assistance (*see* 22 NYCRR 500.23 [a] [4] [i]).

I find that both NYSUT and NYLA possess unique perspectives that are of assistance in resolving the issues in this appeal. NYSUT's local affiliates represent library media specialists, who staff school libraries throughout New York State. NYLA is a not-for-profit corporation formed to lead, educate, and advocate for the advancement of New York State's library community; it also includes a Section of School Librarians. Given the crucial role that librarians play in collection development and responding to challenged books, I have accepted both *amicus* briefs into the record.

Next, following the commencement of this appeal, petitioners submitted a video recording of the September vote that they obtained via a Freedom of Information Law request. The Commissioner may accept additional evidence "upon good cause shown and such terms and conditions as the commissioner may specify" (8 NYCRR 276.5). Petitioners argue that the recording relates to its claim that respondent based its decision on a "misunderstanding of the law." Respondent does not object to its admission. In my discretion, I have accepted this recording into the record.

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[2] Respondent also argues that petitioners lack standing to maintain this appeal. However, respondent's "Objection to Instructional Materials and Controversial Issues" policy allows "[d]istrict community members" to submit objections to the district. Given petitioner Marchitell's status as a district resident and taxpayer, I find that he has standing to challenge the denial of his objection. As such, I decline to dismiss the appeal on this basis (*Appeal of McMillan, et al.*, 61 Ed Dept Rep, Decision No. 18,058).

Turning to the merits, a board of education has broad authority to prescribe the course of study in the schools of the district (Education Law § 1709 [3]; *Appeal of McLoughlin and Carusi*, 44 Ed Dept Rep 336, Decision No. 15,191; *Appeal of Murphy, et al.*, 39 *id.* 562, Decision No. 14,311; *Appeal of Smith, Jr.*, 34 *id.* 346, Decision No. 13,335). This includes the ability to manage its library collection. A school district's discretion to remove material from its collection, however, must be exercised within "fundamental constitutional safeguards" (*Campbell v St. Tammany Parish Sch. Bd.*, 64 F3d 184, 188 [5th Cir 1995], *citing Tinker v Des Moines Indep. Community Sch. Dist.*, 393 US 503, 505-07 [1969]). "[L]ocal school boards may not remove books from school library shelves simply because they dislike the ideas contained [there]in ..." (*Board of Ed., Island Trees Union Free School Dist. No. 26 v Pico*, 457 US 853, 872 [1982]).

A board's decision to retain a challenged book or other library material in its collection will only be reversed if the board has acted in an arbitrary, capricious, or unreasonable manner (*Appeal of Bradshaw*, 62 Ed Dept Rep, Decision No. 18,197).[3] In an appeal to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and establishing the facts upon which he or she seeks relief (8 NYCRR 275.10; *Appeal of P.C. and K.C.*, 57 Ed Dept Rep, Decision No. 17,337; *Appeal of Aversa*, 48 *id.* 523, Decision No. 15,936; *Appeal of Hansen*, 48 *id.* 354, Decision No. 15,884).

Petitioners have failed to demonstrate that respondent's determination was unlawful on the basis that the challenged books are *per se* inappropriate. "Obscenity" is one of a few categories of speech that may be regulated by states consistent with the First Amendment (*see* Penal Law § 235.00).[4] The U.S. Supreme Court has imposed a three-part test to determine whether a work is obscene:

> (1) the average person ... would find that the work, taken as a whole, appeals to the prurient interest;
> (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

[3] While boards of education have greater discretion to prescribe curricula than to select library materials, the standards of review in an appeal to the Commissioner are the same (*compare Appeal of Munch*, 47 Ed Dept Rep 199, Decision No. 15,667; *see generally Pico*, 457 US at 868-69).

[4] *Paris Adult Theatre I v Slaton*, 413 US 49, 64 (1973) ("The States, of course, may follow ... a 'laissez-faire' policy and drop all controls on commercialized obscenity, if that is what they prefer ...").

> (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[5]

The purpose of the third requirement is, as the Court explained in *Jacobellis v Ohio*,

> ... the portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press ... [M]aterial dealing with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied ... constitutional protection.[6]

Petitioners' argument rests upon the assumption that fictional works describing or portraying human sexuality are *per se* objectionable and subject to exclusion from school libraries. Petitioners cite no authority for this contention.[7] I acknowledge that each of the challenged books contain some vivid and detailed accounts of sexual interactions. But that alone is not enough to justify their censorship.

Petitioners have otherwise failed to demonstrate that the challenged books here lack "literary, artistic, political, or scientific value." Indeed, petitioners do not even allege that they have read the books in question. In his written challenges to the books, petitioner Marchitell merely asserted that he had read "[e]nough of each book to lodge a complaint." Petitioner Moms for Liberty makes no allegations concerning its familiarity with the works in question.

Respondent's determination, by contrast, was supported by the review committee's analysis of the educational, literary, and artistic values of each book. The committee completed evaluation forms for each book, identifying awards and distinctions as well as publisher and industry reviews that assessed the educational merit of the materials. In each evaluation, the committee outlined important themes and topics in the books, such as

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[5] *Miller v California*, 413 US 15, 24 (1973).

[6] 378 US 184, 191 (1964) (citations omitted).

[7] Petitioners also allege that the challenged books are "pornography." This term, however, carries no legal significance. It is not defined in the Penal Law and was only used, in the case cited by petitioners, for background purposes (*see People v Keyes*, 141 AD2d 227, 229 [3d Dept 1988] [referring generally to "eliminat(ion) of the child pornography industry" as a motivating factor in enacting Penal Law § 263.15, the crime of promoting a sexual performance by a child]).

homelessness, bullying, racial discrimination, gender identity, consent, religion, and feminism. In the September vote, respondent stated that it had "further consider[ed]" the committee's report and determined that the review was conducted in accordance with board policy. Respondent's deference to the views of the committee, which followed board policy and reached a reasoned conclusion, can hardly be considered arbitrary or capricious (*see generally Appeals of Manders*, 63 Ed Dept Rep, Decision No. 18,295; *Appeal of D.G.D. and J.D.*, 62 *id.*, Decision No. 18,270; *compare Case v Unified Sch. Dist. No. 233*, 908 F Supp 864, 876 [D Kan 1995]).

Additionally, while petitioners purport to object solely to the sexual content of the challenged books, they object to several passages of *All Boys Aren't Blue* that have nothing to do with sexuality. Below are three such passages:

> ...It's as if the more visible LGBTQIAP+ people become, the harder the heterosexual community attempts to apply new norms. I think the majority fear becoming the minority, and so they will do anything and everything to protect their power.
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> ... [E]arly in 2012, Trayvon Martin was killed by George Zimmerman—and my entire perspective shifted on being a Black person in this society ... My eyes were opened by seeing the shooting of Black people at the hands of police. Seeing the killing of Black children like Tamir Rice at the hands of police. Seeing that it didn't matter whether you were an affluent Black, a poor Black, a child, or an adult. In the eyes of society, I was still a n****.
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> When I say I'm not blue, I'm referring to the blue on the police uniform my father wore. How I've watched too many in that same blue harm Black and brown people. I know for myself that although I respect my father with all my heart, it is my duty to fight against how that institution has harmed us.

Petitioners' objection to these passages can only be understood as an objection to author George M. Johnson's personal and political views.[8] I agree with NYLA that such objections are emblematic of a "dangerous nationwide trend

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[8] Additionally, while petitioners characterize the challenged books are "pornographic fiction," both *All Boys Aren't Blue* and *Jesus Land* are non-fiction.

of accusations used to intimidate and threaten schools and librarians into denying access to books on the basis of their content and the identities of their authors." The Office of the Attorney General and the State Education Department recently denounced this trend in joint guidance, indicating that school boards cannot

- "Ban [] books that highlight the diverse histories and perspectives of Black people;
- Us[e] a pretext of inappropriateness or lewdness to systemically remove diverse perspectives from the classroom; or
- Prohibit[] discussions related to lesbian, gay, bisexual, transgender, nonbinary and gender expansive people ... using a pretext of inappropriateness or obscenity."[9]

School boards considering the censorship of library materials must carefully consider whose voices will be silenced thereby.

The case law cited by petitioners regarding a school board's authority to limit speech is inapposite as respondent has not proposed any restriction on speech (*see e.g. Bethel Sch. Dist. No. 403 v Fraser*, 478 US 675, 685 [1986] [upholding disciplinary consequences for a student who delivered a "lewd and indecent" speech]; *R.O. ex rel. Ochshorn v Ithaca City Sch. Dist.*, 645 F3d 533, 541 [2d Cir 2011] [upholding school district's prohibition on the publication of a drawing of "stick figures in sexual positions" in its school newspaper]). These cases do not, as petitioners suggest, impose an affirmative duty on boards of education to prohibit "vulgar" speech. They instead hold that school boards possess the authority to censor inappropriate student speech that would, in other settings, be protected by the First Amendment.[10]

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[9] New York State Office of the Attorney General and New York State Education Department, Guidance to Promote Diversity, Equity, and Inclusion in New York Public Schools (Aug. 9, 2023), *available at* https://www.nysed.gov/sites/default/files/programs/diversity-equity-inclusion/oag-nysed-dei-guidance.pdf. In this respect, petitioner Marchitell complained in his initial challenge that "[t]here is great value in keeping sexual deviancy away from underage children." "Deviancy" has long been wielded as a pejorative to criminalize and delegitimize same-sex relationships. *See* Jordan Blair Woods, *LGBT Identity and Crime*, 105 CAL. L. REV. 667, 674 (2017) (arguing that "there was little space to view LGBT people in the criminal justice system other than as deviant sexual offenders" until the mid-1970s, when the decriminalization of sodomy enabled "scholars, advocates, and policymakers in the 1980s and 1990s to use antidiscrimination principles to move discussions about LGBT identity and crime away from viewing LGBT people as deviant sexual offenders ...."); *see also Mishkin v State of N.Y.*, 383 US 502, 505 (1966) (observing that books in obscenity prosecution depicted "deviations" such as "homosexuality").

[10] While a passage in *Pico* suggests that boards may remove books from their collections if it finds them "pervasively vulgar," such considerations are not relevant here as respondent elected to maintain the books in its collection (457 US at 871).

Petitioners also argue that "early exposure to sexual content" is harmful to children, citing several academic studies.[11] While this argument was not raised below, I note that the studies have no bearing on the instant dispute; for example, one surveyed Swedish high school seniors and found that sexual experiences prior to age 14 were "associated with problematic behaviours during later adolescence"[12] while another surveyed eighth and ninth grade Finnish students regarding the "associations between pubertal timing, sexual activity and self-reported depression...."[13] No academic study, in any event, could abrogate students' "right to receive information and ideas" through school library materials (*Pico,* 457 US at 872).

Contrary to petitioners' arguments, the right to academic, intellectual, and personal freedom lies at the very heart of this dispute. "The vocation of a librarian," as a federal court recently put it, "requires a commitment to freedom of speech and the celebration of diverse viewpoints unlike that found in any other profession."[14] This is reflected in the fact that Intellectual Freedom is one of the six values of the State Education Department's School Library Program Rubric, "a reflective self-assessment instrument that can be used to assess school library programs."[15] And school librarians, whose duties are educational in nature, enjoy academic freedom to the same extent as classroom teachers (8 NYCRR sections 30-1.1 [e], 30-1.8 [b], 80-2.8; *see Appeal of the Board of Educ. of the Malverne Union Free Sch. Dist.*, 29 Ed Dept Rep 363, Decision No. 12,320, *affd* 181 AD2d 371 [3d Dept 1992]).

The U.S. Supreme Court has held that boards of education lack authority, under the First Amendment, to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" (*Pico,* 457 US at 854). This rule derives from the Court's opinion in *West Virginia State Bd. of Educ. v Barnette,* which held that West Virginia's state educational agency could not expel students for failing to salute the flag (319 US 624 [1943]

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[11] Petitioners did not submit copies of these studies. However, I have obtained them with the assistance of the New York State Library and take official notice thereof (8 NYCRR 276.6).

[12] Asa A. Kastbom, et al., "Sexual debut before the age of 14 leads to poorer psychosocial health and risky behaviour in later life," *Acta Paediatrica* (2015): 91-100.

[13] Tiitakerttu Kaltiala-Heino, et al., "Pubertal timing, sexual behaviour, and self-reported depression in middle adolescence," *Journal of Adolescence* 26 (2003): 531-45. The authors concluded that both the early onset of puberty as well as "the extent of young people's reported intimate sexual experiences ... [were] associated with self-reported depression in middle adolescence in both sexes ...."

[14] *Fayetteville Pub. Library et al. v Crawford County, Ark., et al.,* [WD Ark, July 29, 2023, 5:23 Civ 05086, Brooks, J.], at **12-14 (Mem Op and Order).

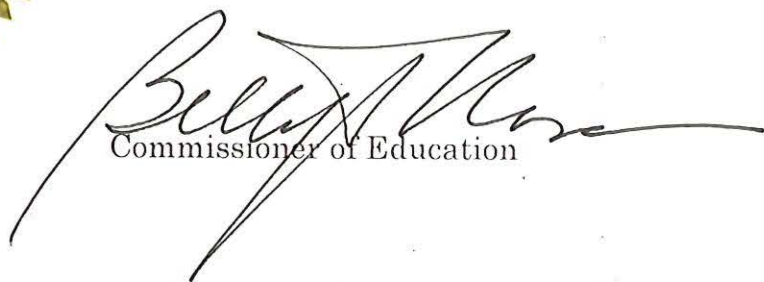
[15] New York State Education Department, "School Library Program Rubric," Fall 2020, available at https://www.nysed.gov/curriculum-instruction/nysed-school-library-program-rubric (last accessed Apr. 25, 2024).

[Jackson, JJ.]). *Barnette* affirmed the importance of intellectual diversity and its inextricable connection to freedom, stating that "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual ...." To do otherwise would "teach youth to discount important principles of our government as mere platitudes" (*Barnette*, 319 at 637).

I have considered petitioners' remaining arguments and find them to be without merit.

THE APPEAL IS DISMISSED.

IN WITNESS WHEREOF, I, Betty A. Rosa, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 25th day of April 2024.



Commissioner of Education