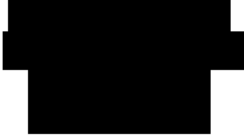




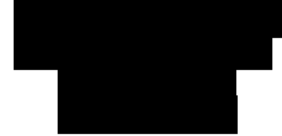
DISTRICT OF COLUMBIA



TENNESSEE



VIRGINIA



October 10, 2023

Board of Education
ATTN: Pamela Anstee, Board President
Clyde-Savannah CSD
215 Glasgow St.
Clyde, NY 14433

VIA OVERNIGHT MAIL

Dear President Anstee and Clyde-Savannah CSD Board Members:

The American Center for Law and Justice represents Moms for Liberty of Wayne County and Reverend Marchitell in regard to the Board of Education of the Clyde-Savannah Central School District's ("the Board") decision to reverse course and uphold the Library Materials Review Committee's ("Library Committee") decision to include five books containing sexually explicit material in the Jr/Sr. High School. Moms for Liberty of Wayne County has 266 members – 192 of whom are taxpayers and/or parents of students enrolled in Wayne County public schools. As has already been established, Reverend Marchitell is also a citizen of Wayne County and the leader of a local church in Wayne County.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties under law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.¹

¹ For example, in *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987), the Court unanimously struck down a public airport's ban on First Amendment activities. In *Board of Education v. Mergens*, 496 U.S. 226 (1990), the Court held by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause. In *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993), the Court unanimously held that denying a church access to public school premises to show a film series on parenting violated the First Amendment. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court unanimously held that minors enjoy the protection of the First Amendment. Most recently, the ACLJ's chief counsel argued the case of *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125 (2009), in which the Court held that the government's decision to erect a

The purpose of this letter is to provide the Board with an accurate statement of law relating to this matter and to request – on behalf of 14 parents in the Clyde-Savannah School District – that the Board will amend its policies to provide much needed guidance to the Library Committee in the selection and review of books which would prohibit lewd, obscene, and sexually explicit content as defined by case law in your jurisdiction.

Specifically, we implore the Board to amend Section 8320 governing the Selection of Library and Multimedia Materials to include a section (e) under “interpreting these principles” which provides as follows:

(e) Materials will not be included that contain lewd, vulgar, or sexual content including content that incites to sensual desire or imagination, depicts or describes actual or simulated sexual intercourse, bestiality, masturbation, excretion, or lewd exhibit of the genitals.

Statement of Facts

The parties involved in this matter are already acquainted with the facts of this matter. In summary, on August 9, 2023, the Board voted to remove five books from the library defeating a motion by the Library Committee to retain the books in the Jr/Sr. High School Library.

For ease of reference, just some of the objectionable and sexually graphic content contained within each book is copied below.

“People Kill People” by Ellen Hopkins - pg. 138




“It ends with us” - Colleen Hoover - pg. 173




privately-donated monument on government property constituted government speech and did not open a speech forum for other privately-donated monuments.




“All boys aren’t blue” by George M. Johnson - pg. 266



“Red Hood” by Elana K. Arnold - pg. 105



Jesus Land: A Memoir by Julia Sheeres - pg. 112



The concerns and objections raised by Reverend Marchitell and a gym full of parents in making this content readily accessible in the Jr./Sr. high school is obvious and requires no elaboration. The content in these books falls squarely within content deemed lewd and/or obscene

and inappropriate in the school setting. See *R.O. v. Ithaca City Sch. Dist.*, 645 F.3d 533, 541 (2d Cir. 2011) (defining “lewd” as “inciting to sensual desire or imagination.”) (citing *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 327 (2d Cir. 2006) (quoting *Merriam Webster’s Third New Int’l Dictionary* 1147 (1st ed. 1981))); see also *id.* (describing lewd, vulgar, and indecent expression as “speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo”). See also NY Penal Law, Part 3, Title M, Article 235 § 235.00 defining material as “obscene” if “(a) the average person, applying contemporary community standards, would find that considered as a whole, its predominate appeal is to the prurient interest in sex, and (b) **it depicts or describes in a patently offensive manner, actual or simulated; sexual intercourse . . . masturbation . . . excretion or lewd exhibition of the genitals**, and (c) considered as a whole, it lacks **serious** literary, artistic, political or scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.”

Notwithstanding the legitimate, and even compelling, reasons the Board voted to keep these books out of the library, on September 7, 2023, Emilie Bastian (Library Media Specialist) and Matthew Drahms (parent of a student in this District and brother to a member on the Library Committee and Director of Curriculum for the District) (hereinafter “the Petitioners”) filed a Petition and Application for Stay asking the Commissioner to stay the Board’s decision of August 9, 2023, and reinstate the books. On September 13, 2023, and purportedly in response to the legal threats lodged by the Petitioners, the Board reversed course and voted to reinstate the books to the library. In support for reversal, the President of the Board indicated that the Board was reinstating the books not because they approved of the content (in fact, the President indicated that she did not believe the content was appropriate for school-aged children) but because they believed they were obligated to do so under the law.

As explained below, all of the claims raised by Petitioners Bastian and Drahms are unsupported by the law and NYSED policies and are wholly without merit. Federal, state, and local law affirms that the Board’s decision to remove books containing lewd, obscene, and sexually explicit content was proper, supported by legitimate pedagogical interests, and a far cry from arbitrary and capricious.

Statement of Law

I. The First Amendment Does Not Prevent the School Board From Removing Lewd or Inappropriate Books from the School Library.

“The First Amendment does not prevent the school officials from determining that to permit [] vulgar and lewd speech . . . would undermine the school’s basic educational mission.” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986). **Obscenity including “sexually explicit” and “vulgar and lewd” speech “is wholly inconsistent with the ‘fundamental values’ of public school education.”** *Id.* at 685-86 (emphasis added).

Petitioners erroneously assert in claims two and three of their petition that students and teachers have a First Amendment right to access any content they wish via the school library. Nor does it – as petitioners outrageously suggest – protect a minor’s right to access such inappropriate content “without incurring the stigma of having to identify themselves as wishing to access material deemed ‘pornographic’ or otherwise inappropriate.” Petition, at ¶ 63.

While – as the Petitioners point out – the Court in *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982) held that “the Constitution protects the right to receive information and ideas,” *id.* at 867, the Court also made clear there are limits to this right and “that the school board has the authority to remove books that are vulgar.” *Bethel Sch. Dist.*, 478 U.S. at 684. Indeed, courts have held time and time again that it is not only permissible for a school district to regulate inappropriate content and speech, it is also permissible to impose sanctions when such content or speech takes place in the school setting. *Id.* at 685-686.

In *Bethel School District v. Fraser*, 478 U.S. 675 (1986), the Court made these points unequivocally clear:

This Court’s First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience **where the speech is sexually explicit and the audience may include children.** In *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court upheld a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults. **And in addressing the question whether the First Amendment places any limit on the authority of public schools to remove books from a public school library, all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar.** *Board of Education v. Pico*, 457 U.S. 853, 871-872 (1982) [****18] (plurality opinion); *id.*, at 879-881 (BLACKMUN, J., concurring in part and in judgment); *id.*, at 918-920 (REHNQUIST, J., dissenting).

Id. at 684. As the Court further noted, “[t]hese cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children -- especially in a captive audience -- from exposure to sexually explicit, indecent, or lewd speech. *Id.*

Consistent with the Supreme Court cases cited above, the United States Court of Appeals for the Second Circuit² has also consistently upheld a school district’s right to censor content that is “lewd” or “sexually explicit.” Just a few years ago in *R.O. v. Ithaca City School District*, the Second Circuit upheld a school’s decision to censor content that included “cartoon . . . drawings of stick figures in various sexual positions” deeming it “unquestionably lewd.” 645 F.3d 533, 541 (2d Cir. 2011). Particularly relevant here, the Second Circuit defines “lewd” as “inciting to sensual desire or imagination.” *Id.* (citing *Guiles*, 461 F.3d at 327 (quoting *Merriam Webster’s Third New Int’l Dictionary* 1147 (1st ed. 1981))); *see also id.* (describing lewd, vulgar, and indecent expression as “speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo”).

² New York falls within the jurisdiction of the United States Court of Appeals for the Second Circuit.

II. A Teacher Does Not Have Academic Freedom to Expose Minors to Sexually Explicit Content.

Petitioners also outrageously suggest that the library media specialist has a right to academic freedom to expose students to books containing graphic sexual content and/or detailed descriptions of individuals engaged in sexual intercourse or other acts. Once again, Petitioners have taken case law entirely out of context to support such an assertion. To be clear, New York does **not** recognize any such right. As the case cited by Petitioners actually explains, “[b]oards of education have the right to ‘establish and apply’ curricula” – not teachers. *Appeal of Rickson*, N.Y. Ed. Dept. Decision No. 18,211, 2022 NY EDUC. DEPT. LEXIS 140 at *7-8 (November 22, 2022). And while this right must be “balanced against teachers’ right to academic freedom, *see Matter of Malvern Union Free Sch. Dist. v. Sobol*, 181 AD2d 371 (3d Dept 1992), this right is not absolute. Instead, teachers must first demonstrate the instruction (1) has educational value; (2) is relevant to the curriculum; and (3) is “suitable to the age and maturity of the students.” *Id.* at *8.

In *Appeal of Rickson*, the content deemed acceptable and meeting the requisite criteria involved an interview with a physician on the issue of vaccinations and national and international policies – not sexually explicit romance novels. The discussion topics for students to consider centered around identification of the physician’s credibility/experience; comparison of how other countries handled the vaccination issue; and whether Constitutional rights were being upheld or violated, etc. Thus, while the content may have been controversial, it was not lewd or inappropriate.

Here, in stark contrast, the books are nothing more than fiction novels containing graphic descriptions of sexual encounters between children and/or adults of various sexual identities.³ While Petitioners Bastian and Drahms make general assertions that the Committee determined that the books are “educationally suitable,” for children in ages ranging from junior to senior high school, and met the six criteria, they wholly fail to articulate with any specificity how these books actually satisfy those standards. Further, as courts have properly noted, any educational content would be undermined by the inappropriate content.

To be sure, neither the Guidebook created by Petitioner Bastian, nor Board Policies 8320, etc., contain any provision guaranteeing access to lewd or sexual content. Both the Guidebook and Board Policies are subject to controlling case precedent here and do not override the Board’s responsibilities to protect students from exposure to inappropriate content which – as explained in more detail below – is proven to cause harm from childhood into adulthood.

³ Petitioners also inaccurately suggest that both Reverend Marchitell and the Board’s opposition to these books is based on ideological objections because the books explore themes related to race or LGTBT. Petitioner, at ¶ 36. These accusations are wholly unsupported. The books initially removed actually represent a host of various themes including more than just racism and LGTBTQ, but all the books contain inappropriate and graphic sexual content.

III. NYSED Supports School Districts' Decisions to Restrict Lewd or Inappropriate Content in School.

NYSED has upheld school districts' decisions to remove lewd or inappropriate content in schools and even punish students for violating such policies. *See Appeal of Parsons*, N.Y. Ed. Dept. Decision No. 12,954, 1993 NY Educ. Dept. LEXIS 81 (June 30, 1993). In *Appeal of Parson*, a high school senior student was suspended for wearing a t-shirt worn by the student which contained the words "BIG JOHNSON – the World's Largest Revolvers" and depicted "a revolver to the head of another boy with a woman standing behind them near a motorcycle." Words on the back of the T-shirt included "YOU NEVER SHOOT BLANKS WHERE YOU'RE PACKIN' A BIG JOHNSON."

Upholding the school district's decision to suspend the student, the Commissioner cited the Supreme Court's decision in *Bethel* and affirmed that, unlike political expression, "obscene, indecent or profane language . . . offend[s] for the same reasons that obscenity offends." Accordingly, "**such utterances [have]. . . no essential part of any exposition of ideas, and. . . of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.**" *Id.* at *5 (citing *Bethel*, 478 U.S. at 685).

Rejecting the student's claim that his T-shirt was not vulgar or offensive, the Commission explained,

Despite petitioner's argument that the T-shirts are neither, the term "johnson" is defined in the Oxford English Dictionary, 2nd Ed., as a slang word meaning "penis." As such, it takes little imagination to view the T-shirts in question as portraying phallic symbols and speech consisting of sexual metaphors. Accordingly, there is no basis to find that Alan's suspension for continuing to wear the offending T-shirt after repeated warnings and requests that he cover it or change it infringed upon his First Amendment right to freedom of expression.

Id. at *6. The Commissioner concluded that it is entirely appropriate and within a school district's authority and responsibility to ban such content even when it might otherwise have been protected as "political expression."

In the same vein, even if petitioners could demonstrate that the books met the appropriate criteria the Board maintains a duty and certainly a legitimate interest to remove such books due to the lewd and sexual content.

IV. The Documented Harms Relating to the Early Exposure of Minors to Sexual Content Is Undisputed and Serves as a Compelling Reason for the School Board to Act.

In addition to undisputed case law supporting the Board's decision to remove the books, extensive research documenting the numerous harms to minors caused by early exposure to sexual content further supports the Board's decision. Early exposure of minors to sexual content has been

associated with serious long-term consequences. A 2012 study showed that minors who were exposed to sexual content were more likely to initiate sexual activity at an earlier age than their counterparts who were not exposed.⁴ This study suggested that exposure to sexually explicit content increased sexual risk-taking by accelerating the sexual curiosities of students during adolescence.⁵ Another study in 2009 showed similar effects from X-rated movies, internet pornography, and adult literature and magazines.⁶⁷

Increased sexual risk-taking in minors has been shown to greatly increase their likelihood of experiencing:

- sexually transmitted infections,⁸
- pregnancy,⁹
- sexual abuse and victimization,¹⁰
- lower educational attainment,¹¹ and
- engagement in other risk behaviors, such as smoking, drinking, and drugs.¹²

Once more, minors who engage in sexual activity are:

- more likely to participate in anti-social or delinquent behavior,¹³
- more likely to experience decreased relationship quality and stability, including a higher likelihood of divorce later in life,¹⁴

⁴ O'Hara, et. al, *Greater Exposure to Sexual Content in Popular Movies Predicts Earlier Sexual Debut and Increased Sexual Risk Taking*, Psychological Science, (2012), <https://doi.org/10.1177/0956797611435529>.

⁵ *Id.*

⁶ Brown, J. D., & L'Engle, K. L., *X-Rated: Sexual Attitudes and Behaviors Associated With U.S. Early Adolescents' Exposure to Sexually Explicit Media*, Communication Research, (2009), <https://doi.org/10.1177/0093650208326465>.

⁷ *Id.*

⁸ Bradley, Beverly J & Greene, Amy C, *Do health and education agencies in the United States share responsibility for academic achievement and health? A review of 25 years of evidence about the relationship of adolescents' academic achievement and health behaviors*, Journal of Adolescent Health, (2013), [Do health and education agencies in the United States share responsibility for academic achievement and health? A review of 25 years of evidence about the relationship of adolescents' academic achievement and health behaviors - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/23811111/).

⁹ *Id.*

¹⁰ Kastbom, Asa A, et. al, *Sexual debut before the age of 14 leads to poorer psychosocial health and risky behaviour in later life*, Acta Paediatrica, (2015), [Sexual debut before the age of 14 leads to poorer psychosocial health and risky behaviour in later life - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/26011111/).

¹¹ Kagesten, Anna & Blum, Robert Wm, *Characteristics of youth who report early sexual experiences in Sweden*, Archives of Sexual Behavior, (2015), [Characteristics of youth who report early sexual experiences in Sweden - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/26011111/).

¹² Kastbom, Asa A, et. al, *Sexual debut before the age of 14 leads to poorer psychosocial health and risky behaviour in later life*, Acta Paediatrica, (2015), [Sexual debut before the age of 14 leads to poorer psychosocial health and risky behaviour in later life - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/26011111/); Coker, A. L., et. al, (1994) *Correlates and consequences of early initiation of sexual intercourse*, Journal of School Health, (1994), [Correlates and consequences of early initiation of sexual intercourse - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/10511111/).

¹³ Tubman, J G, et. al, *The onset and cross-temporal patterning of sexual intercourse in middle adolescence: prospective relations with behavioral and emotional problems*, Child Dev., (1996), [The onset and cross-temporal patterning of sexual intercourse in middle adolescence: prospective relations with behavioral and emotional problems - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/10511111/).

¹⁴ Paik, Anthony, *Adolescent Sexuality and the Risk of Marital Dissolution*, Journal of Marriage and Family, Vol. 73, Issue 2, (2011), [Adolescent Sexuality and the Risk of Marital Dissolution - Paik - 2011 - Journal of Marriage and Family - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/21111111/).

- more likely to live in poverty,¹⁵
- more likely to experience a decrease in general physical and psychological health, including depression,¹⁶
- less likely to exercise self-efficacy and self-regulation,¹⁷ and
- less attached to family, school, and faith.¹⁸

Another study indicates that sexual relationships in middle adolescence signifies problems in development rather than success maturation into adulthood.¹⁹

In summary, exposure to sexual content only encourages sexual behavior. In turn, sexual behavior among adolescents leads to negative physical, mental, social, and economic health outcomes for youths.

V. The Board’s Decision to Remove the Books Meets Legitimate Pedagogical Interests.

As the case law and research cited above demonstrates, the Board not only has a legitimate interest to ensure students aren’t exposed to early sexualization through graphic sexual content in school libraries, it has a compelling interest in doing so.

As Petitioners expressly acknowledge, New York law gives a board of education “broad authority to prescribe the course of study in the schools of the district, *including the ability to manage its library collection.*” As the evidence above demonstrates, the Board’s objective to “provide a positive school culture which promotes self-esteem, mutual respect, fair treatment, the responsible exercise of freedom” is undoubtedly undermined by exposing children to graphic sexual content contained within these books.

[Family - Wiley Online Library](#); Sandfort, Theo G., et. al, *Long-term health correlates of timing of sexual debut: results from a national US study*, Am. J. Public Health, (2008), [Long-term health correlates of timing of sexual debut: results from a national US study - PubMed \(nih.gov\)](#).

¹⁵ Finger R, et. al, *Association of virginity at age 18 with educational, economic, social, and health outcomes in middle adulthood*, Adolescent Family Health (2004); Cubbin C, et. al, *Neighborhood poverty, aspirations and expectations, and initiation of sex*, J Adolesc Health., (2010), [Neighborhood poverty, aspirations and expectations, and initiation of sex - PubMed \(nih.gov\)](#).

¹⁶ Tubman, supra note 12; Sandfort, supra note 13; O’Donnell, L., et. al, *Early sexual initiation and subsequent sex-related risks among urban minority youth*, *Family Planning Perspectives*, (2001), [Early sexual initiation and subsequent sex-related risks among urban minority youth: the reach for health study - PubMed \(nih.gov\)](#); Kaltiala-Heino, et. al, *Early puberty and early sexual activity are associated with bulimic-type eating pathology in middle adolescence*, *Journal of Adolescent Health*, (2001), [Early puberty and early sexual activity are associated with bulimic-type eating pathology in middle adolescence - PubMed \(nih.gov\)](#), Bidwell, R.J., *Adolescent Sexuality*, Case based pediatrics for medical students and residents, Honolulu Hawaii: University of Hawaii Department of Pediatrics, (2003), [Case Based Pediatrics Chapter \(hawaii.edu\)](#).

¹⁷ Kastborn, supra note 9.

¹⁸ Ream, G.L., *Reciprocal Effects between the Perceived Environment and Heterosexual Intercourse Among Adolescents*, J. Youth Adolescence, (2006), [Reciprocal Effects between the Perceived Environment and Heterosexual Intercourse Among Adolescents | SpringerLink](#).

¹⁹ Kaltiala-Heino, et. al, *Pubertal timing, sexual behaviour and self-reported depression in middle adolescence*, *Journal of Adolescence*, (2003), [Pubertal timing, sexual behaviour and self-reported depression in middle adolescence - ScienceDirect](#).

While the “library [can] be a principal place in our society where one can go to explore and find” ideas, *see* Petition, at ¶ 62, it should not be a place where a **minor child** can go and access **sexually explicit** material. Courts recognize a widespread “interest in protecting minors from exposure to vulgar and offensive spoken language.” *Bethel*, 478 at 684 (citing *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). In no other public arena would the arguments presented by the petitioners – i.e. that teachers or parents have a right to expose minors to, or that students should be able to access, sexually explicit and other indecent content without restriction – pass muster. And it certainly should not in this context involved a school library.

Conclusion

A change in the Board’s policy to prohibit materials containing lewd, vulgar, and/or sexual content is consistent with the constitutional principles in our country and long-standing case law. As such, and in keeping with a course of action that will best protect minor children, we respectfully request that the Board reverse its decision to include the five books referenced above containing sexually explicit material in the Jr/Sr. High School. In addition to this request, our clients will be filing an appeal with the NYSED Commission on Friday, October 13, 2023. Should you wish to discuss this matter further or have any questions in this regard, please feel free to contact me directly at (615) 599-5572, ext. 4006.

Sincerely,



Abigail A. Southerland*
Senior Litigation Counsel
American Center for Law & Justice



*Admitted to practice in Tennessee