THE DUKE LEGAL CLINICS | First Amendment Clinic

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Pam Thompson
Moore County Schools Board of Education
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By email: Pam.thompson@ncmcs.org, cparker@ncmcs.org

Dear Ms. Thompson and Moore County Schools Board of Education:

We are writing with regard to the conduct of Board member Philip Holmes and administrators at Pinecrest and North Moore High Schools. In early May, following a meeting with Mr. Holmes regarding books in the school's library, Pinecrest principal Stefanie Phillips removed the book "Life is Funny" by E.R. Frank from the library, reportedly due to a few passages that she found to be "pervasively vulgar." Mary Kate Murphy, School Library Books: Removal Campaign Continues, The Pilot, May 13, 2022. The removal of this book occurred around the same time that Mr. Holmes successfully advocated for the removal of "Looking for Alaska" by John Green from North Moore High School's library. The removal and banning of these two books violate the Board's own policies, North Carolina law, and the First Amendment. In light of this, we request that in future all Moore County Schools staff follow the prescribed procedures for challenging library books, which includes at least two levels of review beyond the initial, informal approach. MOORE CNTY. SCHS. POL'Y ser. 5410R, pt. E, paras. 3, 4. We also hope that all decisions concerning such challenges will be consistent with the U.S. Supreme Court's First Amendment jurisprudence.

Moore County Board of Education policy lays out a three-step procedure for addressing "objections to some [school library] resources . . . voiced by the public." Ser. 5410R, pt. E. The first step requires the complainant to discuss her concerns with staff members in an attempt to "resolve the issue informally." However, both the policy itself and North Carolina law strongly suggest that removal of the challenged material from the library is impermissible at this step of the process.[1] State law gives school boards *sole* authority to decide whether challenged material should be removed or retained. N.C. GEN. STAT. § 115C-98. Thus, building-level staff—including the school principal—lack the authority to make such decisions. This is reflected in the fact that the Board's policy does not give any committee convened to assess the complainant's challenge the authority to make removal decisions, but merely authorizes it to issue recommendations to the Board. Ser. 5410R, pt. E, paras. 3, 4. Thus, Moore County school staff

[1] Parents can demand that a particular resource not be made available to their child, ser. 5410R, pt. E, para. 2, but are not entitled to make the same demand on behalf of all children in the district.

who removed books from libraries after informal meetings with Mr. Holmes or any other concerned citizen violated the Board's policies and North Carolina law.

In addition, Board policy guarantees that each complaint will receive "due process," which requires, in this instance, a public hearing on the matter. *Id.* Numerous courts, including the U.S. Supreme Court, have held that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." U.S. Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 272 (2010) (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)); *see also* Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1229 (11th. Cir. 2009) (stating that "notice and an opportunity to be heard" is a "root requirement" of due process in a case concerning removal of books from a school library). Since all Moore County Schools students and their parents have an interest in school library books, the Board's due process guarantee requires it to conduct a public hearing when considering any removal demands. Clearly, no such hearing occurred in the instant case, in contravention of the Board's own policy of due process.

Furthermore, to the extent that school administrators removed books based on their personal beliefs, the removals violate the First Amendment.[2] The First Amendment prohibits school officials from taking books off school library shelves merely "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.'" Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982) (plurality opinion) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)). The books caught in Mr. Holmes' crosshairs all address topics like transgender identity, homosexuality, and systemic racism in ways that some may find offensive. But it is well-established law that school officials do not have the discretion to "transmit community values" by removing library books based upon their "personal social, political, and moral views." *See, e.g.*, Case v. United Sch. Dist. No. 223, 908 F. Supp. 864, 876 (D. Kan. 1995).

Ms. Phillips cited the "pervasive vulgarity" of parts of "Life is Funny" as the reason for its removal, and Mr. Holmes has been quoted voicing similar concerns with that and other books. This reason is unlikely to stand up in court to justify removal here. First, to pass constitutional muster, the vulgarity that forms the basis of officials' decisions must be truly *pervasive*—not limited to a few sexually explicit passages, as appears to be the case in "Life is Funny." *Cf.* Pico, 457 U.S. at 890 (Burger, J., dissenting) (questioning why vulgarity must be "pervasive" to be constitutionally proscribed, rather than "concentrated in a single chapter or a single page"). Second, numerous courts have treated the failure of school boards to follow their own, established procedures as important evidence of constitutionally improper motivations. *See, e.g.*, Case, 908 F. Supp. at 876; Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 190–91 (5th

[2] The standards for free-speech claims under the North Carolina Constitution are substantially identical to those for free-speech claims under the federal constitution. *See, e.g.*, Munn-Goins v. Bd. of Trs. of Bladen Cmty. Coll., 658 F. Supp. 2d 713, 730 (E.D.N.C. 2009); State v. Petersilie, 432 S.E.2d 832, 841 (N.C. 1993); Evans v. Cowan, 510 S.E.2d 170, 175–76 (N.C. Ct. App. 1999); Lenzer v. Flaherty, 418 S.E.2d 276, 287–88 (N.C. Ct. App. 1992). Therefore, the conduct at issue here is likely violative of North Carolina's highest law as well as the First Amendment.

Cir. 1995); Pico, 457 U.S. at 874–75. Thus, the failure of school administrators to follow the Board's 5410R procedure in this case will likely evoke skepticism in a reviewing court. Finally, evidence that school board members had not read a book before voting to remove it is another indication of an unconstitutional intent to "strangle the free mind at its source." Campbell, 64 F.3d at 190 (quoting W. Va. Bd. of Educ., 319 U.S. at 624, 637). Although it is unknown whether Mr. Holmes or school administrators are suitably familiar with the books in this case, local news reporting that Mr. Holmes mistakenly led an inquiry into the educational suitability of Joseph Conrad's "Heart of Darkness," mistaking it for Ashley Hope Perez's "Out of Darkness," suggests that he may have scant knowledge of the books he seeks to remove. *See* Murphy, *supra*.

In light of the foregoing, we request that in the future, all Moore County Schools staff rigorously follow the Board's 5410R procedures, and that all decisions concerning challenges to school library books be in harmony with the First Amendment. Furthermore, we ask that the Moore County Schools clarify the status—available or unavailable, under review for removal or not—of "Life is Funny," "Looking for Alaska," and any other resources challenged by Board members. Finally, if you have any questions regarding your First Amendment obligations to constituents, we would be happy to advise you to provide additional clarification.

Thank you for your time and attention to these concerns, which we hope can be addressed swiftly and amicably.

Kind regards,

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