



# LAKE COUNTY

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## MEMORANDUM

TO: Board of County Commissioners

FROM: Melanie Marsh, Acting County Attorney *mm*

DATE: November 13, 2009

RE: Re-location of Library Books

### Issue Presented

- 1) Whether the government can remove books deemed inappropriate for certain age groups from the young adult section of the public library and re-locate such books to the adult section without violating the First Amendment of the U.S. Constitution?
- 2) Whether the government can refuse to purchase books deemed inappropriate for certain age groups without violating the First Amendment of the U.S. Constitution?

### Brief Answer

- 1) Courts have generally held that the relocation of a book from a children's section to the adult section of the public library constitutes a violation of the First Amendment of the U.S. Constitution, unless such publications are deemed obscene as that term is defined by the U.S. Supreme Court and Florida Statutes, or unless such decision is based upon established, regular, and facially unbiased procedures for review of controversial materials.
- 2) The government has discretion to determine what publications are appropriate for the public library collection and is under no obligation to purchase any particular publication. Such discretion is necessary to insure that library collections meet the needs of the community to the fullest extent possible based on scarcity of funds, limited personnel, and restricted shelf space.

## Discussion

### 1. Removal/Relocation of Certain Books from Library Shelves.

The issue of whether or not a governmental body can remove certain targeted books from library shelves has been the subject of numerous court challenges. Challenges date back to at least 1978. However, the courts have been fairly consistent in their interpretation of the First Amendment as it applies to library materials.

The First Amendment to the United States Constitution indisputably protects the right to receive information. Sund v. City of Wichita Falls, 121 F.Supp. 2d 530, 547 (N.D. Texas 2003). The right to receive information is vigorously enforced in the context of a public library, the quintessential locus of the receipt of information. Id. Public libraries are limited public forums and the government's ability to restrict patron's First Amendment rights is extremely narrow. Id. at 548. Therefore, the government cannot limit access to library materials unless the government can demonstrate that the restriction is necessary to achieve a compelling governmental interest and there are no less restrictive means available. Id.

Removing obscene material from library shelves would constitute a compelling government interest as the U.S. Supreme Court has held that obscene material is unprotected by the First Amendment. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973); See also Board of Education v. Pico, 457 U.S. 853, 102 S.Ct. 2799 (1982) (stating that removal of books because they were pervasively vulgar would not violate constitutional principles). However, what constitutes obscene material is generally defined by state law. In Florida, the Legislature has defined "obscene" to mean:

The status of material which (a) the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest; (b) depicts or describes, in a patently offensive way, sexual conduct as specifically defined [in the Florida Statutes]; and (c) taken as a whole, lacks serious literary, artistic, political, or scientific value.

Fla. Stat. §847.001(10) (2009). The Florida definition of "obscene" reflects the definition of obscene as set forth in the Miller case.

Alternatively, removal or relocation of publications based upon an "established, regular, and facially unbiased procedure for the review of controversial materials," would be permissible. Board of Education v. Pico, 457 U.S. 853, 102 S.Ct. 2799 (1982). However, where the government, in making their decision to remove or relocate a publication, ignores the advice of literary experts, ignores the views of librarians and teachers, and ignores the guidance of literary publications that rate books for students, it faces a challenge that the decision was based upon irregular and *ad hoc* procedures. Id. at 2812.

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In Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea, 454 F.Supp. 703 (Mass. Dist. Ct. 1978), the School Committee barred from the high school library an anthology of writings which included a poem by a fifteen year old girl which the School Committee found to be "filthy and offensive" because it was replete with street language and sexual overtones. However, the School Committee never contended that the poem was obscene as that term was defined by the U.S. Supreme Court. The anthology was originally selected for the library based upon the fact that the editors were highly regarded professionals, and the publisher was one having a good reputation in the area of young adult literature.

The court's analysis in overturning the banning of the anthology was that the book was removed simply because its theme and language was considered offensive by the School Committee, not because the book was obscene as that term was defined by the U.S. Supreme Court. Evidence presented at the trial indicated that the anthology did have some literary value even if some parents and the School Committee believed it had no place in the library system. The court acknowledged that the poem was not polite, was tough, was challenging and thought-provoking, as it employed vivid street language, legitimately offensive to some, but certainly not to all. Id. at 714. As such, there was no compelling governmental interest in removing the book from the library.

A similar case from Texas involved the removal of two books which were geared towards children from gay or lesbian families. Sund v. City of Wichita Falls, 121 F.Supp. 2d 530 (N.D. Texas 2003). However, rather than outright banning the books from the public library, the City passed an ordinance which, upon receipt of a petition from 300 library card holders, would remove a publication from the children's section of the library to the adult section of the library. The defendants argued that since the books were being relocated rather than removed from the library no First Amendment violation existed. The court disagreed and stated that:

The burdens on Plaintiff's First Amendment rights imposed by the resolution are nonetheless constitutionally objectionable. Even where a regulation does not silence speech altogether, the Supreme Court has given the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.

Id. at 549. The opinion discussed the chilling effect on the First Amendment that the relocation option would have on those who sought the censored books, but who would only be able to locate the books if they knew in advance that they wanted that specific title. Id. at 549. The relocation option unconstitutionally burdens the browsing rights of library patrons. Id. 551. The court also opined that the relocation option could permit a non-parent to dictate what someone else's children may read, or could allow one parent to suppress material for not only her own children, but for all others in the community. Id. The responsibility lies:

Where First Amendment rights are concerned, those seeking to restrict access to information should be forced to take affirmative steps to shield themselves from unwanted materials; the onus should not be on the general public to overcome barriers to their access to fully-protected information.

Sund, 121 F.Supp. at 551.

The same line of reasoning was followed in Counts v. Cedarville School District, 295 F.Supp.2d 996 (W.D. Arkansas 2003), in which the Harry Potter series of books were made available to students only upon being given written permission from a parent to access such books. The court stated that “these burdens, albeit relatively small, constitute a sufficient allegation of an actual concrete and particularized invasion of a legally protected interest.” Id. at 999. Further, the court dismissed the banning authority’s arguments that the students had access to the books in other forums on the grounds that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” Id. at 1000. Therefore, unless the government can show that restrictions such as requiring parental permission to access a publication are justified, the restrictions amount to an impermissible infringement of First Amendment rights. Id. at 1002.

Based upon the foregoing legal authorities, choosing to remove or relocate a particular publication from library shelves implicates the First Amendment of the U.S. Constitution. The law is clear that government officials cannot remove books simply because they dislike the ideas contained within those books. Sund, 121 F.Supp. 2d at 548. View-point and content-based discrimination is constitutionally impermissible unless narrowly tailored to serve a compelling state interest. Obscenity constitutes a compelling state interest if it meets the statutory definition. Removal or relocation on the grounds of anything short of meeting the statutory definition of obscenity, or following an established, regular, and facially unbiased procedure for the review of controversial materials opens the door for constitutional challenge and litigation.

## 2. Discretion to Purchase for Library Collections

The case law is clear that governments have discretion in determining what publications to purchase for its library collections. There is no obligation on the behalf of government to purchase any particular book or publication. Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea, 454 F.Supp. 703 (Mass. Dist. Ct. 1978). Purchasing decisions requires choosing from an infinite variety of books while still maintaining budgeting restrictions, personnel restrictions and restricted shelf space. Id. at 713. Further, the U.S. Supreme Court stated in Board of Education v. Pico, 457 U.S. 853, 102 S.Ct. 2799 (1982), that nothing within their decision on the removal of books from a library collection, affects the discretion of a government to choose books to add to a public library.

3. County Policies

In accordance with case law and generally accepted library standards, the County has adopted a Collection Development Policy (LCC-11) and a Patron Request for Reconsideration of Library Materials Policy (LCC-12). Reconsideration Policy provides patrons an avenue by which a publication contained within a branch or member library may be reviewed. The policy utilizes the standards set forth in the Development Policy. The standards are as follows:

- a. Relevance to community needs
- b. Timeliness or permanence of the material
- c. Suitability of subject, style, and level for the intended audience
- d. Quality of writings, design, illustrations, or production
- e. Relative importance in comparison with existing materials in the collection on the same subject
- f. Critics' and staff's reviews
- g. Reputation of the publisher or producer; authority and significance of the author, composer, filmmaker, etc.
- h. Price
- i. Appearance of title in special bibliographies or indexes
- j. Availability and suitability of format.

In accordance with the Pico case, following an established, regular, and facially unbiased procedure for the review of controversial materials, would be a permissible way to evaluate a particular controversial publication. The County has established such a procedure and those procedures should be followed.

cc: Sanford Minkoff, Interim County Manager