BOOK CHALLENGES, CENSORSHIP, AND MICHIGAN PUBLIC LIBRARIES

This information sheet is intended as a tool to assist in clarification and decision making for Public Library Directors and Boards. It is not intended as legal advice. Library Boards and Directors should consult with their library attorneys when determining a plan or policy for their libraries.

December 6, 2021

Background on the Right to Information

The first amendment of the U.S Constitution secures the right of free speech for every person in the United States. In 1947, the Supreme Court of the United States confirmed in Martin v. City of Struthers, Ohio, (319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943), that the framers of the constitution intended that freedom of speech under the first amendment right of freedom of speech included the right to receive information:

"*The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, Lovell v. Griffin, 303 U.S. 444, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949, and necessarily protects the right to receive it.*"

The Martin case involved a municipal ordinance that prevented a religious group from distributing pamphlets door to door, but it is the first case to establish a right to receive information under the first amendment. There have been several cases and opinions after Martin which follow the right to receive information, and some of those connect the exercise of this right to public library access:

"*At the threshold, however, this right, first recognized in Martin and refined in later First Amendment jurisprudence, includes the right to some level of access to a public library, the quintessential locus of the receipt of information."* Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242 (1992) (Case involved Library policies that restricted the use of the library by homeless man).

Kreiner is a federal court of appeals case from the third circuit. Its analysis of the proximity of public libraries to the right to receive information has been widely accepted legal precedent.

In other words, people in the United States have a constitutional right to information and a fundamental way to exercise that right is through a public library.

Therefore, removing materials from a library simply because some members of the community object to the content, is censorship, which is a violation of the First Amendment.

"[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read ...and freedom of inquiry, freedom of thought, and freedom to teach....Without those peripheral rights the specific rights would be less secure." Griswold v. Connecticut, 381 US 479 *(1965)*. (Case involved a state law prohibiting the distribution of information about contraceptives to women without the permission of their husbands).

Even though schools have some latitude with which to restrict materials to those which support a prescribed curriculum, the Supreme Court in Pico still determined that content-based removal of certain books from the

school library was a violation of students' first amendment rights. Bring this analysis to a public library situation (where there is little recognized authority to restrict access to information) and the bar against content-based removal is even more obvious.

"*We hold that local school boards may not remove books from school library shelves simply 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." West Virginia Board of Education v. Barnette, 319 U.S., at 642, 63S.Ct., at 1187. Such purposes stand inescapably condemned.*" *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982)*

Q. Don't public libraries restrict access to information simply by choosing to purchase some materials over others? Isn't that censorship?

A. Public libraries, and indeed all libraries, by necessity, must have comprehensive policies and procedures for determining what materials their collections should contain. No library, save the Library of Congress, has the space and resources to acquire and circulate every publication on every topic. Libraries make decisions according to objective criteria that considers, among other factors, their budget, the demographics of their community, the current circulation habits and demands of their patrons, contemporary societal issues and events, the literary or entertainment quality of the material (as considered by objective professional reviews, author reputation and experience, etc.), public libraries' through their collections, must anticipate the information that will be in demand and of use by their patrons, and must represent a broad representation within that information.

This detailed vetting process is called a library's collection development policy, and this policy details how materials are selected for inclusion into the collection.

So, while it is true that librarians do make choices between materials and between subject matter, the mission of most public libraries is to provide a well-rounded collection that represents multiple perspectives as well as the facts connected to a certain topic.

""To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons. Although they seek to provide a wide array of information, their goal has never been to provide "universal coverage." Id., at 421. Instead, public libraries seek to provide materials "that would be of the greatest direct benefit or interest to the community." Ibid. To this end, libraries collect only those materials deemed to have "requisite and appropriate quality." Ibid. See W. Katz, Collection Development: The Selection of Materials for Libraries 6 (1980) ("The librarian's responsibility ... is to separate out the gold from the garbage, not to preserve everything"); F. Drury, Book Selection xi (1930) ("[I]t is the aim of the selector to give the public, not everything it wants, but the best that it will read or use to advantage"); App. 636 (Rebuttal Expert Report of Donald G. Davis, Jr.) ("A hypothetical collection of everything that has been produced is not only of dubious value, but actually detrimental to users trying to find what they want to find and really need")."

United States v. Am. Libr. Ass'n, Inc., 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) (case involving the constitutionality of CIPA and forced library filtering).

IN other words, selecting materials for a public library using a professional process involving objective criteria is very different from removing material because the remover dislikes, or is made uncomfortable by the content. One is collection development, one is censorship.

Collection development information can be found:
https://www.michigan.gov/libraryofmichigan/libraries/admin/qsac/appendices2/appendix-d-collection-development

Q. But every right – including speech- has limits. Aren't there limits or exceptions to this idea of "right to information?" What if the information desired or available could cause harm, or does not align with "community standards," or reflects opinions and values that are objectionable?

As with most of our constitutional rights, freedom of speech and the right to information that flows from it are not absolute. There are circumstances under which information can be restricted, such as when part of a public school classroom curriculum (because a school has specific educational and curricular requirements that may necessarily involve the inclusion of some topics and not others, and a school can require students to read about specific topics and opinions), or in a private library or business (because private entities are not bound by the first amendment when offering information), or within a religious organization. The only speech that can be restricted by content is speech that is found to be:
Defamatory – Speech or information that is false and could harm the reputation of the individual discussed (especially if the speaker (or writer) knew the information was false).
True Threats - Speech that promises a crime will be committed ("I am going to kill you if you don't give me your money").
Fighting Words – Face to face Speech that when said, has a high probability of provoking a physical fight or violence between parties. *Chaplinsky v. New Hampshire (1942)*
Inciting Words – Speech that is made in order to inspire "imminent lawless action," **and** is likely to actually cause the lawless action. (Such as a speaker deliberately rallying a crowd to riot or commit another unlawful act, in a situation where the crowd was already excited and rowdy and likely to riot). *Brandenburg v. Ohio*
Obscenity – Probably one of the most misunderstood exemptions. The definition of "obscenity" as determined by the supreme court in Miller, is a vague one that is only really applicable to a court (since only a court can truly label content as "obscene.").
In Miller, the Supreme Court's test defining obscenity is:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, ("Prurient" = arouses sexual desire).
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 2615, 37 L. Ed. 2d 419 (1973)

Generally, the label of obscenity seems to be applied to extreme representations of sexually explicit material, such as child pornography, bestiality, and other activities rejected on a societal level. It does not generally seem to apply to legal adult pornography or sexual content in literature – even age-appropriate content in literature aimed at younger readers. Material is not obscene simply because it is depicting activity that is controversial or non-conforming to what is considered "normal." The label seems to be intended by the court to be applied to "hard core" sexual content:
"Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct. "Miller v. California, 413 U.S. 15, 27, 93 S. Ct. 2607, 2616, 37 L. Ed. 2d 419 (1973)

Now, Michigan has a law that restricts the dissemination of sexually explicit materials to minors. The Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors Act, 1978 PA 33, MCL 722.671 et. Seq. https://legislature.mi.gov/Laws/MCL?objectName=MCL-33-1978-I. The first part of this act provides criminal penalties for the dissemination of sexually explicit content to minors. The second part of this act restricts the sale of violent videogames to minors. Although amendments to the statute have been struck down by courts as unconstitutional, a more recent amendment to MCL 722.673 et seq. reworded the law and is currently in effect.
The law specifically exempts teachers and librarians from prosecution for disseminating sexually explicit materials as a part of their employment (checking books out, buying books or using books as part of an

approved curriculum) (see Section 6(d), ,MCL 722.676(d)
https://legislature.mi.gov/Laws/MCL?objectName=MCL-722-676 .
The second part to the law, which restricts videogames, was also struck down as unconstitutional, and is not currently in effect. The restrictions centered on violence.
For additional information on restrictions beyond content based restrictions, see
https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/266 (National Constitution Center)
The right to receive information is not absolute, but neither is it a right that is easily negated.

Q. I am hearing of librarians being accused of providing sexual content to minors. Can I be criminally liable if a patron or board member feels a title is "sexual content," or inappropriate?
Unless you are providing minors with sexual content with the intention of receiving or experiencing gratification or sexual activity, it is unlikely. The Michigan law expressly exempts librarians and teachers providing materials in the context of their employment. (See discussion in previous question, above). MCL 722.676(d) https://legislature.mi.gov/Laws/MCL?objectName=MCL-722-676 .
Libraries and librarians concerned about any type of legal liability should always consult their library attorney, and or their personal attorney.

Q. Don't library boards and library directors have a responsibility to protect their community (especially children) from materials that expose patrons to inappropriate and harmful topics? If these boards and librarians wouldn't let their own kids watch or read this material, why permit any other child to?
A. The issue here is who decides what is "inappropriate" and "harmful?" Who gets to decide what topics or types of material everyone else is allowed to see/view/read/hear? Just because one portion of the community is uncomfortable with a topic, or has a religious or other objection, is not sufficient grounds to deny the rest of the community access to that material, to those ideas. The law already accounts for truly harmful content. The rest is a matter of personal and familial choice and culture. Public libraries do not stand in the shoes of parents with regards to the welfare of their children. They are not a school, or a childcare center. They are public spaces that welcome people of all ages and types with the mission of providing the information, or the means and expertise to locate the information that each individual wish to have. Parents and guardians bear the responsibility and the right only to determine the materials they and their children can access.
"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion .... If there are any circumstances which permit an exception, they do not now occur to us." 319 U.S., at 642, 63 S.Ct., at 1187.Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982)

Q. Can a library governing board dictate the content-based removal of library materials?
A. This is a tricky question. In Michigan, most establishment types authorize the governing board of a library to be the legal representatives of the library. The governing board has the authority to make (among other decisions) policy, financial, personnel, and facilities decisions. However, as they say, "With great power comes great responsibility." An illegal, thoughtless or ill-conceived decision could result in the board being on the wrong side of a lawsuit, which can be very costly in money, community goodwill towards the library, and damage to the board's reputation. In reality, the issues surrounding content-based censorship and book removal are so divisive in U.S. culture that even if there is no lawsuit brought, the damage to the library's reputation with the community it serves (and is funded by) could cause years of bad feelings, as well as catastrophic losses in funding if the fallout includes the defeat of a millage. The question for the board becomes not "can you?" but "should you?" Is the content of the material so damaging that it is worth the

potential ramifications involved in removing it- especially when the action could end up being temporary since the materials could be easily re-instated upon the arrival of new terms and new board members?
"*If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of ideas. Thus, whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799,73 L. Ed. 2d 435 (1982)*

Q. Help! Our library is experiencing a book challenge. Where can I obtain more information and resources?
There are several good resources listed below. In addition, don't forget to reach out for help if you need it. You are not alone!

Contact your cooperative director. Chances are they have been through a challenge and can offer suggestions and support.

Contact the Library of Michigan Library Development team. We can offer information and support. **Contact ALA's Office of Intellectual Freedom** (ALA OIF). They have legal and library professionals who can advise you on managing the challenge. You do not have to be an ALA member to call!

Resources:
https://www.ala.org/tools/challengesupport - ALA Office of Intellectual Freedom (OIF) website for managing and reporting book challenges. One of the most comprehensive sites on materials challenges.

https://www.webjunction.org/documents/webjunction/Book_Censorship_in_Schools_A_Toolkit.html - Webjunction materials from National Coalition Against Censorship (NCAC) Sample letters and tips on a book challenge process. Aimed at school libraries but contains information of use to public libraries too.

https://www.ala.org/tools/challengesupport/selectionpolicytoolkit - ALA OIF Toolkit for challenges, reconsideration policies, and book selection policies- includes separate information aimed at public and school libraries.

https://ckls.libguides.com/c.php?g=833878&p=5954448 Central Kansas Library system – Book Challenges resources site. Contains sample reconsideration policies and letters as well as tips on handling a reconsideration request.

http://cbldf.org/2017/06/librarian-offers-tips-for-handling-ugly-book-challenges/ - (Comic Book Legal Defense Fund, CBLDF) Article with suggestions by a librarian who survived a contentious book challenge.

https://jaslarue.blogspot.com/2008/07/uncle-bobbys-wedding.html - Excellent example of a well- crafted letter responding to a book challenge by well-known speaker and former library director, Jamie LaRue.

https://bannedbooksweek.org/banned-books-week-handling-challenges/ - Another site managed by the ALA OIF. Focuses on banned books and banned books week. This page contains a summary of tips for handling book challenges.
http://cbldf.org/2021/10/comics-challenges-return/ - Website of the Comic Book Legal Defense Fund, which advocates for intellectual freedom protections for comic book (including Anime and Manga) works. Advises libraries and book sellers as well as artists and authors on handling challenges of comics and sequential art titles.

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