

Last month, USBE approved a Model Media Selection and Review policy in response to various book challenges last year and concerns from parents. USBE has requested each district review our policies and make sure we are up to date and robust prior to October 1st, 2022. Our goal, as always, is the education and protection of children.

DCSD's current policy and the model policy USBE approved in July are similar in many, many ways. Both allow for challenges and appeals and outline very similar methods of doing so. Both the current and model policies outline the selection process and the review process, though the model policy is more in-depth.

Last Fall, DCSD Media Specialists met in an effort to add more details to the current policy. Much of what they suggested is also in the model policy.

So, what differences are there between the current policy and the model policy? Here are the highlights:

1. The model policy requires additional record keeping (a list of which challenged books were discarded, and detailed records of each challenged book and its conclusion).
2. The model policy requires challenged material to be restricted while the committee is reviewing it.
3. The model policy includes guidelines for incorporating new Utah Code on sensitive materials and pornographic material.
4. The model policy includes a more detailed appeals process.
5. The model policy includes an appeals process to USBE.

Beyond the Model Policy, what additional changes are we recommending?

1. Utilize District-wide, instead of School-wide review of books when challenged.
2. Utilize the board as the Appeal Committee.

Link to Proposed Media Selection and Review Policy ([link](#))

Side by Side of policies

DCSD Current Policy	DCSD Media Ideas	USBE Model
<p data-bbox="201 1339 574 1472">No part of the Current Policy was kept word-for-word, and is therefore not comparable side-by-side.</p> <p data-bbox="201 1541 548 1640">4.0411 LITERATURE AND MEDIA SELECTION AND REVIEW</p> <p data-bbox="201 1709 586 1875">Duchesne County School District values the role of quality literature and media in the educational experience of students.</p>	<p data-bbox="646 1440 1003 1875">I. Library Policy A. Duchesne County School District libraries support and enhance student learning. DCSD values libraries, media centers, and library staff who select, maintain, and preserve rich repositories of balanced, relevant,</p>	<p data-bbox="1029 1339 1305 1402">Final Passed Version July 26 2022</p> <p data-bbox="1057 1440 1419 1875">I. Library Policy A. _____(LEA's name) school libraries support and enhance student learning. _____(LEA's name) values libraries, media centers, and library staff who select, maintain, and preserve rich repositories of balanced, relevant,</p>

<p>The Board is committed to thoughtful selection and consideration of required reading and viewing materials and recognizes the rights of parents to provide suggestions of quality material and to question literature or media, which they personally consider inappropriate or harmful to their own child.</p> <p>4.0411.01 ADMINISTRATION</p> <p>Issue Date: 10/9/08 Updated: 2/25/09</p> <p>1. The Literature and Media Selection and Review policy shall be administered according to established reading/viewing standards and a District Literature/Media Selection and Review Committee.</p> <p>2. The district will support DCSD educators and staff if they choose required literary materials from the DCSD Recommended Literature List and follow this policy's suggestion for use of media in the classroom (refer to Item 5).</p> <p>3. When educators wish to use literary resources that do not appear on the DCSD Recommended Literature List, a literature recommendation form available at the schools, district offices, or online can be submitted for committee review.</p> <p>4. Media includes both Educational and Entertainment productions. Teachers will consider media carefully before including it in</p>	<p>age appropriate, and varied educational sources for students.</p> <p>B. This policy specifies the process for identifying materials to be included or disqualified from use in libraries and schools based on Section 53G-10-103, Sensitive Instructional Materials, state and federal law, Board Rule R277-217, Educator Standards and LEA Reporting, or based on age appropriate content.</p> <p>II. Selection of Materials for Library Collection</p>	<p>age appropriate, and varied educational sources for students.</p> <p>B. This policy specifies the process for identifying materials to be included or disqualified from use in libraries and schools based on Section 53G-10-103, Sensitive Instructional Materials, state and federal law, Board Rule R277-217, Educator Standards and LEA Reporting, or based on age appropriate content.</p> <p>II. All employees of ____ (LEA's name) must adhere to this policy and are subject to the ____ (LEA's name) employee conduct policies for any personal violation.</p> <p>III. Selection of Materials for Library Collection</p> <p>A. The library professional or designated ____ (LEA's name) volunteer will initially select all library materials under the direction of the local board, including gifts and donations, consistent with this policy using the following criteria:</p> <p>1. seek recommendations and work collaboratively with parents, patrons, others in the school community during the selection process;</p>
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<p>classroom instruction. Teacher choices will adhere to the Duchesne County School District Reading/Viewing Standards.</p> <p>5. DCSD teachers are advised to disclose the names and ratings of each piece of media used in the classroom to parents.</p> <p>6. DCSD will support teacher selections that have been approved by the District Literature/Media Selection and Review Committee.</p> <p>7. Literature or media selected for individual reading or viewing by students does not fall under the guidelines of this policy.</p> <p>8. Media shown separately from an instructional classroom setting for entertainment, reward, or substitutes for recess do not fall under the guidelines of this policy but should comply with Duchesne County School District's movie licensing agreement.</p> <p>4.0411.02 DUCHESNE COUNTY SCHOOL DISTRICT READING/VIEWING STANDARDS</p> <p>Issue Date: 10/9/08 In DCSD, required literature/media selections whether presented orally or individually will meet the following criteria.</p> <ol style="list-style-type: none"> 1. The selection is age appropriate for students. 2. The selection presents themes and material that coincides with the maturity level of students. 	<ol style="list-style-type: none"> A. The responsibility for final material selection rests with library personnel under direction of the governing board of DCSD using the following criteria: <ol style="list-style-type: none"> 1. Overall purpose and educational significance; 2. Legality; and consistency with section IV.D of this policy; 3. Age and developmental appropriateness; 4. Timeliness and/or permanence; 5. Readability and accessibility for intended audience; 6. Artistic quality and literary style; 7. Reputation and significance of author, producer, and/or publisher; 8. Variety of format with efforts to incorporate emerging technologies; 9. Quality and value commensurate with cost and/or need. B. Electronic databases and other web-based searches and content will be filtered through the DCSD state-required internet Filter. 	<ol style="list-style-type: none"> 2. create a collection that reflects diversity of ideas; and 3. create a collection that adheres to the law. <ol style="list-style-type: none"> B. The responsibility for final material selection rests with trained library personnel under direction of the governing board of _____ (LEA's name) using the following criteria: <ol style="list-style-type: none"> 1. Overall purpose and educational significance; 2. Legality; 3. Age and developmental appropriateness; 4. Timeliness and/or permanence; 5. Readability and accessibility for intended audience; 6. Artistic quality and literary style; 7. Reputation and significance of author, producer, and/or publisher; 8. Variety of format with efforts to incorporate emerging technologies; and 9. Quality and value commensurate with cost and/or need. B. Electronic databases and other web-based searches and content will be filtered through the _____ (LEA's name) state-required internet filter.
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<p>3. The selection is appropriate for the viewing/reading level of a majority of students.</p> <p>4. The selection illustrates and teaches specified objectives for learning and follows curricular framework as outlined in the Utah State Core Curriculum.</p> <p>5. The selection will help the students better understand the content, themselves or others.</p> <p>6. The selection has identifiable literary or curricular merit.</p> <p>7. The selection appropriately teaches educational elements, concepts, and genres</p> <p>4.0411.03 DISTRICT LITERATURE/MEDIA SELECTION AND REVIEW COMMITTEE</p> <p>Issue Date: 10/9/08 Updated: 2/25/09</p> <p>1. The Purpose of the DCSD Literature/Media Selection and Review Committee is to review literature and media that have been formally challenged and to select literature for the DCSD Recommended Literature List.</p> <p>2. Chosen literary materials will meet the District Reading/Viewing Standards and be placed on a recommended reading list.</p> <p>3. The Review Committee will include a District Supervisor, one certificated school library media teacher, an appropriate licensed</p>	<p>C. Gifts and donations will be reviewed following selection criteria and will be accepted or rejected using the same criteria.</p> <p>III. Library Collection Maintenance</p> <p>A. Library materials will be maintained consistent with the criteria listed in II.A.2, state and federal laws, including Utah Code Ann. Section 53G-10-103.</p> <p>B. The school librarian or designated specialist will inventory the school library collection and equipment regularly.</p> <p>1. The inventory may be used to determine losses and remove damaged or worn materials to be</p>	<p>C. Gifts and donations will be reviewed following selection criteria and will be accepted or rejected using the Same criteria; and</p> <p>D. A record of reviewed materials will be maintained by each school within ____ (LEA's name) and include:</p> <ol style="list-style-type: none"> 1. the name of the school; 2. the title and author of the material; 3. all available formats of the material (digital/hard copy/etc.); 4. the intended use of the material; 5. the date the material was reviewed; and 6. the employee's name and title that reviewed the material. <p>III. Library Collection Maintenance</p> <p>A. Library materials will be maintained consistent with the criteria listed in II.D, state and federal laws, including Utah Code Ann. Section 53G-10-103, and represent varying viewpoints.</p> <p>B. The school librarian or designated specialist will inventory the school library collection and equipment _____ (how often).</p> <p>1. The inventory may be used to determine losses and remove damaged or worn materials to be considered for</p>
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<p>educator from each school, an administrator, and a parent or community council member from each school.</p> <p>4. The District Literature/Media Selection and Review Committee will recommend an age/maturity level.</p> <p>5. The District Literature/Media Selection and Review Committee will meet as needed to review submitted literature.</p> <p>6. Specific schools and teachers may submit Literature Recommendation forms for formal support of DCSD Literature/Media and Selection Review Committee. prepare to make a recommendation to the committee prior to the scheduled meeting.</p> <p>8. Recommendations may be adopted and challenges considered after discussion of the selection's ability to meet the District Reading/Viewing Standards and through a simple majority acceptance.</p> <p>4.0411.04 CHALLENGED LITERARY/MEDIA MATERIALS</p> <p>Issue Date: 10/9/08 Updated: 2/25/09</p> <p>1. Individuals (community or parent) may challenge use of approved literature only through written submission of the DCSD "Reconsideration of Recommended Literature/Entertainment Media" form. (Form available at individual schools, District</p>	<p>considered for replacement.</p> <p>2. The inventory may also be used to deselect and remove materials that are inconsistent with the law, inconsistent with the criteria in II.A.2, or that are no longer relevant to the curriculum or of interest to students. Materials deselected due to their inconsistency with the law, will be communicated to all schools in the district.</p> <p>3. Identify gaps or deficits in the library's collection.</p> <p>IV. Library Materials Review Process</p> <p>A. DCSD will ensure that each school within the district approves a least-restrictive, transparent process for a library materials review request to be made in physical or electronic formats.</p> <p>B. A library materials review request of a material may only be made by:</p> <ol style="list-style-type: none"> 1. a parent of a student that attends the school; 2. a student who attends the school; or 3. an employee of the school. <p>C. If challenges become unduly burdensome the district may limit the number of challenges</p>	<p>replacement.</p> <p>2. The inventory may also be used to deselect and remove materials that are inconsistent with the law, Or that are no longer relevant to the curriculum or of interest to students.</p> <p>3. Identify gaps or deficits in the library's collection.</p> <p>IV. Library Materials Review Process</p> <p>A. _____(LEA's name) will ensure that each school within _____ (LEA's name) approves a least restrictive, transparent process for a library materials review request to be made in physical or electronic formats.</p> <p>B. A library materials review request of a material may only be made by:</p> <ol style="list-style-type: none"> 1. a parent of a student that attends the school; 2. a student who attends the school; or 3. an employee of the school. <p>C. If challenges become unduly burdensome _____(LEA's name or School name) may limit</p>
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<p>Offices and online at http://www.dcsd.org)</p> <ol style="list-style-type: none"> 2. Use of the challenged material in the classroom will continue until the DCSD Selection Committee makes a formal decision. 3. A parent who is challenging the medium's use in the classroom does have the right to request an alternative assignment for his/her own child without repercussion. 4. The DCSD Selection Committee will call a meeting to review the challenge within thirty days. Each committee member will review the written challenge and the selection prior to the meeting. 5. The challenge will be considered and discussed based on the DCSD Reading/Viewing Standards. 6. The Committee will determine by a simple majority vote whether to retain, modify or remove the challenged material's classroom use. 7. The individual who submitted the challenge will be notified in writing of the committee's decision; they do have the right to appeal the decision through the DCSD school board. 8. DCSD educators are expected to teach recommended reading materials and to consider viewing standards when using educational media. If an individual teacher uses unapproved literature materials or fails to follow the recommendations regarding media use in the classroom 	<p>an individual may make in the course of a school year.</p> <p>D. HB 374 (Section 53G-10-103) references three applicable definitions of "pornographic or indecent material." HB 374 creates a new legislative approach to identify "sensitive materials" in a school setting under Utah statute. Under HB 374, pornographic or indecent material means any material defined as harmful to minors in Section 76-10-1201, described as pornographic in Section 76-10-1203, or described in Section 76-10-1227. Under HB 374, if a school library book meets the definition of any of these three standards then the book should be removed from a school library. A library materials review may be based upon the concern that the material is a sensitive material as defined in Section 53G-10-103, or upon concerns with age-appropriateness of content.</p> <ol style="list-style-type: none"> 1. Utah Code Ann.§ 76-10-1201: "Harmful to minors" means that quality of any description or representation, in whatsoever form, of nudity, sexual 	<p>The number of challenges an individual may make in the course of a school year.</p>
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as outlined by this policy, he/she will not have the support of the board or school administration and may be subject to due process.

4.0411.05
LITERATURE/ENTERTAINMENT MEDIA
RECOMMENDATION FORM

Issue Date: 10/9/08

conduct, sexual excitement, or sadomasochistic abuse when it: (i) taken as a whole, appeals to the prurient interest in sex of minors; (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (iii) taken as a whole, does not have serious value for minors.

2. Utah Code Ann. § 76-10-1203: Any material or performance is pornographic if: (i) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex; (ii) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and (iii) Taken as a whole it does not have serious literary, artistic, political or scientific value.
3. Utah Code Ann. § 76-10-1227: "Description or depiction of illicit sex or sexual immorality" means: (i) human genitals in a state of sexual stimulation or

	<p>arousal; (ii) acts of human masturbation, sexual intercourse, or sodomy; (iii) fondling or other erotic touching of human genitals or pubic region; or (iv) fondling or other erotic touching of the human buttock or female breast.</p> <p>4. Concerns with age-appropriateness of content.</p> <p>E. The identity of the requestor will be protected and kept confidential from all individuals outside of the review process outlined in this policy, to the extent possible.</p> <p>F. The district will ensure each school provides access to a Library Materials Review Request Form (See Appendix A).</p> <p>G. The requestor must provide all information requested on the form including the requestor's complaint or objection to the library material.</p> <p>H. The material that is subject to a review request will have restricted access by maintaining the material behind the circulation desk or requiring an access code for digital materials until the processes described in this policy are completed. Access is</p>	<p>D. A library materials review may be based upon the concern that the material is a Sensitive material as defined in Section 53G-10-103, or upon concerns that with age-appropriateness of content.</p> <p>E. The identity of the requestor will be protected and kept confidential from all Individuals outside of the review process outlined in this policy, to the extent possible.</p> <p>F. ____ (LEA's name or School name) will ensure each school provides access to a Library Materials Review Request Form (See Appendix A).</p> <p>G. The requestor must provide all information requested on the form including the Requestor's complaint or objection to the library material.</p> <p>H. The material that is subject to a review request will have restricted access by Maintaining the material behind the circulation desk or requiring an access code for digital Materials until the processes described in this policy are completed. Access is</p>
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	<p>limited to students with prior parent/guardian permission only.</p> <p>I. The material's access level will be consistent in all schools within the district until a final determination is made regarding the material.</p> <p>J. Upon receipt of a request for review, the school administrator or designee will acknowledge the receipt of the request, create a case number for the review, and convene a Review Committee within a reasonable time according to the procedure outlined below:</p> <ol style="list-style-type: none"> 1. A Review Committee will include seven voting members and one facilitator who does not vote. 2. Members of the committee will include: <ol style="list-style-type: none"> a. a facilitator chosen by district administration (who does not vote); b. one administrator or designee chosen by district administration; c. one licensed teacher who is 	<p>limited to students with prior parent/guardian permission only. A list of restricted materials shall be made available to the public.</p> <p>I. The material's access level will be consistent in all schools within _____(LEA's name) until a final determination is made regarding the material.</p> <p>J. Upon receipt of a request for review, the school administrator or designee will acknowledge the receipt of the request, create a case number for the review, and convene a Review Committee within a reasonable time according to the procedure outlined Below:</p> <ol style="list-style-type: none"> 1. A Review Committee will include a reasonable and an odd number of individuals. 2. Members of the committee will include: <ol style="list-style-type: none"> a. facilitator chosen by _____ (LEA's name or School's name)'s administration; b. at least one administrator or designee; c. a licensed teacher at the
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	<p>currently teaching English language arts or subject relevant to the challenged material chosen by district administration;</p> <p>d. one licensed teacher-librarian or school librarian chosen by district administration; and</p> <p>e. Four parents of current students in the district who are current members of their school community council. Priority will be given to those who are the chair of their school community council.</p> <p>K. The Review Committee will determine the amount of time needed for an adequate review of a material to make a thorough and thoughtful decision and inform the requestor of the determined timeline with a preference for 30 school days where possible and no longer than 60 school days.</p> <p>L. The Review Committee</p>	<p>school who is currently teaching English language arts or subject relevant to the challenged material;</p> <p>d. a licensed teacher-librarian or school librarian; and</p> <p>e. parents of current students at the school that number at least one more than the LEA employees on the Committee including parents reflective of the school community as required in Subsection 53G-10-103(</p> <p>K. The Review Committee will determine the amount of time needed for an adequate review of a material to make a thorough and thoughtful decision and inform the requestor of the determined timeline with a preference for 30 school days where possible and no longer than 60 school days.</p> <p>L. The Review Committee</p>
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	<p>may request that the DCSD board determine the maximum amount of time allowed for review and determination.</p> <p>M. Members of the Review Committee will receive materials to complete the review process, including the following:</p> <ol style="list-style-type: none">1. access to the complete work that includes the material being challenged;2. a copy of the Materials Review Request form;3. a copy of this policy4. relevant information about the title compiled and shared by the library staff, including reason for initial approval of the material; and5. recorded public comment as described below in Subsection O. <p>N. Prior to a decision of the Review Committee the district will provide an opportunity for public comment regarding the material at a governing board meeting.</p> <p>O. The district will provide notice to parents about the opportunity to provide public comment and include the name of the material that is the subject of the materials review at least 48 hours prior to the scheduled meeting for public comment.</p> <p>P. The district will record all public comment, including</p>	<p>may request that the _____(LEA's name) board determine the maximum amount of time allowed for review and determination.</p> <p>M. Members of the Review Committee will receive materials to complete the review process, including the following:</p> <ol style="list-style-type: none">1. access to the complete work that includes the material being challenged;2. a copy of the Materials Review Request form;3. a copy of this policy4. relevant information about the title compiled and shared by the library staff, including reason for initial approval of the material; and5. recorded public comment as described below in Subsection O. <p>N. Prior to a decision of the Review Committee the school conducting the review will provide an opportunity for public comment regarding the material at a governing board meeting.</p> <p>O. The school conducting the review will provide notice to parents about the opportunity to provide public comment and include the name of the material that is the subject of the materials review at least 48 hours prior to the scheduled meeting for public comment.</p>
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	<p>written comment received, and make those comments available to the Review Committee within 48 hours of the public comment meeting.</p> <p>Q. The Review Committee will schedule meetings as determined by the Review Committee and maintain minutes of each meeting.</p> <p>R. The notes from each meeting will be retained by the district and the school conducting the review along with all relevant documentation and the final determination.</p> <p>S. The Review Committee will determine whether the material constitutes sensitive material consistent with Section 53G-10-103, this policy, and the guidance letter provided by the Attorney General's Office dated June 1, 2022.</p> <p>T. In deciding whether the material constitutes sensitive material, the Committee must consider all elements of the definitions of pornographic or indecent materials as defined in section IV.D and Utah Code Sections 76-10-1235, 76-10-1201, 76-10-1203, and 76-10- 1227. if a school library book meets the definition of any of these standards then the book should be removed from a school library.</p> <ol style="list-style-type: none"> 1. Utah Code Ann.§ 76-10-1201: "Harmful to minors" means that quality of any description or 	<p>P. The school conducting the review will record all public comment, including written comment received, and make those comments available to the Review Committee within 48 hours of the public comment meeting.</p> <p>Q. The Review Committee will schedule meetings as determined by the Review Committee and maintain minutes of each meeting.</p> <p>R. The notes from each meeting will be retained by the _____(LEA's name or School name) and the school conducting the review along with all relevant documentation and the final determination.</p> <p>S. The Review Committee will determine whether the material constitutes sensitive material consistent with Section 53G-10-103, this policy, and the guidance letter provided by the Attorney General's Office dated June 1, 2022.</p> <p>T. In deciding whether the material constitutes sensitive material, the Committee must:</p> <ol style="list-style-type: none"> 1. consider all elements of the definitions of pornographic or indecent materials as defined in Utah Code Sections 76-10-1235, 76-10-1201, 76-10-1203, and 76-10- 1227; and 2. whether the material is age appropriate due to vulgarity or violence.
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	<p>representation, in whatsoever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it:</p> <ul style="list-style-type: none">(i) taken as a whole, appeals to the prurient interest in sex of minors; (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (iii) taken as a whole, does not have serious value for minors. <p>2. Utah Code Ann. § 76-10-1203: Any material or performance is pornographic if: (i) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex; (ii) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and (iii) Taken as a whole it does not have serious literary, artistic, political or scientific value.</p> <p>3. Utah Code Ann. § 76-10-1227: "Description or depiction of illicit sex or sexual immorality"</p>	
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	<p>means: (i) human genitals in a state of sexual stimulation or arousal; (ii) acts of human masturbation, sexual intercourse, or sodomy; (iii) fondling or other erotic touching of human genitals or pubic region; or (iv) fondling or other erotic touching of the human buttock or female breast.</p> <p>4. Concerns with age-appropriateness of content.</p> <p>U. In deciding whether the material is age appropriate due to vulgarity, violence, or content, the Committee must consider the material taken as a whole and consider whether it has serious literary, artistic, political, or scientific value for minors, which may include the following objective criteria:</p> <ol style="list-style-type: none"> 1. reliable, expert reviews of the material or other objective sources; 2. committee members' experience and background; and 3. community standards. <p>V. In deciding whether the material taken as a whole has serious literary, artistic political, or scientific value as described in Subsection U., the Committee should consider that:</p> <ol style="list-style-type: none"> 1. serious value does not mean any value; and 2. greater protections should exist 	<p>U. In deciding whether the material is age appropriate due to vulgarity, violence, or content, the Committee must consider the material taken as a whole and consider whether it has serious literary, artistic, political, or scientific value for minors, which may include the following objective criteria:</p> <ol style="list-style-type: none"> 1. reliable, expert reviews of the material or other objective sources; 2. committee members' experience and background; and 3. community standards. <p>V. In deciding whether the material taken as a whole has serious literary, artistic political, or scientific value as described in Subsection U., the Committee should consider that:</p> <ol style="list-style-type: none"> 1. serious value does not mean any value; and
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	<p>concerning content for a library in an elementary or middle school setting.</p> <p>W. The Review Committee will make a final determination of a reviewed material by determining one of the following:</p> <ol style="list-style-type: none"> 1. Retained: the determination to maintain access in a school setting to the challenged material for all students. 2. Restricted: the determination to restrict access in a school setting to the challenged material for certain students as determined by the Review Committee. 3. Removed: the determination to prohibit access in a school setting to the challenged material for all students. <p>X. The decision of the Review Committee will be determined by majority vote. Specifically, at least four members of the committee must vote for the same choice (retained, restricted, removed).</p> <p>Y. A material may not be reviewed again for three school years following the Review Committee's determination.</p> <p>Z. The final determination of the Review Committee will be communicated to the requestor and appropriate employees within 5 school days of the decision being made.</p>	<ol style="list-style-type: none"> 2. greater protections should exist concerning content for a library in an elementary or middle school setting. <p>W. The Review Committee will make a final determination of a reviewed material as follows:</p> <ol style="list-style-type: none"> 1. Retained: the determination to maintain access in a school setting to the challenged material for all students. 2. Restricted: the determination to restrict access in a school setting to the challenged material for certain students as determined by the Review Committee. 3. Removed: the determination to prohibit access in a school setting to the challenged material for all students. <p>X. The decision of the Review Committee will be determined by majority vote.</p> <p>Y. A material may not be reviewed again for three school years following the Review Committee's determination.</p> <p>Z. The final determination of the Review Committee will be communicated to the requestor and appropriate employees within 5 school days of the decision being made.</p>
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	<p>AA. The district will maintain a list of all materials that receive a “removed” determination and make the list available to similar schools within the district.</p> <p>BB. Decisions of all challenged books will be communicated to schools within the district whether retained, restricted, or removed.</p> <p>V. Appeals Process</p> <p>A. The original requestor or another individual who was not on the Review Committee may appeal the determination of the Review Committee in writing to the school principal or district superintendent within 15 business days of receipt of the Review Committee’s final determination using an Appeal Request Form (See Appendix B).</p> <p>B. If an appeal is filed, the school board will act as the Appeals Committee.</p> <p>1. The school board (Appeal Committee) may add parent or school administrator member(s) who did not participate in the initial Review Committee, only as necessary to have an odd number of members.</p> <p>C. If there is not an appeal of the Review Committee’s</p>	<p>AA. __ (LEA’s name) will maintain a list of all materials that receive a “removed” determination and make the list available to similar schools within __ (LEA’s name)</p> <p>BB. Decisions of all challenged books will be communicated to schools within _____ (LEA’s name) whether retained, restricted, or removed.</p> <p>V. Appeals Process</p> <p>A. The original requestor or another individual who was not on the Review Committee may appeal the determination of the Review Committee in writing to the school principal within 15 business days of receipt of the Review Committee’s final determination using an Appeal Request Form (See Appendix B).</p> <p>B. If an appeal is filed with the school principal, the local governing authority will act as the Appeals Committee.</p> <p>1. The local governing authority (Appeal Committee) may add parent or school administrator member(s) who did not participate in the initial Review Committee, only as necessary to have an odd number of members.</p>
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	<p>recommendation, the Review Committee's recommendation is the final determination for the challenged material.</p> <p>D. The Appeals Committee will determine the amount of time needed for an adequate review, not longer than 60 school days and a preference for 30 school days, of a material required to make a thorough and thoughtful decision.</p> <p>E. Members of the Appeals Committee will receive materials to complete the review process, including the following:</p> <ol style="list-style-type: none"> 1. a copy of the material; 2. a copy of the Materials Review Request form; 3. all meeting minutes; 4. the Review Committee's final recommendation; 5. any other documents considered part of the administrative record related to the Review Committee's proceedings including all recorded public comments as described in Subsection IV.O. above. <p>F. The Appeals Committee will schedule meetings as needed, as determined by the Appeals</p>	<p>C. If there is not an appeal of the Review Committee's recommendation, the Review Committee's recommendation is the final determination for the challenged material.</p> <p>D. The Appeals Committee will determine the amount of time needed for an adequate review, not longer than 60 school days and a preference for 30 school days, of a material required to make a thorough and thoughtful decision and inform the requestor of the determined timeline.</p> <p>E. Members of the Appeals Committee will receive materials to complete the review process, including the following:</p> <ol style="list-style-type: none"> 1. a copy of the material; 2. a copy of the Materials Review Request form; 3. all meeting minutes; 4. the Review Committee's final recommendation and rationale for the decision; 5. any other documents considered part of the administrative record related to the Review Committee's proceedings including all recorded public comments as described in Subsection V.O. above. <p>F. The Appeals Committee will schedule meetings as needed, as determined by the Appeals</p>
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	<p>Committee and maintain minutes of each meeting.</p> <p>G. The notes from each meeting will be retained by the district, along with all relevant documentation and the final determination by the Appeals Committee.</p> <p>H. The Appeals Committee may make a final determination of a reviewed material as follows:</p> <ol style="list-style-type: none">1. Retained: the determination to maintain access in a school setting to the challenged material for all students;2. Restricted: the determination to restrict access in a school setting to the challenged material for certain students;3. Removed: the determination to prohibit access in a school setting to the challenged material for all students. <p>I. The decision of the Appeals Committee will be determined by majority vote. Specifically, the majority of members of the committee must vote for the same choice (retained, restricted, removed). A primary vote may be needed to narrow it down to two options, followed by a final vote to determine a majority.</p> <p>J. A book/material may not be reviewed again for three school years if the Appeals Committee votes</p>	<p>Committee and maintain minutes of each meeting.</p> <p>G. The notes from each meeting will be retained by the _____(LEA's name) along with all relevant documentation and the final determination by the Appeals Committee.</p> <p>H. The Appeals Committee may make a final determination of a reviewed material as follows:</p> <ol style="list-style-type: none">1. Retained: the determination to maintain access in a school setting to the challenged material for all students;2. Restricted: the determination to restrict access in a school setting to the challenged material for certain students;3. Removed: the determination to prohibit access in a school setting to the challenged material for all students; or4. Another determination as decided by the Appeals Committee. <p>I. The decision of the Appeals Committee will be determined by majority vote.</p> <p>J. A material may not be reviewed again for three school years if the Appeals Committee votes</p>
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	<p>to uphold a Review Committee's determination. K. The final determination of the Appeals Committee will be communicated to the requestor and appropriate employees within 10 days of the determination. L. The district will maintain a list of the determinations by Appeals Committee and make the list available to all schools within the district or by public request.</p> <p>VI. Final Procedural Review (Not Legally Binding until USBE amends R277-123)</p> <p>A. The requestor in V.A., may petition the USBE for a procedural review of the Appeals Committee's decision.</p> <p>B. The USBE will review the petition and determine if a procedural review is warranted, to determine whether the LEA correctly followed its library materials review policy referred to in Rule R277-628.</p> <p>C. That determination may include the USBE's decision to have the appeal considered initially by a USBE Committee or a panel of USBE members.</p> <p>D. If the USBE determines in USBE's procedural review that the LEA did not correctly follow its</p>	<p>to uphold a Review Committee's determination. K. The final determination of the Appeals Committee will be communicated to the requestor and appropriate employees within 10 days of the determination. L. _____(LEA's name) will maintain a list of the determinations by Appeals Committee and make the list available to all schools within _____(LEA's name) and the public.</p> <p>VII. Final Procedural Review (Not Legally Binding until USBE amends R277-123)</p> <p>A. The requestor in V.A., may petition the USBE for a procedural review of the Appeals Committee's decision.</p> <p>B. The USBE will review the petition and determine if a procedural review is warranted, to determine whether the LEA correctly followed its library materials review policy referred to in Rule R277-628.</p> <p>C. That determination may include the USBE's decision to have the appeal considered initially by a USBE Committee or a panel of USBE members.</p> <p>D. If the USBE determines in USBE's procedural review that the LEA did not correctly</p>
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	<p>materials review policy, it will return the appeal to the LEA with direction to repeat its review process in compliance with its library materials review policy referred to in Rule R277-628.</p> <p>E. The USBE will make a final written appeal decision no more than 60 school days after the USBE's determination that the appeal satisfies the criteria for USBE review.</p> <p>F. This USBE review decision is final.</p> <p>VII. Communication</p> <p>A. An easily accessible webpage on the public website for the district will be updated and available prior to the beginning of each school year to inform teachers, staff, students, and parents of the following:</p> <ol style="list-style-type: none"> 1. A Materials Review Request Form (See Appendix A); 2. An Appeal Request Form (See Appendix B); 3. This Library Policy. 	<p>follow its materials review policy, it will return the appeal to the LEA with direction to repeat its review process in compliance with its library materials review policy referred to in Rule R277-628.</p> <p>E. The USBE will make a final written appeal decision no more than 60 school days after the USBE's determination that the appeal satisfies the criteria for USBE review.</p> <p>F. This USBE review decision is final.</p> <p>VIII. Communication</p> <p>A. An easily accessible webpage on the public website for ____ (LEA's name) will be updated and available prior to the beginning of each school year to inform teachers, staff, students, and parents of the following:</p> <ol style="list-style-type: none"> 1. A Materials Review Request Form (See Appendix A); 2. An Appeal Request Form (See Appendix B); 3. Application to serve on a materials Review Committee; 4. This Library Policy; 5. A list of all materials that are restricted while under Review or have received a Review Committee or Appeals Committee determination.
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		<p>B. If made aware of material that may be considered sensitive material as defined in Section 53G-10-103, _____(LEA's name) will inform relevant parties regarding appropriate actions to take pursuant to this policy.</p>
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From Model Policy Appedix C: The attorney general gives more explanation to his letter.

Appendix C: Attorney Generals Guidance Letter and Supplemental Guidance Letter

STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL

SEAN D. REYES

ATTORNEY GENERAL

Spencer E. Austin

Chief Criminal Deputy

Daniel Burton

General Counsel

Ric Cantrell

Chief of Staff

Melissa A. Holyoak

Solicitor General

Brian L. Tarbet

Chief Civil Deputy

MEMORANDUM

TO:

FROM:

DATE:

RE:

Utah State Board of Education

Utah Attorney General Sean D. Reyes; Utah Solicitor General Melissa A.

Holyoak; Education Division Director Meb W. Anderson

June 1, 2022

Official Memorandum-Laws Surrounding School Libraries

Introduction

This memorandum provides analysis regarding HB 374, Sensitive Materials in Schools, and its prohibition of obscenity in school libraries. This memorandum supersedes any prior memorandum or other information previously provided by the Office of the Utah Attorney General (AGO) on the question of removing pornographic books from school libraries, including a May 4, 2022 memorandum from AGO Education Division Counsel (May 4 Memo), titled

"Laws surrounding school libraries." Any conflict or inconsistency between this document and any prior pronouncement from the AGO should be resolved in favor of the analysis herein. Any relevant part of the May 4 Memo not inconsistent with this document is incorporated by Reference.

This memorandum has been personally written, reviewed, and approved by the Utah Attorney General and senior executive leadership of the AGO and constitutes the official position of the AGO (Official Memo). Our office was asked by the Utah State Board of Education (Board) and local education agencies (LEAs) to address issues limited to removal of inappropriate books in school libraries. Thus, the Official Memo does not address broader issues of appropriate classroom materials or other school curricula and focuses solely on school library books.¹ The focus and emphasis on these materials should not, therefore, be interpreted as the sum of AGO analysis on all issues relating to HB 374. The AGO is available to provide analysis

¹ The May 4 Memo similarly does not address these broader issues because the AGO was only asked about the

limited question of books in school libraries.

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² to the Board and LEAs on these broader issues if we are asked to do so as contemplated by state statute.

Background

With access and addiction to pornography increasing among Utah children, the average age of first exposure and addiction to pornography among young people reaching pre-pubescent levels, and an increasing online threat of porn to the health, development, and welfare of youth, the Utah State Legislature has taken very positive and proactive measures to address the threat of pornography to schoolchildren. Parenthetically, through the multiple programs of the AGO, including its Internet Crimes Against Children Taskforce (ICAC), Children's Justice Centers (CJCs), Secure Strikeforce, and online training resources, the AGO is at the front line every day of protecting vulnerable Utah children from exposure to and exploitation from pornography. In cases we investigate and prosecute, we witness the devastation to child victims and survivors of pornography exploitation and exposure. Among other measures to combat pornography's detrimental impact on children, the Utah Legislature recently passed HB 374 which addresses "sensitive materials" that the Legislature intends to prohibit in the school setting and designates exceptions for certain instructional materials. The State of Utah has recognized that pornography in Utah is a public health crisis and that the school settings are places where "pornographic or indecent materials" will not be allowed. Because HB 374 applies to both textbooks used to deliver curriculum and material used to support a student's learning in the school setting, it applies to library books in public schools.

Executive Summary

Library books in Utah public schools are prohibited if they are pornographic or indecent as defined under one of three state statutes. The Board must create model policies consistent with such statutes, including HB 374, for LEAs. In turn, LEAs must follow such policies to comply with state statutes. As is the case with most laws that implicate the First Amendment of the United States Constitution, HB 374 will likely be subject to legal challenge. If the law is challenged, the AGO will vigorously defend the law.

As further detailed below, there are actions the Board and LEAs may take in complying

with HB 374 to mitigate the risk of legal challenge. The first is to immediately remove books from school libraries that are categorically defined as pornography under state statute. This will help protect the LEAs from potential lawsuits brought by parents or groups alleging the school failed to comply with state laws.

The second mitigation action comes into play as LEAs remove pornographic materials from libraries. In such instances, any legal challenge to that removal will be analyzed under both Utah statute (including HB 374) and federal law.² However, under federal law, there are some conflicts as to the appropriate standard and there is no definitive United States Supreme Court precedent governing removal of library books. Because under federal law, categorical exclusions alone may not be sufficient, the LEAs can further mitigate risk regarding their removal decision by engaging in analysis as to any overall value the materials may have that might forestall removal. Undertaking such an analysis in good faith significantly increases the likelihood of overcoming a legal challenge to the removal of the book.

Nothing in the legal analysis contained in the May 4 Memo or Official Memo should be read to undermine the legislative goals or the laws which aim to initiate and bring about the proactive removal of obscenity from school libraries. The AGO views the Board's responsibility as creating model policies for LEAs to strictly comply with HB 374.

While the AGO cannot determine on a book-by-book basis which materials should be removed, the office supports schools and the Board as they execute their duties in evaluating what materials can be removed under state and federal law. The AGO has, therefore, provided analysis on the standards found in statute and in case law, but declines to designate which books are likely to survive legal challenge if removed from public school library shelves.

Analysis

This Official Memo is provided to clarify certain points of law discussed in the May 4 Memo and to assure appropriate context on certain matters.

1. The purpose of the May 4 Memo and this Official Memo is to provide analysis of HB 374 with respect to library books only.

Generally, the May 4 Memo was written in response to the requirement in HB 374 that the Board, in consultation with the AGO, "provide guidance and training to support public schools in identifying instructional materials that meet the definition of sensitive materials under" Section 530-10-103. More specifically, the May 4 Memo was for LEAs relating only to library books. (The first sentence of the Memo states that it "outlines the law as it pertains to school library books in Utah.") In fact, LEAs throughout Utah had requested information relating specifically to the handling of school library books pursuant to HB 374. Like the May 4 Memo, this Official Memo does not address course material. This Official Memo does not contain the AGO's discussions and analysis to the Board on other issues relating to HB 374. It is limited to the questions posed relating to the removal of certain books from library shelves due to reports of pervasively vulgar material, identified as sensitive materials under HB 374. The AGO will

2 The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." It applies to the States by virtue of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666

(1925). The Supremacy Clause of the U.S. Constitution directs state courts that they "must not give effect to state laws that conflict with federal law[]." *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320,324 (2015).

Accordingly, federal court decisions inform the analysis here.

continue to consult with the Board relating to both school library books and other school course materials.

2. Utah Law prohibits "sensitive material" in the school setting.

HB 374 (Section 53G-10-103) references three applicable definitions of "pornographic or

indecent material." HB 374 creates a new legislative approach to identify "sensitive materials" in a school setting under Utah statute. Under HB 374, pornographic or indecent material means any material defined as harmful to minors in Section 76-10-1201, described as pornographic in Section 76-10-1203, or described in Section 76-10-1227. Under HB 374, if a school library book meets the definition of any of these three standards then the book should be removed from a school library.³ We reiterate our view that these definitions and standards are legally defensible. The relevant definitions are:

a. Utah Code Ann. § 76-10-1201: "Harmful to minors" means that quality of any description or representation, in whatsoever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it:

- (i) taken as a whole, appeals to the prurient interest in sex of minors;
- (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (iii) taken as a whole, does not have serious value for minors.

As described in the May 4 Memo, if a school library book in Utah were identified and removed from a library shelf as vulgar or obscene based on this standard, it is likely to pass constitutional review in a subsequent legal challenge.

b. Utah Code Ann. § 76-10-1203: Any material or performance is pornographic if:

- (a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex;
- (b) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and
- (c) Taken as a whole it does not have serious literary, artistic, political or scientific value.

As described in the May 4 Memo, if a school library book in Utah were identified and removed from a library shelf as vulgar or obscene based on this standard, it is likely to pass constitutional review in a subsequent legal challenge.

³ HB 374, as codified at Section 53G-10-103, defines "sensitive material" as an instructional material that is pornographic or indecent material as that term is defined in Section 76-10-1235, Accessing pornographic or indecent material on school property. When citing to the language of Section 1235 in the May 4 Memo, there was a citation error (i.e., it stated 1217 instead of 1227). To be clear, Section 76-10-1235 states that in a school setting or on school property in Utah, "Pornographic or indecent material" means any material: "(i) defined as harmful to minors in Section 76-10-1201; (ii) described as pornographic in Section 76-10-1203; or (iii) described in Section 76-10-1227."

c. Utah Code Ann. § 76-10-1227: "Description or depiction of illicit sex or sexual immorality" means:

- (i) human genitals in a state of sexual stimulation or arousal;
- (ii) acts of human masturbation, sexual intercourse, or sodomy;
- (iii) fondling or other erotic touching of human genitals or pubic region; or
- (iv) fondling or other erotic touching of the human buttock or female breast.

Section 1227(2)(a) states that subject to Section 1227(2)(c), "this section and Section 76-10-1228 do not apply to any material which, when taken as a whole, has serious value for minors." Section 1227(2)(c) states conclusively that subsections (i), (ii) and (iii) of 1227(1)(a) "ha[ve] no serious value for minors."

Section 1227(2)(c) can be read as a legislative directive that no description of illicit sex in subsections (i-iii) could have serious literary, artistic, political, or scientific value. Under that interpretation, if a book contains any of the material listed in subsections (i), (ii), or (iii), HB 374 requires the book to be removed from a school library. Such an interpretation creates

categorical exclusions or a "bright line" rule. A decisionmaker that removes library books based on these defined categories directly complies with state statute. Other materials under category (iv), as per the plain language of the statute, can be assessed under a "taken as a whole analysis" to further comply with state statute. Direct compliance with HB 374 and removal of books under state statutes 76-10- 1201, 1203, and 1227 will likely insulate LEAs from lawsuits for violations of state statute.

3. Federal Law may require more than application of a bright line rule. Even when removal of library books meets strict compliance with HB 374 and related state statutes, a legal challenge will invite application of federal First Amendment jurisprudence, a body of cases which have not favored bright line rules in obscenity cases. See, e.g., *Home Box Off, Inc. v. Wilkinson*, 531 F. Supp. 987, 996 (D. Utah 1982) ("It is elementary that merely calling something obscene doesn't make it so.").

4 The U.S. Supreme Court has long held that "the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). Simply put, while HB 374 provides very specific categories of materials to be removed, in federal jurisprudence, there is no bright line rule regarding the removal of books from library shelves in public schools under the U.S. Constitution.

A federal court might plausibly read Section 1227(2)(c) not as a bright line rule, but as a rebuttable presumption. That is, descriptions or depictions of things set forth in 1227(1)(a)(i), (ii), and (iii) presumably have no serious value for minors, unless the school proactively determines that such materials have serious literary, artistic, political, or scientific value. This is akin to the "taken as a whole" analysis that removal under subsection (iv) requires under Section

1227(2)(a) and (b). Failure to consider library materials "as a whole" may present risk of conflict with federal law. *State v. Watts*, 498 P.3d 365, 374-75 (Utah 2021) (citing *Miller v. California*, 413 U.S. 15, 18 (1973)).⁵

For example, removing a school library book because it contains a sole description or depiction of an act of "sexual intercourse" or "fondling" (or other forbidden depiction specified under Section 1227) may be subject to increased risk of legal challenge if the book would not otherwise be removed under Sections 1201 or 1203, or 1227 (iv), when taken as a whole.

A cardinal rule of statutory interpretation is that when a statute is susceptible to two plausible interpretations, it should be interpreted to avoid the constitutional conflict. See, e.g., *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005); see also *Hernandez v. Carrera-Carlson*, 547 F.3d 1237, 1251 (10th Cir. 2008) ("[E]ven after a court has construed a statute to avoid constitutional doubts, an agency remains free to interpret the same statute in a different manner so long as its subsequent interpretation is reasonable and avoids serious constitutional questions").

Accordingly, to further protect the bright line removal decisions made under state statute from any legal challenge, LEAs analyzing material under subsections (i), (ii), and (iii) of 1227(1)(a) may consider further analyzing the material under the "serious value" definition found in 1227(2)(b). Under 1227(2)(b) a book that otherwise violates 1227(1)(a) should remain on the shelves if it has "serious literary, artistic, political, or scientific value for minors, taking into consideration the ages of all minors who could be exposed to the material." This is not intended as a formula to avoid implementation of HB 374 but to bolster the removal decisions and assure there has been a thoughtful process to determine whether there is any redemptive value in the offending material.

In other words, even if the material is specifically listed in subsections (i), (ii), and (iii), the decisionmaker may consider independently analyzing whether such material has serious value for minors under 1227(2)(b). And, to further validate the removal decision under federal

law, decisionmakers may consider assessing the materials "as a whole" when analyzing materials under Section 1227.

5 The possible ambiguity between bright line and rebuttable presumption of Section 1227(2)(c) is amplified by the fact that Section 1227 is generally meant to apply to indecent public displays. The First Amendment's obscenity analysis for public displays may differ from its obscenity analysis for library materials but is not addressed herein.

Any decision or attempt to resist removal of offending material under Section 1227 based on "serious value" or "as a whole," is fraught with its own risks and potential legal challenge by parents who believe the decision is too permissive and contrary to state statute. Cf United States

v. Stevens, 559 U.S. 460,478 (2010) ("But the text says 'serious' value, and 'serious' should be taken seriously."). Serious value does not mean any value. Of crucial note, this risk of lawsuits by parents only increases for libraries in elementary or middle schools versus high schools. See Utah Code § 76-10-1227(2)(b) ("'serious value' ... taking into consideration the ages of all minors who could be exposed to the material").

4. Circuit courts disagree on the precedential impact of the Pico case.

In Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853 (1982) ("Pico"), the U.S. Supreme Court was faced with a challenge to the removal of books from library shelves by the defendant board of education. "[T]he only books at issue in [Pico] are library books, books that by their nature are optional rather than required reading." Id. at 862 (emphasis in original). The relevant question in Pico was whether the "First Amendment impose[s] any limitations upon the discretion of petitioners [the School Board] to remove library books from the Island Trees High School and Junior High School?" Id.

While Pico is the only case in which the Supreme Court has addressed the removal of books from library shelves, it is a plurality opinion-no part of the opinion garnered five votes. Justice Brennan's view, joined by Justices Marshall and Stevens, was that if there was a finding that the removals were based on viewpoint, then the removals violated the First Amendment. Id. at 871-72. Justice Blackmun concurred, finding that schools cannot remove books if "motivated simply by the officials' disapproval of the ideas involved." Id. at 879-80 (Blackmun, J., concurring). Justice White also concurred solely as to remanding the matter for a trial on whether the school board removed the books based on viewpoint or vulgarity. Id. at 883 (White, J., concurring). The dissenting justices (Chief Justice Burger joined by Justices Powell, Rehnquist, and O'Connor) questioned the plurality's recognition of the "right" of access to particular books:

"It does not follow, however, that a school board must affirmatively aid the speaker in his communication with the recipient. In short the plurality suggests today that if a writer has something to say, the government through its schools must be the courier." Id. at 887 (Burger, C.J., dissenting).

The Pico case is the closest the U.S. Supreme Court has come to providing guidance on the issue of removal of books from school library shelves and supports the notion that "pervasively vulgar" books can be removed. Id. at 871. The Court later acknowledged this holding: "all members of the [Pico] Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675,684 (1986).

Opinions from the circuit courts of appeals on the precedential nature of Pico are as divided as the justices were. At least two federal circuit courts have issued opinions suggesting that Justice Brennan's Pico plurality opinion is the opinion of the High Court. See, Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027 & n.5 (9th Cir. 1998); see also Turkish Coal. Of Am., Inc. v. Bruininks, 678 F.3d 617, 623 (8th Cir. 2012). Neither of these cases directly addressed the issue of removal of books from library shelves and both distinguished Pico on

those grounds. *Monteiro*, 158 F.3d at 1027; *Turkish Coal*, 678 F.3d at 623. Other circuits have held otherwise. The Fifth Circuit concluded that "Pico is of no precedential value as to the application of the First Amendment to these issues." *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1045 (5th Cir. 1982). Similarly, the Eleventh Circuit held that "[w]ith five different opinions and no part of any of them gathering five votes from among the nine justices [] Pico is a non-decision so far as precedent is concerned. It establishes no standard." *Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1200 (11th Cir. 2009).

The Tenth Circuit—the case law that Utah is bound by—held that in "Pico, a plurality of the Supreme Court recognized a free speech 'right to receive' information and held unconstitutional a school board's censorship of several books from a school library." *Roberts v. Madigan*, 921 F.2d 1047, 1056 (10th Cir. 1990); but see *Cummins v. Campbell*, 44 F.3d 847, 853 n.4 (10th Cir. 1994) (noting that Pico did not produce a "majority opinion on the merits"). *Roberts* involved a students' challenge of the opportunity to read the Bible. 921 F.2d at 1056. The Tenth Circuit recognized the similarity between the removal of the Christian books and the claims in Pico, but the court expressed no opinion as to the students' "right to receive ideas" because the *Roberts* plaintiffs lacked standing. *Id.*

Even if the Tenth Circuit were to treat Justice Brennan's plurality opinion in Pico as controlling, that opinion recognized that courts must apply the First Amendment "in light of the special characteristics of the school environment." 457 U.S. at 868 (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969)). In Pico, Justice Brennan emphasized that the constitutionality of removal decisions "depends upon the motivation behind" the library book removals. *Id.* "[U]nconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar," nor if "the removal decision was based solely upon the 'educational suitability' of the books in question." *Id.* Following this reasoning, decisionmakers motivated to remove a book under an HB 374 challenge in order to protect youth from the public health crisis of pornography likely satisfy Pico's constitutional motivation analysis.

Conclusion

HB 374 prohibits pornographic or indecent material as defined as harmful to minors in Section 76-10-1201, described as pornographic in Section 76-10-1203, or described in Section 76-10-1227. School library books that meet any of these statutory definitions are prohibited from school libraries. Analysis under these statutory definitions, or strict application of the categorical exclusions in 1227(1)(a)(i), (ii), and (iii), is the way to directly comply with HB 374. To mitigate the risk of legal challenge relating to decisions under Section 1227, LEAs may also analyze the materials as a whole and determine whether the materials have any serious literary, artistic, political, or scientific value. While these are important considerations, nothing should prevent the Board and LEAs from proactively complying with state law in removing pornographic books from library shelves. Any decision to retain books in libraries that meet the definition of pornography is contrary to state statute and significantly increases the likelihood of a lawsuit against the LEA for non-compliance. The AGO will continue to consult with the Board and LEAs regarding analysis and compliance with other facets of HB 374.

MEMORANDUM TO LEAs

TO: LEAs

FROM: Ashley Biehl, Assistant Attorney General

RE: Laws surrounding library policies

DATE: 05/03/2022

The document outlines the law as it pertains to school library books in Utah. The intent is to provide LEAs with legal guidance. The Utah State Board of Education (USBE) will be

releasing a model library policy before the 2022-2023 school year that LEAs may utilize in addition to these principles.

1. Do students have legal rights regarding access to school library materials?

Yes. The United States Supreme Court (“SCOTUS”) has an extremely long history of recognizing that students have their own First Amendment rights in school. The removal of books from a school library can constitute an official suppression of ideas, in violation of the First Amendment. In *Tinker v. Des Moines*, SCOTUS held that “School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect.”¹

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”²

In *Island Trees v. Pico*, SCOTUS noted that “[l]ocal school boards have broad discretion in the management of school affairs, but such discretion must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. ... [T]he special characteristics of the school library make that environment especially appropriate for the recognition of such rights.”³

Finally, SCOTUS has stated that “students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.”⁴ “The school library is the principal locus of such freedom.”⁵

2. What is the legal standard for assessing what is harmful to minors?

Utah Code Annotated (UCA) 76-10-12016 defines harmful to minors. It is important to note that to be defined as harmful to minors, a book must meet all three factors outlined below.

(5)(a) “Harmful to minors” means that quality of any description or representation, in whatsoever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it:

(i) taken as a whole, appeals to the prurient interest in sex of minors;

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(iii) taken as a whole, does not have serious value for minors.

(b) Serious value includes only serious literary, artistic, political or scientific value for minors.

1 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511, 89 S. Ct. 733, 739, 21 L. Ed. 2d 731 (1969)

2 *Shelton v. Tucker*, (364 U.S. 479), at 487 (81 S.Ct. 247, 5 L.Ed.2d 231) (1960)

3 *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 853, 102 S. Ct. 2799, 2801, 73 L.

Ed. 2d 435 (1982)

4 *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, quoting *Keyishian v. Bd. of Regents of Univ. of*

State of N. Y., 385 U.S. 589, 603, 87 S. Ct. 675, 683, 17 L. Ed. 2d 629 (1967)

5 *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868–69, 102 S. Ct. 2799, 2809, 73

L. Ed. 2d 435 (1982)

6 Utah Code Ann. § 76-10-1201

This means that a work that contains nudity, sexual conduct, sexual excitement, or sadomasochistic abuse is not harmful to minors on its face. If a work contains one of those things (as defined below), it MUST then be considered under this three-factor test. In order to be harmful to minors, the work must contain nudity, sexual conduct, sexual excitement or

sadomasochistic abuse AND appeal to the prurient interest in sex of minors, be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors, AND lack serious literary, artistic, political, or scientific value.

EXAMPLE: A book on anatomy contains depiction of nudity. This book is not harmful to minors because it does not appeal to the prurient interest in sex of minors, and has serious scientific value for minors.

EXAMPLE: Bram Stoker's Dracula contains a scene of sexual conduct. This book is not harmful to minors because it does not appeal to the prurient interest of minors, is not patently offensive to prevailing standards in the adult community when taken as a whole with respect to what is suitable to minors, and it has serious literary value.

EXAMPLE: Penthouse Magazine is likely to be considered harmful to minors as it appeals to the prurient interests in sex, would likely be deemed to be patently offensive to prevailing standards in the adult community with respect to what is suitable for minors, and arguably lacks serious literary, artistic, political and scientific value.

i. How is nudity defined?

UCA 76-10-1201

(10) "Nudity" means:

(a) the showing of the human male or female genitals, pubic area, or buttocks, with less than an opaque covering;

(b) the showing of a female breast with less than an opaque covering, or any portion of the female breast below the top of the areola; or

(c) the depiction of covered male genitals in a discernibly turgid state.

ii. How is sexual conduct defined?

UCA 76-10-1201

(14) "Sexual conduct" means acts of masturbation, sexual intercourse, or any touching of a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a female, breast, whether alone or between members of the same or opposite sex or between humans and animals

in an act of apparent or actual sexual stimulation or gratification.

iii. How is sexual excitement defined?

UCA 76-10-1201

(15) "Sexual excitement" means a condition of human male or female genitals when in a state of sexual stimulation or arousal, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

iv. How is sadomasochistic abuse defined?

UCA 76-10-1201

(13) "Sadomasochistic abuse" means:

(a) flagellation or torture by or upon a person who is nude or clad in undergarments, a mask, or in a revealing or bizarre costume; or

(b) the condition of being fettered, bound, or otherwise physically restrained on the part of a person clothed as described in Subsection (13)(a).

v. What does "prurient interest" mean?

SCOTUS has defined prurient interest as: "Material appeals to the prurient interest, for instance, only if it is in some sense erotic."⁷

The Utah Supreme Court has also clarified that "Material does not evoke a prurient interest unless it has the capacity to provoke 'sexual responses over and beyond those

that would be characterized as normal.'"⁸ "An expression or depiction must at least be erotic in some significant way to the average person".⁹

vi. What standards must be used to determine if an item has scientific, literary,

political or artistic value?

To determine whether a book has scientific, literary, political or artistic value, the determining factor is whether a reasonable person would find value in the material when taken as

a whole. This factor utilizes a national floor for what constitutes value. Thus, the work must be considered as a whole, and must be looked at through the lens of whether a reasonable person in

America would think it has redeeming value.

In *Ashcroft v. ACLU*, SCOTUS laid out this standard as follows: “[T]he value of [a] work [does not] vary from community to community based on the degree of local acceptance it has won.”¹⁰ Rather, the relevant question is “whether a reasonable person would find ... value in the material, taken as a whole.”¹¹ Thus, the serious value requirement “allows appellate courts to

⁷ *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 579, 122 S. Ct. 1700, 1710, 152 L. Ed. 2d 771 (2002).

⁸ *City of St. George v. Turner*, 860 P.2d 929, 934 (Utah 1993), citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S.

491, 498, 105 S.Ct. 2794, 2799, 86 L.Ed.2d 394 (1985).

⁹ *City of St. George v. Turner*, 860 P.2d 929, 934 (Utah 1993), citing *Cohen v. California*, 403 U.S. 15, 91 S.Ct.

1780, 29 L.Ed.2d 284 (1971)

¹⁰ *Ashcroft v. Am. C.L. Union*, citing *Pope v. Illinois*, 481 U.S. 497, 500, 107 S. Ct. 1918, 1921, 95 L. Ed. 2d 439

(1987)

¹¹ *Id.*, at 501, 107 S.Ct. 1918.

impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value.”

UCA 76-10-1227 (c) provides that “(c) A description or depiction of illicit sex or sexual immorality as defined in Subsection (1)(a)(i), (ii), or (iii) has no serious value for minors.” Subsection (1)(a)(i-iii) reads: “) "Description or depiction of illicit sex or sexual immorality" means: (i) human genitals in a state of sexual stimulation or arousal; (ii) acts of human masturbation, sexual intercourse, or sodomy; (iii) fondling or other erotic touching of human genitals or pubic region”. However, it is important to remember that 76-10-1201 requires all three prongs of the test to be met. Therefore, even if a book does not have literary, scientific, political or artistic value for the above reasons, it must also be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and appeal to the prurient interests in sex of minors, in order to be harmful to minors.

vii. Does this require a book to be considered as a whole when assessing suitability?

Yes. The third prong of “harmful to minors” requires a book to lack serious artistic, scientific, political, or literary value. SCOTUS has defined this criteria as “whether a reasonable person would find ... value in the material, taken as a whole.”¹² Therefore, the book must be considered in its entirety when determining whether it has scientific, literary, artistic, or political value.

Additionally, UCA 76-10-1227(2)(a) provides that: “Subject to Subsection (2)(c), this section and Section 76-10-1228 do not apply to any material which, when taken as a whole, has serious value for minors.”

Finally, the Utah Supreme Court has held that “under Supreme Court caselaw, an obscenity analysis must focus on the work ‘taken as a whole’.”¹³

viii. Can books be banned if, taken as a whole, they are vulgar or educationally unsuitable?

Yes. SCOTUS has held that “an unconstitutional motivation would not be demonstrated

if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. ...[I]f it were demonstrated that the removal decision was based solely upon the “educational suitability” of the books in question, then their removal would be “perfectly permissible.”¹⁴

12 Id.

13 State v. Watts, 498 P.3d 365, 374-75 (Utah 2021), citing Miller v. California, 413 U.S. 15, 18 (1973)

14 Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871, 102 S. Ct. 2799, 2810, 73 L.

Ed. 2d 435 (1982)

3. Are library books and books assigned as a part of classroom curricula subject to the same standard?

No. Library Books are given significantly wider protection under the First Amendment than books that are assigned as a part of school curriculum.

“Petitioners might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.”¹⁵

4. What factors may NOT go into a book removal?

Books may not be removed because they contain ideas that local school boards disagree with based upon: politics, nationalism, religion, or other matters of opinion.

“In brief, 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.” Such purposes stand inescapably condemned by our precedents.”¹⁶

“Petitioners rightly possess discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner.”¹⁷

5. Does HB 374 change the standard for school library books?

No. HB 374 prohibits sensitive materials in the school setting. HB 374 defines sensitive material as “an instructional material that is pornographic or indecent material as that term is defined in Section 76-10-1235.” Section 76-10-1235 defines pornographic or indecent material as: “i) defined as harmful to minors in Section 76-10-1201; ii) described as pornographic in Section 76-10-1203; or (iii) described in Section 76-10-1217.”

This section references back to 76-10-1201, which, as noted above in question 2, requires the three prong test under 76-10-1201(5)(a) to be utilized in determining whether a material is harmful to minors. Therefore, this three-prong test under 76-10-1201(5)(a) must always be utilized when assessing whether a library book is ‘sensitive material’. It also references UCA 76-10-1203, which provides the same test as 76-10-1201(5), with the difference that the first two

15 Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 869, 102 S. Ct. 2799, 2809, 73 L.

Ed. 2d 435 (1982)

16 Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 872, 102 S. Ct. 2799, 2810, 73 L.

Ed. 2d 435 (1982) citing West Virginia Board of Education v. Barnette, 319 U.S., at 642, 63 S.Ct., at 1187.

17 Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870, 102 S. Ct. 2799, 2810, 73 L.

Ed. 2d 435 (1982)

prongs assess what appeals to the prurient interests in sex or is patently offensive to adults, rather than minors. UCA 76-10-1203 essentially repeats the same three-prong test, but focuses on adults, rather than minors.

6. Are library books included in HB 374?

Yes, though HB 374 does not change the standard that is used to assess school library books, which is noted above in question 2, and can be found under UCA 76-10-1201.

HB 374 defines instructional materials as:

(1)(a) (i) "Instructional material" means a material, regardless of format, used:

(A) as or in place of textbooks to deliver curriculum within the state curriculum 122 framework for courses of study by students; or

(B) to support a student's learning in the school setting.

(ii) "Instructional material" includes reading materials, handouts, videos, digital 125 materials, websites, online applications, and live presentations.

...

(f) (i) "School setting" means, for a public school:

(A) in a classroom;

(B) in a school library; or

(C) on school property

(g) (i) "Sensitive material" means an instructional material that is pornographic or indecent material as that term is defined in Section 76-10-1235.

(ii) "Sensitive material" does not include an instructional material:

(A) that an LEA selects under Section 53G-10-402;

(B) for medical courses;

(C) for family and consumer science courses; or

(D) for another course the state board exempts in state board rule.

As noted in question 5, HB 374 defines sensitive material as "an instructional material that is pornographic or indecent material as that term is defined in Section 76-10-1235." Section 76-10-1235 defines pornographic or indecent material as: "i) defined as harmful to minors in Section 76-10-1201; ii) described as pornographic in Section 76-10-1203; or (iii) described in Section 76-10-1217."

Section 76-10-1201, requires the three prong test under 76-10-1201(5)(a) to be utilized in determining whether a material is harmful to children, and section 76-10-1203 essentially provides the same test. Therefore, this three-prong test under 76-10-1201(5)(a) must be utilized when assessing whether a library book is 'sensitive material'.

7. What should be done with a book while it is pending review?

While there is no specific law stating that books must be left in the library when facing a challenge, leaving books on the shelves while pending review helps to ensure that schools are not engaging in prior restraint. As noted in question 1, students have extensive first amendment rights in school, and the removal of a book from a school library can constitute a suppression of ideas. Prior restraint is a legal doctrine in the first amendment is violated when the government prevents speech before it occurs. In this case, removing books before a determination is made as to whether they meet the definition of "harmful to children" runs the risk of violating student's first amendment right's to study and inquire, via prior restraint.

SCOTUS has a long history of disfavoring prior restraints. "Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights," wrote then-Chief Justice Warren Burger. SCOTUS has held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."¹⁸ They further noted that "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."¹⁹

18 Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963)
19 Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 390, 93 S. Ct.
2553, 2561, 37 L. Ed. 2d
669 (1973)