

02-097

CONSTITUTION OF VIRGINIA: BOARD OF EDUCATION (SCHOOL BOARDS).

EDUCATION: SCHOOL BOARDS; SELECTION, QUALIFICATION & SALARIES -- GENERAL POWERS AND DUTIES OF SCHOOL BOARDS.

Authority for school board to remove books from public school library for reasons such as pervasive vulgarity, educational unsuitability, or age inappropriateness; decision requires school board to make factual determination.

The Honorable Frank S. Hargrove, Sr.
Member, House of Delegates
April 22, 2003

Issue Presented

You ask whether a school board has the authority to remove from a public school library books that convey illegal or unhealthy sexual practices in a positive manner.

Response

It is my opinion that a school board has the authority to remove books from a public school library for reasons such as pervasive vulgarity, educational unsuitability, or age inappropriateness based on its good faith educational judgment. Such decisions regarding any particular materials, however, would require the school board to make a factual determination.

Background

You relate that it has come to your attention that an organized effort is underway to promote unsafe, unhealthy, harmful, as well as illegal sexual practices, in the public schools of the Commonwealth. You do not relate the precise nature of the materials at issue or the purveyor of such materials.

Applicable Law and Discussion

Article 8, § 7 of the Constitution of Virginia and § 22.1-28 provide that "[t]he supervision of schools in each school division shall be vested in a school board." School boards are charged with the care, management and control of school property.¹

The Supreme Court of the United States has long recognized that "[p]ublic education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our [Constitutional] Republic."² Public schools convey the information and tools required to achieve success and self-reliance in society. They also inculcate in

tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system."³ The task given to government in providing public education is a weighty and critical one. Apart from providing education in basic curricula, public educators face great pressure to adopt, and at times to advance, social and political agendas.⁴ These agendas are sometimes inconsistent with the wishes of the parents of students and the will of the electorate expressed through their local government and school boards.

The education of the youth of this Nation is the responsibility of the parents of the students.⁵ In our system of government, many parents delegate that authority to public school teachers and to state and local school officials. It is at the local level, and not in the federal courts, that the best interests of students should be determined.⁶

In *Board of Education v. Pico*,⁷ the Supreme Court of the United States reviewed a local board of education's decision to remove certain morally objectionable books from a high school and junior high school library.⁸ The board's decision was based on its belief that the books were "anti-American, anti-Christian, anti-Sem[itic], and just plain filthy."⁹ Many of the books removed contained profanity and vulgarity.¹⁰ The Second Circuit reversed the district court's granting of summary judgment to the school board on plaintiffs' First Amendment claims.¹¹ A sharply divided Court voted to affirm the Second Circuit's decision to remand the case for a determination of the school board's motives.¹² A majority of the Court could not, however, agree on the degree of discretion available to school libraries.¹³ In short, the *Pico* Court did not render a majority opinion.¹⁴ Justice Brennan wrote what is commonly referred to as the "plurality" opinion.¹⁵ The plurality determined that the First Amendment necessarily limits the government's right to remove from a high school library materials based on their content.¹⁶ Justice Brennan reasoned that the right to receive information is inherent in the right to speak and that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."¹⁷

Justice Brennan explained that this principle was particularly important given the special role of the school's library as a locus for free and independent inquiry.¹⁸ At the same time, Justice Brennan recognized that public high schools play a crucial role "in the preparation of individuals for participation as citizens."¹⁹ Justice Brennan, therefore, agreed with the petitioners that local school boards are entitled to great discretion "to establish and apply their curriculum in such a way as to transmit community values."²⁰ Accordingly, the plurality determined that "local school boards may not remove books ... 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.'"²¹ Justice Brennan noted that the school board might remove books that are not suited to educational purposes or those that contain pervasive vulgarity.²²

In his concurring opinion, Justice Blackmun focused not on the right to receive information recognized by the plurality, but on the school board's discrimination against disfavored ideas. Justice Blackmun recognized that *Pico's* facts invoke two significant, competing interests: (1) the mission of public schools to prepare students to be citizens; and (2) the First Amendment's core proscription against content-based regulation of speech.²³ Justice Blackmun noted that a state must normally demonstrate a compelling reason for content-based regulation, but that a more limited form of protection should apply to public education.²⁴ Balancing the two principles at stake, Justice Blackmun concurred that the school board could not remove books based on mere disapproval of their content, but could

limit its collection for reasons of educational suitability, budgetary constraint, offensive language, or age inappropriateness.²⁵

In his dissent, Chief Justice Burger concluded that any First Amendment right to receive speech does not affirmatively obligate the government to provide such speech in high school libraries.²⁶ He reasoned that, although a state could not constitutionally prohibit a speaker from reaching an intended audience, nothing in the First Amendment requires public high schools to act as a conduit for particular speech.²⁷ Chief Justice Burger explained that such an obligation would be inconsistent with public high schools' inculcative mission. That mission necessarily requires schools to make content-based choices among competing ideas in order to establish a curriculum and to educate students.²⁸

It is significant to note that all of the *Pico* Justices, including the dissenters, recognize that any discretion afforded to school libraries is uniquely tied to the public schools' role as educator.²⁹ Of even more significance to your question is Justice Rehnquist's observation that high school libraries must be treated differently from public libraries.³⁰ Indeed, Chief Justice Burger and Justice Rehnquist justified giving public schools broad discretion to remove books from the school library, in part by noting that such objectionable materials remained available in public libraries.³¹

Both before and after the *Pico* decision, lower courts faced with schoolbook bans generally have upheld school boards' decisions that remove books from the curriculum, but not from the school library.³²

Campbell v. St. Tammany Parish School Board arose from a parent's complaint, which persuaded the school board to remove a book entitled "*Voodoo & Hoodoo*" from all parish school libraries.³³ The book traced the development of African tribal religion and contained "how-to" advice about spells, tricks, and hexes as ways to bring ill fortune to others or to bring about particular events.³⁴ A fourteen-member school board voted in favor of removing the book, but stated no reasons for its decision.³⁵ Earlier, the district court granted plaintiffs' motion for summary judgment and ordered the return of the book to all parish libraries.³⁶ Relying on *Pico*, the district court found that the school board's removal was intended to deny students access to the objectionable ideas contained in the book, particularly the descriptions of voodoo practices and religious beliefs.³⁷ In reviewing the depositions of eight of the twelve school board members who voted in favor of removal, the Fifth Circuit found the factual record insufficiently developed and remanded the case for trial to determine "the true, decisive motivation behind the School Board's decision."³⁸ The Fifth Circuit's decision was influenced by the fact that "many of the School Board members had not even read the book, or had read less than its entirety, before voting as they did."³⁹ The court also noted that the school board's noncurricular-based decision, coupled with the refusal to consider its own committees' recommendations,⁴⁰ suggested that the board's decision might have been an attempt to "strangle the free mind at its source."⁴¹

You do not relate the types of books that are at issue or whether the school board has considered any options other than removal of an objectionable book. These factors, and others, would be relevant to the constitutional analysis of any particular removal decision. Regardless, any determination whether a specific book may be banned from a school library necessarily requires a factual inquiry into the subject matter of the book. For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the

Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.⁴² While factors such as educational suitability and quality are inherently subjective or judgmental in nature, neither the Constitution of the United States nor the *Pico* decision prohibits good-faith educational judgments by school boards based upon such factors.⁴³

Conclusion

Accordingly, it is my opinion that a school board has the authority to remove books from a public school library for reasons such as pervasive vulgarity, educational unsuitability, or age inappropriateness based on its good faith educational judgment. Such decisions regarding any particular materials, however, would require the school board to make a factual determination.

¹ See Va. Code Ann. § 22.1-79(2), (3), (5) (Michie Repl. Vol. 2000) (authorizing school board to care for, manage and control school property, oversee conduct of public schools and ensure compliance with laws, and determine studies to be pursued and teaching methods). This opinion is limited to school libraries where the school board has retained complete or some control or authority over library operations. This opinion does not extend to purely public libraries operating on school property pursuant to agreements between a local school board and a library board pursuant to § 22.1-131.

² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278 (1988); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

³ *Ambach v. Norwick*, 441 U.S. 68, 77 (1979).

⁴ See, e.g., *Hazelwood School District v. Kuhlmeier*, 484 U.S. at 278 (noting that public educator's task is weighty and delicate, demanding particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so.)

⁵ *Id.* at 273.

⁶ *Id.* (noting that education is primarily responsibility of parents, teachers, and state and local school officials); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207-08 (1982) (placing primary responsibility of determining educational methods for handicapped children in state and local authorities and parents); *Wood v. Strickland*, 420 U.S. 308, 326 (1975) (noting that public education system necessarily relies on judgment of school administrators and school board members); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (noting that public education generally is under control of state and local authorities).

⁷ 457 U.S. 853 (1982).

⁸ *Id.*

⁹ *Id.* at 857 (quoting *Pico v. Bd. of Educ.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

¹⁰*Id.* at 907 (citing *Pico v. Bd. of Educ.*, 638 F.2d 404, 419 n.1 (2d Cir. 1980)).

¹¹*Id.* at 860.

¹²The *Pico* plurality opinion states: "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." *Id.* at 871 (first emphasis added) (footnote omitted). You do not advise whether any decision has been made regarding removing books and if so, by whom. It is evident that the lawfulness of any removal decision will turn, in large part, on the motives for such removal.

¹³Compare *id.* at 855 (plurality op.), with *id.* at 875-79 (Blackmun, J., concurring); and *id.* at 883-84 (White, J., concurring).

¹⁴The Supreme Court has noted that in cases for which there is no clear majority, a court should examine the "position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)), *quoted in* *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995). The Fifth Circuit noted that "Justice White's concurrence in *Pico* represents the narrowest grounds ..., and it does not reject the plurality's assessment of the constitutional limitations on school officials' discretion to remove books from a school library." *Campbell*, 64 F.3d at 189. Although the plurality in *Pico* does not have "*precedential value*," the Fifth Circuit noted that it would "provide useful guidance in determining the constitutional implications of removing books from a public school library." *Id.* (citing *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982)).

¹⁵Three Justices joined in the plurality opinion, one of whom concurred in part. *Pico*, 457 U.S. at 855.

¹⁶See *id.* at 869-71 (plurality op.).

¹⁷*Id.* at 866 (plurality op.) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

¹⁸See *id.* at 868-69 (plurality op.). Justice Powell wrote a separate dissent in *Pico* to say that the plurality opinion is standardless and meaningless. See *id.* at 895 (Powell, J., dissenting). Justice Powell noted that "[e]ven the 'chancellor's foot' standard in ancient equity jurisdiction was never [as] fuzzy" as attempting to divine which books could be removed under the plurality opinion's standards. *Id.* (Powell, J., dissenting). Justice Powell's dissent, like Justice Rehnquist's, also took issue with how the plurality opinion characterizes the nature of a school library. "The plurality suggests that the books in a school library derive special protection under the Constitution because the school library is a place in which students exercise unlimited choice. This suggestion is without support in law or fact. It is contradicted by this very case. The school board in this case does not view the school library as a place in which students pick from an unlimited range of books—some of which may be inappropriate for young people. Rather, the school library is analogous to an assigned reading list within which students may

exercise a degree of choice." *Id.* at 895 n.2 (Powell, J., dissenting) (citations omitted). Justice Rehnquist noted that "elementary and secondary schools are inculcative in nature. The libraries of such schools serve as supplements to this inculcative role." *Id.* at 915 (Rehnquist, J., dissenting).

¹⁹*Id.* at 864 (plurality op.) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

²⁰*Id.* (citation omitted).

²¹*Id.* at 872 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

²²*Id.* at 871.

²³*See id.* at 876-78 (Blackmun, J., concurring).

²⁴*See id.* at 877.

²⁵*See id.* at 879-80.

²⁶*See id.* at 887-89 (Burger, C.J., dissenting).

²⁷*See id.*

²⁸*See id.* at 889.

²⁹*See id.* at 863-64, 869-71 (plurality op.); *id.* at 876 (Blackmun, J., concurring); *id.* at 879 (Blackmun, J., concurring) ("Certainly, the unique environment of the school places substantial limits on the extent to which official decisions may be restrained by First Amendment values."); *cf. id.* at 889 (Burger, C.J., dissenting) ("Whatever role the government might play as a conduit of information, schools in particular ought not to be made a slavish courier of the material of third parties.... How are 'fundamental values' to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum."); *id.* at 909-10 (Rehnquist, J., dissenting) ("When it acts as an educator, ... the government is engaged in inculcating social values and knowledge in relatively impressionable young people.... In short, actions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign."); *id.* at 921 (O'Connor, J., dissenting) ("[I]n this case the government is acting in its special role as educator."). In addition, the Court states: "It is well established that 'decency' is a permissible factor where 'educational suitability' motivates its consideration." *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 570 (1998).

³⁰*See Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting) ("Unlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry[.]").

³¹*See id.* at 892 (Burger, C.J., dissenting) ("Books may be acquired from ... public libraries, or other alternative sources unconnected with the unique environment of the local public schools."); *id.* at 915 (Rehnquist, J., dissenting) ("[T]he most obvious reason that petitioners' removal of the books did not violate

respondents' right to receive information is the ready availability of the books elsewhere.... The books may be borrowed from a public library[.]").

³²*Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577 (6th Cir. 1976) (holding that action of school board in removing books from public high school library, because it deemed them distasteful, was unconstitutional); *Case v. Unified Sch. Dist.*, 908 F. Supp. 864 (D. Kan. 1995) (removing lesbian romance novel from high school library, because school board's decision was based on personal disapproval of author's ideas, was in disregard of policy governing objectionable materials, and was done without discussion of less restrictive alternatives); *Roberts v. Madigan*, 702 F. Supp. 1505 (D. Colo. 1989), *aff'd*, 921 F.2d 1047 (10th Cir. 1990) (holding that removal of Bible from school library was unconstitutional; however, removal of religiously themed books from classroom library was justified by Establishment Clause concerns); *Sheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679 (D. Me. 1982) (holding that students and their parents were entitled to preliminary injunction against school committee for banning library book for its "objectionable" language); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979) (finding that removal of "MS magazine" from high school library because of its "political" content was unconstitutional); *Right to Read Def. Comm. v. Sch. Comm.*, 454 F. Supp. 703 (D. Mass. 1978) (holding that school committee's removal from high school library of anthology of writings containing poem with indecent, but nonobscene, language infringed on First Amendment rights of students and faculty). *But see Virgil v. Sch. Bd.*, 862 F.2d 1517 (11th Cir. 1989) (holding that school board's decision to remove previously approved curriculum from elective course was constitutional; decision was based on vulgarity and sexually explicit content of material and was reasonably related to legitimate pedagogical concerns); *Bicknell v. Vergennes Union High Sch. Bd. of Dirs.*, 638 F.2d 438 (2d Cir. 1980) (finding that school board did not violate students' First Amendment rights in removing books from school library on basis of vulgarity and indecent language); *Presidents Council v. Cmty. Sch. Bd.*, 457 F.2d 289 (2d Cir. 1972) (holding that school board's removal of book about youth's life in Spanish Harlem from junior high school library and restricting its availability to parents was not unconstitutional).

³³64 F.3d at 185-86.

³⁴*Id.* at 185.

³⁵*Id.* at 187 (12-2 decision).

³⁶*Id.*

³⁷See *Delcarpio v. St. Tammany Parish Sch. Bd.*, 865 F. Supp 350, 354-56, 363 (E.D. La. 1994), *rev'd sub nom. Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184.

³⁸*Campbell*, 64 F.3d at 190.

³⁹*Id.*

⁴⁰Two separate committees, selected pursuant to the school board's appeal procedures, recommended keeping the book, but with restricted access requiring parental permission. *Id.* at 186-87.

⁴¹ *Id.* at 190 (quoting *Barnette*, 319 U.S. at 637).

⁴² See 2001 Op. Va. Att'y Gen. 73, 74; see also Op. Va. Att'y Gen.: 1999 at 132, 132; 1986-1987 at 1, 6 (citing predecessor § 2.1-118); accord 1991 Op. Va. Att'y Gen. 122, 124.

⁴³ *Pico* noted that, "[i]n rejecting petitioners' claim of absolute discretion to remove books from their school libraries, we do not deny that local school boards have a substantial legitimate role to play in the determination of school library content." 457 U.S. at 869 (plurality op.).