

# MEMO

**FOSTER SWIFT**  
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

**TO:** Lapeer District Library  
**FROM:** Anne M. Seuryneck  
**DATE:** February 20, 2025  
**RE:** Legal Issues Concerning Restricting Access to Books

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## ISSUE

We understand that the Library Board wishes to restrict access to certain books in the Library or otherwise discourage minor patrons from accessing them. We understand the Library Board is possibly considering various strategies, including:

- moving children's books to an "adult section,"
- putting certain books behind glass or the circulation desk so that a patron must ask to access it,

The Library has requested our opinion on these potential policies.

## SHORT ANSWER

Adopting any of the above policies places the Library on, at best, shaky constitutional ground. Indeed, each of these actions may be unconstitutional based on similar policies found unconstitutional by various courts. Accordingly, each of these possible actions places the Library at significant risk of being sued, and losing. Additionally, plaintiffs who are successful in civil actions under 42 USC §1983 for violations of civil/constitutional rights may be awarded their attorney fees under 42 USC §1985. In other words, the Library would face significant risk of having to pay a successful plaintiff's attorney fees, in addition to its own.

In the pages below, we examine the relevant statutes and caselaw analyzing each option. But first, here are the foundational legal bullet points and summaries:

- Restricting a patron's, even a child's, access to books based on constitutionally protected subject matter violates the First Amendment.
- Public bodies may not restrict access to books based on the book's viewpoint.
- In states under the jurisdiction of the United States Court of Appeals for the Sixth Circuit, including Michigan, there likely exists a "right to receive information" that would be violated by restricting or making it harder to access a book.
- Restricting access to a book creates a "stigma" around accessing it, in violation of the First Amendment.

- The rights of children and parents who wish to have access to materials are protected.
- Persons who wish to be shielded from certain information or materials bear the burden of taking steps to shield themselves from that information or those materials.
- Public bodies placing burdens on First Amendment rights may do so only by using the “least restrictive means” and must have a “compelling” reason to do so (the highest burden in constitutional law).
- Policies and actions directed at restricting access to certain materials may, intentionally or otherwise, amount to unconstitutional “viewpoint” discrimination.
- To restrict access to materials, library officials must read/view the materials and make informed judgments. There is no rating system for books like there is for movies.

The following are statutory references and case summaries that relate to restricting children’s access to materials in a public library.

## **RELEVANT LAW**

### **A. Caselaw**

Under the United States Constitution, the law recognizes a “right to receive information” from a public library. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir.1992). People commonly understand that the First Amendment protects citizens against government censorship. However, under the United States Constitution, the law also recognizes a separate First Amendment Right -- that is a “right to receive information” from a public library. The Court in *Kreimer* stated as follows:

Our review of the Supreme Court's decisions confirms that the First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the positive right of public access to information and ideas.

This protected First Amendment Right cannot be taken away from patrons merely because other patrons disagree with the message of certain material. The United States Supreme Court noted this principle when deciding a school board could not remove books:

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.” *West Virginia Board of Education v. Barnette*, 319 U.S., at 642, 63 S.Ct., at 1187. Such purposes stand inescapably condemned by our precedents.

*Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 102 S.Ct. 279, 973 L.Ed.2d 435 (1984). So, the Library may not remove books from its collection because some patrons may disagree with the message. The following are cases that illustrate the legal concerns with some policies.

***Sund v City of Wichita Falls, Texas*, 121 F Supp 2d 530 (N.D. Texas, 2000)**

The City of Wichita Falls passed a resolution granting library card holders the right to submit a petition to have particular books or publications moved from the children's section of the library to the adult areas of the library. The resolution included specific criteria for removing materials from the children to adult sections.

After books were removed from the children's sections following petitions, other residents sought an injunction in federal court. The district court granted the injunction. The court concluded that the resolution was unconstitutional in a variety of ways, including the following:

- The court held that the removal of books from the children's area of the library violated federal and state constitutional rights to receive information, citing several opinions of the United States Supreme Court: *Reno v American Civil Liberties Union*, 521 US 844 (1997), *Board of Education v Pico*, 457 US 853, 867-868 (noting that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom," and that "students too are beneficiaries of this principle"), *Tinker v Des Moines Indep. Community Sch. Dist.*, 393 US 503, 511 (1969) (explaining that school aged children possess First Amendment rights). The court also held that "[t]he right to receive information is vigorously enforced in the context of a public library." It noted the United States Supreme Court's holding in *Pico* that "government officials 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." (quotation marks omitted). Indeed, the court held that *public libraries* lack the unique concerns of school libraries (school discipline, discretion over curriculum) and are "designed for freewheeling inquiry."
- The court held that public libraries are limited public forums, in which the City could not limit access to library materials solely on the basis of the contents of the materials, absent a showing that the restriction on speech is necessary to achieve a compelling government interest and that there are no less restrictive alternatives for achieving that interest (otherwise known as "strict scrutiny.") But even so, the court noted that the City was limiting access to materials on the basis of viewpoint, which is almost never constitutional.
- The court held that a *burden* on First Amendment rights (by restricting access to materials) violates First Amendment rights, just as outright bans on expression (banning materials from the library) do. Therefore, because the resolution restricted a child's, or an adult's, ability to find a material, it violated the First Amendment.
- The court noted that regulation of children's access to materials not deemed obscene for adults is only permissible where the restricted materials are "harmful to minors." It noted

that the United States Supreme Court has held that “[c]learly all nudity cannot be deemed obscene even to minors.”

The Court noted that:

- “if a parent wishes to prevent her child from reading a particular book, that parent can and should accompany the child to the Library, and should not prevent all children in the community from gaining access to constitutionally protected materials.”
- “Where First Amendment rights are concerned, those seeking to restrict access to information should be forced to take affirmative steps to shield themselves from unwanted materials; the onus should not be on the general public to overcome barriers to their access to fully-protected information.”

***Counts v Cedarville Sch. Dist.*, 295 F Supp 2d 996 (W.D. Ark, 2003)**

A school district restricted students’ access to certain books in its library. Students were required to have a signed permission statement from their parent/guardian to access specific books. Parents sued.

Although it held that *Sund* was not directly on point, the court found “that the stigmatizing effect of having to have parental permission to check out a book constitutes a restriction on access” in violation of the First Amendment.

In addition to rejecting specific school district concerns about school issues, the court also rejected the school district’s arguments that it was protecting students from learning about “witchcraft,” an undesirable religion. (The controversy in this case surrounded “Harry Potter.”)

***Parents, Families, and Friends of Lesbians and Gays, Inc. v Candenton R-III Sch. Dist.*, 853 F Supp 888 (W.D. MZ (2012).**

The defendant school district used an internet filter system that blocked access to websites based on subject matter. The system allows for some ability to directly block or unblock specific websites. But to unblock a website, a student or school official had to open the specific site (and vice versa). A student and a group of publishers of websites that provide resources for LGBT youth sued.

The court found that the system systematically blocked websites that expressed a positive viewpoint toward LGBT issues in a variety of ways, including by filtering out “sexuality.” Therefore, the school, through this system, had engaged in unconstitutional viewpoint discrimination, and the system was not narrowly designed to serve a compelling state interest. The system was not narrowly limited to protect students from viewing images that were obscene, child pornography, or were harmful to minors.

Additionally, the court concluded that the school district’s filter system violated students’ right to receive information and ideas. Because the filter blocked references to “sexuality,” it burdened students’ access to LGBT positive information and stigmatized that information.

Accordingly, the court held that the school's filter system was unconstitutional.

***Right to Read Defense Committee of Chelsea v School Committee of City of Chelsea*, 454 F Supp 703 (D. Massachusetts, 1978)**

A school district removed "Male and Female Under 18" from the high school library after the Committee (the school board) Chair called the book "filthy," "offensive," "objectionable," "outright obscene," and "low down dirty rotten filth, garbage, fit only for the sewer" after reading only one part of it, and other members of the Committee voted to do so without reading any of it.

Court held that the "record leaves this court with no doubt" that the book in question was banned because the city considered "the theme and language" "to be offensive."

***Parents, Families, and Friends of Lesbians and Gays, Inc.*, 853 F Supp 2d 888 (2012)**

A district court found that a school district engaged in unconstitutional viewpoint discrimination when the internet filter system it used often labeled materials positive toward LGBT individuals under "sexuality" but labeled materials that were negative toward LGBT individuals as "religion." In other words, pro-LGBT sites were blocked; sites that viewed LGBT content as negative were not blocked. In that case, the court found that the system stigmatized LGBT positive material.

### ANALYSIS

At least under current law in Michigan, persons, including children, have a "right to receive information." Placing books in areas that restrict access to them (in "adult sections", or behind glass) or requiring parental permission to access materials burdens that right and violates the First Amendment.

Please ask any questions you may have.

AMS:KTB

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