

March 2, 2017

Governor Terry McAuliffe
Common Ground for Virginia
P.O. Box 1475
Richmond, VA 23218

By fax: (804) 371-6351

Re: H.B. 2191

Dear Governor McAuliffe:

Once again, Virginia legislators have passed a bill requiring parental notification and consent for curricular materials containing any “sexually explicit” content. You vetoed a similar bill last April, and we urge you to veto this one as well. Like the earlier version, it is constitutionally suspect and, if adopted, will undermine the quality of education in Virginia and place its students at a disadvantage in college admissions.

This bill and its predecessor have been met with widespread opposition from educators, parents, and organizations concerned with education, intellectual freedom, and the First Amendment. Your observations about last year’s bill apply equally to this one; it also “lacks flexibility and would require the label of ‘sexually explicit’ to apply to an artistic work based on a single scene, without further context.” As you acknowledged in your veto message last year, local school boards are “best positioned” to develop educational programs that expose students to “literary and artistic works that will expand students’ horizons and enrich their learning experiences.” This remains true.

Your message last year also noted that the Board of Education was considering the issue “in a broader and more complete context.” Indeed, the Board has done so, rejecting on January 26, 2017, a proposal that would have required all districts to provide parental warning for an indeterminate category of “sexually explicit” content without regard to its educational value. Having deferred to the expertise of the Board on this matter, we hope you will take its lead and veto the latest effort to impose a requirement on local school districts that the Board rejected.

Proponents of the bill frame the measure as one that protects parents’ rights. While it may protect the rights of *some* parents, it will undermine the rights of others. There is no evidence that the views of the bills’ proponents are shared by

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NCAC PARTICIPATING ORGANIZATIONS

Actors’ Equity Association
American Association of School Administrators
American Association of University Professors
American Association of University Women
American Booksellers for Free Expression
American Civil Liberties Union
American Ethical Union
American Federation of Teachers
American Jewish Committee
American Library Association
American Literary Translators Association
American Orthopsychiatric Association
American Society of Journalists & Authors
Americans United for Separation of Church & State
Association of American Publishers
Authors Guild
Catholics for Choice
Children’s Literature Association
College Art Association
Comic Book Legal Defense Fund
The Creative Coalition
Directors Guild of America
The Dramatists Guild of America
Dramatists Legal Defense Fund
Educational Book & Media Association
First Amendment Lawyers Association
Free Speech Coalition
International Literacy Association
Lambda Legal
Modern Language Association
National Center for Science Education
National Communication Association
National Council for the Social Studies
National Council of the Churches
National Council of Jewish Women
National Council of Teachers of English
National Education Association
National Youth Rights Association
The Newspaper Guild/CWA
PEN American Center
People For the American Way
Planned Parenthood Federation of America
Project Censored
SAG-AFTRA
Sexuality Information & Education Council of the U.S.
Society of Children’s Book Writers & Illustrators
Student Press Law Center
Union for Reform Judaism
Union of Democratic Intellectuals
Unitarian Universalist Association
United Church of Christ
Office of Communication
United Methodist Church,
United Methodist Communications
Women’s American ORT
Woodhull Sexual Freedom Alliance
Writers Guild of America, East
Writers Guild of America, West

most parents¹ or that the public schools are required to accommodate parental preferences that do not promote educational goals. Indeed, the law indicates quite the opposite.

Parents' Rights

The proposal seeks to institutionalize a specific set of values about the propriety of educational materials that include sexual content. The approach ignores the fact that parents in Virginia, as elsewhere, hold widely divergent views on this and other topics.² For this reason, every federal appeals court to consider the issue has concluded that, while parents have a general right to control their children's upbringing, they do not have a right to control what they are taught in the public schools: "while parents can choose between public and private schools, they do not have a constitutional right to 'direct how a public school teaches their child.'" *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir.), *cert. denied*, 555 U.S. 815 (2008), quoting *Blau v. Fort Thomas Public School District, et al.*, 401 F.3d 381, 395 (6th Cir. 2005). See also *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) (parents do not have the right "to tell a public school what his or her child will and will not be taught"). Accord, *Swanson v. Guthrie Indep. School Dist.* 135 F.3d 694 (10th Cir. 1998); *Herndon v. Chapel Hill-Carrboro*, 89 F.3d 174 (4th Cir. 1996) (rejecting parents' challenge to school's community service requirement and upholding the school's "reasonable regulation").

Consistent with these rulings, federal appellate courts routinely accord school officials wide deference to determine the content of the educational program. See, e.g., *Fleischfresser v. Directors of School Dist.* 200, 15 F.3d 680, 690 (7th Cir. 1994) (upholding the use of contested materials designed "to build and enhance students' reading skills and develop their senses of imagination and creativity"). See also *Smith v. Board of Commissioners*, 827 F.2d 684, 694 (11th Cir. 1987) (upholding school board's choice of "particular textbooks because they deemed them more relevant to the curriculum, or better written, or for some other nonreligious reason found them to be best suited to their needs"); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005), as amended, 427 F.3d 1187 (9th Cir. 2006) (school officials have the authority to decide "how it will provide information to its students [and] what information it will provide"); *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1070 (6th Cir. 1987) (courts should take care before interfering with the "educational program adopted by duly chosen local authorities.")

Federal courts have also rejected the exact type of accommodation sought here: parental notice and the right to an alternative assignment. In *Parker v. Hurley*, for example, the First Circuit rejected a free exercise claim brought by parents alleging that certain materials violated their religious beliefs; they sought, not to remove the materials, but to receive advance notice and a right to opt out of assignments. The court denied the request, finding no precedent that "permit[s]

¹ In fact, statements to the Board of Education reveal that some parents support the teaching of books like *Beloved*, because they have educational value and prepare students for college.

² In *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2741 (2011), the Supreme Court explicitly rejected the notion that the view of some parents – in that case, that violent video games are inappropriate for minors – are shared by all, and further held that a parental consent requirement enacted in the name of parental rights reflects only "what the State thinks parents *ought* to want." The Court rejected the claim that such a content and viewpoint based parental consent requirement could be "justified in aid of parental authority," in part because there was no evidence that the requirement would "meet a substantial need of parents." *Id.* at 2740.

parents to demand an exemption for their children from exposure to certain books used in public schools.” 514 F. 3d at 102.

Thus, the federal courts are unanimous in upholding the authority of school officials to select materials for their educational value, regardless of parental objections. They recognize that the effort “to eliminate everything that is objectionable ... will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result” *McCullum v. Board of Education*, 333 U.S. 201, 235 (1948) (Jackson, J., concurring). Parents who object to what is taught in the public schools have the right to send their children to private or religious schools or educate them at home. They can review their children’s assignments, file formal book challenges, and request an alternative assignment. However, they have no right to demand that schools notify parents about specific types of content or to demand an accommodation that would interfere with or burden the educational system.

First Amendment

The First Amendment prohibits agents of the state, including public school officials, from restricting or burdening access to books or ideas based on their content or viewpoint or because they are controversial, unpopular, or offensive. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (“no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion”); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) (“A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive.”)

Some parents object to sexual content, others to violence, still others to religious or racial references. For every parent who objects to an assigned book, there will be others who favor it. In practice, the attempt to alter school curricula in response to individual objections means privileging the moral or religious beliefs of some individuals over others. It is precisely this form of viewpoint discrimination by government that our constitutional system is designed to prevent.

The bill not only identifies a certain kind of content as inherently suspect, but it would also effectively create a parental consent requirement for students to access a specific category of educationally valuable content. In *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011), the Supreme Court struck down a requirement that minors obtain parental permission to purchase violent video games. The Court struck down the parental consent requirement for this type of content because it restricted “expression because of its message, its ideas, its subject matter, or its content.” *Id.* at 2733 (citation omitted). The fact that the restriction only applied to minors did not significantly alter the constitutional inquiry because “[m]inors are entitled to a significant measure of First Amendment protection,” *id.* at 2735 (citation omitted), including protection from a restrictive requirements for parental consent. The bill you have been asked to sign, moreover, makes no exception even for students who are not minors, and it is patently unconstitutional as applied to them.

The regulation of violent video games failed to survive constitutional scrutiny because there was no evidence of “an ‘actual problem’ in need of solving.” *Id.* at 2738. The same logic dooms the present bill: there is no suggestion that there is “an actual problem” from use of books like *Beloved* in schools, or that any student has been harmed by reading *Beloved* or any other educationally valuable literary works.³ The only “problem” is that an unknown number of parents personally object to books with sexual content, even though they have educational value.

The requirement for parental notification and consent not only deters the teaching of important material. It also completely disregards the First Amendment rights of students to be taught books that have unquestioned educational value.⁴ The proposal originated from a parent’s objection to the teaching of *Beloved* in a 12th Grade Advanced Placement class, which is designed to provide college credit for advanced students, some of whom are eighteen years old. The objection to an award-winning, iconic American novel, written by a Nobel Prize winner, which is studied by students all over the country, reveals how the proposal could place Virginia students at a competitive disadvantage by discouraging the teaching of significant works of literature.

Virginia Constitution

Finally, Article VIII, Section 7 of the Virginia Constitution requires that the day-to-day management of a school is a function vested in the local school boards: “The supervision of schools in each school division shall be vested in a school board.” Thus, this proposal is unconstitutional because it seeks to circumvent the local school board’s constitutionally protected mandate to manage the day-to-day operations of schools.

School Board v. Parham, 218 Va. 950 (1978) further solidifies the point. There, the State Board attempted to delegate the application of the local school board’s policies, rules and regulations to an outside arbitration panel. The court found that the arbitration had the effect of “remov[ing] from a local school board and transfer[ing] to others a function essential and indispensable to the exercise of the power of supervision vested by Section 7 of Article VIII.” *Id.* at 957. The Court held that the day-to-day management (there, the management of a teaching staff) is a function vested in the local boards. *Id.* The court went further: “It would be wholly unrealistic to say that Article VIII was designed to inject the State Board directly into the daily management of a local teaching staff. Recognizing this proposition and implementing Section 7 of Article VIII, the General Assembly has placed the management of local teaching staffs in local school boards.” *Id.* at 958.

³ The courts have also consistently declined to uphold restrictions on access to constitutionally protected expression even when the material allegedly causes harm. See, e.g., *Brown*, 131 S. Ct. at 2739 (violent video games cause harm to minors) and *American Booksellers Association v. Hudnut*, 771 F. 2d 323 (7th Cir. 1985) (pornography causes harm to women).

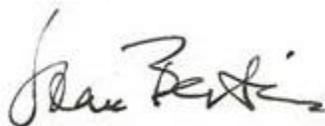
⁴ “A student’s First Amendment rights are infringed when books that have been determined by the school district to have legitimate educational value are removed” in response to complaints. *Monteiro v. Tempe Union High School District*, 158 F.3d 1022, 1029 (9th Cir. 1998). Offering an alternative assignment on demand is not a solution: “due to the practical burdens, schools would be unlikely to choose to teach alternate works separately to students objecting to a portion of the curriculum. Instead, they would probably simply remove books that they believed to be educationally valuable, but that might be controversial, or offensive to some.” *Id.* at 1028, n.7.

Similarly, determining whether to notify parents when a specific curriculum is to be taught in class is part of the "day-to-day management" of a school that constitutionally resides with the local school board. Notably, the *Parham* arbitration panel only sought to apply the rules set forth by the school board; yet, it was still found to be unconstitutional. Here, this proposal exceeds the attempt in *Parham* by creating and mandating a process for handling certain materials and notifying parents of the material in advance of it being taught. It divests the school board of its function and places that authority squarely outside of it. Thus, under the Virginia Constitution and as expressed in *Parham*, the proposal is unconstitutional.

Conclusion

We strongly urge you to veto this bill. It would undermine high quality education, disadvantage students in the state, and hamper the ability of school divisions to meet the requisite "standards of quality." It detracts from those objectives by threatening the ability of local school divisions and teachers to include in the curriculum a wide range of educationally valuable materials. More significantly, it would potentially expose the state to liability for violating the constitutional rights of parents whose disagree with its underlying premises and of students whose access to materials selected for their educational content is diminished.

Sincerely,



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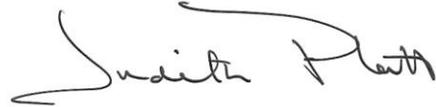
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