

January 19, 2017

Dr. Billy K. Cannady, President  
Members of the Board  
Virginia Board of Education  
P.O. Box 2120  
Richmond, VA 23218

By electronic mail: [BOE@doe.virginia.gov](mailto:BOE@doe.virginia.gov)

Re: Sexually Explicit Content

Dear President Cannaday and the Members of the Board of Education:

We have written previously to comment on the proposal to require parental notification about curricular materials containing “sexually explicit” content and to provide an alternative assignment on demand (see letter dated November 16, 2016, attached). As indicated, we believe this requirement will not only undermine the quality of education by deterring the use of valuable educational materials, but will also infringe on the constitutional rights of students and parents. We write again to address arguments advanced by proponents of the proposal at recent public hearings.

The proposal is the culmination of a three-year campaign waged primarily by one parent. She has received support from the Concerned Parents and Educators of Fairfax County, whose mission is to compel the public schools to “respect the values of students and their families.”<sup>1</sup> They assume, without evidence, that the values they espouse are shared by all parents and that public schools have an obligation to accommodate their values. Both assumptions are incorrect as a matter of fact and law.<sup>2</sup>

<sup>1</sup> <http://concernedparentsandeducators.org/about/>

<sup>2</sup> They also incorrectly claim that the Governor’s veto of House Bill 516, which was similar to the present proposal, constitutes a directive to the board to adopt this approach. However, the veto was based on the bill’s potential “real life consequences” for students and the Board’s ability to consider the “broader and more complete context” of the issue. It left the Board free to conclude that a parental consent requirement would be detrimental to the school system’s educational mission.

Joan E. Bertin  
*Executive Director*

**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

The proposal seeks to institutionalize one set of values about the propriety of educational materials that include sexual content. It would effectively create a parental consent requirement for all students, *including some who are not minors*, to read educationally valuable materials that contain some sexual references. No such requirement is imposed on any other category of content.

Parents have widely divergent views and values. 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 families over others. It is precisely this form of viewpoint discrimination by government that our constitutional system is designed to prevent.

For this reason, every federal appeals court to consider the issue has upheld the use of materials selected for their pedagogical value, rejecting the demand by parents that the curriculum reflect or conform to their beliefs and values. Parents have no right “to tell a public school what his or her child will or will not be taught.” *Blau v. Fort Thomas Public School District, et al.*, 401 F.3d 381, 395 (6<sup>th</sup> Cir. 2005). See also *Parker v. Hurley*, 514 F. 3d 87, 102 (1st Cir. 2008), *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003), *Swanson v. Guthrie Indep. School Dist.* 135 F.3d 694, 699 (10<sup>th</sup> Cir. 1998), *Littlefield v. Forney Indep. School*, 268 F.3d 275, 291 (5<sup>th</sup> Cir. 2001), *Fleischfresser v. Directors of School Dist.* 200, 15 F. 3d 680 (7<sup>th</sup> Cir. 1994), *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6<sup>th</sup> Cir. 1987).

These and other courts 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” *McCollum 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 option to request an alternative assignment, to send their children to private or religious schools, or to educate them at home.

In addition, the attempt to accommodate the views of some parents would inevitably come at the expense of the rights of other parents and their children; “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 (9<sup>th</sup> Cir. 1998).

The proposal singles out books with sexual content for special scrutiny. However, 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 *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943) (“Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing”). The proposed regulation would be tantamount to allowing parents who object to books like *Beloved* to picket schools while denying

the same right to others who support the teaching of such books. “Government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views” *Police Dept. of Chicago v. Mosley*, 408 US 92, 96 (1972).

The proponents of the rule argue that the sexual content in such books might “trigger unhealthy responses in some students.” This argument lacks any factual foundation and would be insufficient to overcome the First Amendment considerations in any event. Countless courts have rejected similar arguments seeking to ban or restrict access to constitutionally protected expression because it allegedly causes harm. See, e.g., *American Booksellers Association v. Hudnut*, 771 F. 2d 323 (7<sup>th</sup> Cir., 1985) (pornography causes harm to women) and *Brown v. Entertainment Merchants Association*, 564 U.S. \_\_\_, 131 S.Ct. 2729, (2011) (violent video games cause harm to minors).

The latter case is especially instructive. In it, the Supreme Court struck down a requirement that minors obtain parental permission to purchase violent video games. The Court characterized the requirement as a restriction on “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.

For the regulation of video games to survive constitutional scrutiny, it would have been necessary to show that there was “an ‘actual problem’ in need of solving,” and that the restriction on speech was “necessary to the solution.” *Id.* at 2738. The video game law failed on both grounds. Similarly, here there is absolutely no evidence of an “actual problem.” There is no suggestion that any student has in fact been harmed by reading *Beloved* or any other book assigned in school.<sup>3</sup> The proposal is justified solely on the ground that some parents have personal objections to books with sexual content, even if they have educational value.

The Court in *Brown* addressed the claim that the parental consent requirement could be “justified in aid of parental authority.” The Court rejected that argument because there was no evidence that the proposed requirement would “meet a substantial need of parents.” *Id.* at 2740. The Court noted that parents have other options if they wish to restrict their children’s access to video games, just as Virginia parents already have the right to review curricular materials and request an alternative assignment or to have their child placed in a regular English class rather than an advanced placement class where students are assigned more challenging material.

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<sup>3</sup>According to press reports, the campaign against *Beloved* began after a student who was reading it for a 12<sup>th</sup> grade Advanced Placement English class told his mother that the book “disturbed him.... [He] recalled reading the book before bed and having night terrors after he fell asleep. ‘It was disgusting and gross,’ he said. ‘It was hard for me to handle. I gave up on it.’” [https://www.washingtonpost.com/local/education/fairfax-county-parent-wants-beloved-banned-from-school-system/2013/02/07/99521330-6bd1-11e2-ada0-5ca5fa7ebe79\\_story.html?utm\\_term=.d6881f47e95e](https://www.washingtonpost.com/local/education/fairfax-county-parent-wants-beloved-banned-from-school-system/2013/02/07/99521330-6bd1-11e2-ada0-5ca5fa7ebe79_story.html?utm_term=.d6881f47e95e)

The *Brown* Court explicitly rejected the notion that the sensitivities of some parents are shared by all.<sup>4</sup> Instead, the Court held that while the parental consent requirement “may indeed be in support of what some parents” want, the requirement reflects “what the State thinks parents *ought* to want.” *Id.* at 2741. The proposed parental consent regulation now under consideration represents precisely this same kind of determination about what parents *should* want, expressed openly by its advocates and by extension the Board if it is adopted.

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 able to read and study books that have unquestioned educational value. The fact that the proposal originated from a parent’s objection to the teaching of *Beloved*, an iconic American novel, in a *12<sup>th</sup> Grade Advanced Placement* class, which includes students who are not minors, reveals the defects in the proposal. Any parental consent requirement imposed on students over the age of eighteen plainly violates their rights, and even younger students have a constitutionally-recognized interest in access to important educational materials.

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.

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

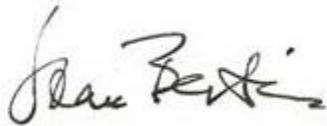
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<sup>4</sup> Meg Kilgannon made a similar claim speaking to the Board on November 17, 2016, on behalf of Concerned Parents and Educators of Fairfax County. She stated that the proposed regulation applies to “materials that people of any socio-economic level, or any political party or persuasion, would find objectionable.” In fact, *Beloved* is the kind of book many parents want their children to study in advanced level high school classes, either because they appreciate its educational value or because it will help prepare them for college.

function and places that authority squarely outside of it. Thus, under the Virginia Constitution and as expressed in *Parham*, the proposal is unconstitutional.

We strongly urge you to reject this proposed regulation that does nothing to ensure that students in Virginia public schools receive a high quality education or that school divisions meet the “standards of quality.” Rather, 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.

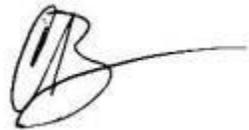
Sincerely,



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National Coalition Against Censorship



Claire Gastaña, Executive Director  
American Civil Liberties Union of Virginia



Charles Brownstein, Executive Director  
Comic Book Legal Defense Fund



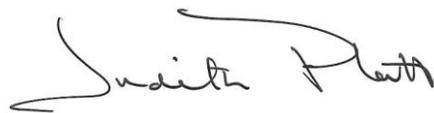
Millie Davis, Director  
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Chris Finan, Director  
American Booksellers for Free Expression



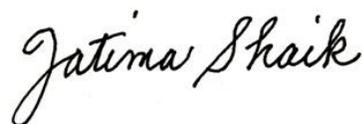
Lin Oliver, Executive Director  
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Mary Rasenberger, Executive Director  
Authors’ Guild



Fatima Shaik, Co-Chair  
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PEN America