

**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

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

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.”¹ 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.²

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

² 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.

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 (6th 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 (10th Cir. 1998), *Littlefield v. Forney Indep. School*, 268 F.3d 275, 291 (5th Cir. 2001), *Fleischfresser v. Directors of School Dist.* 200, 15 F. 3d 680 (7th Cir. 1994), *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th 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 (9th 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 (7th 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.³ 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.

³According to press reports, the campaign against *Beloved* began after a student who was reading it for a 12th 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

The *Brown* Court explicitly rejected the notion that the sensitivities of some parents are shared by all.⁴ 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 *12th 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

⁴ 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,



Joan Bertin, Executive Director
National Coalition Against Censorship



Claire Gastaña, Executive Director
American Civil Liberties Union of Virginia



Charles Brownstein, Executive Director
Comic Book Legal Defense Fund



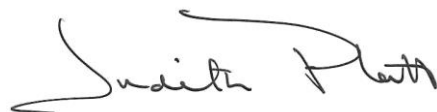
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Judith Platt, Director
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