



**PHILADELPHIA**  
1800 JFK Blvd., Suite 1900A  
Philadelphia, PA 19103  
T 215-238-6970  
F 215-772-3125

**PITTSBURGH**  
429 Fourth Ave., Suite 1910  
Pittsburgh, PA 15219  
T 412-258-2120  
F 412-535-8225

## **Testimony to the Senate and House Democratic Policy Committees**

October 5, 2023

Thank you for the opportunity to testify today. I am Deborah Gordon Klehr, Executive Director of the [Education Law Center](https://www.elc-pa.org), a non-profit legal services organization whose mission is to ensure access to a quality public education for students who are underserved by our education system, including Black and Latino students, students with disabilities, those in the foster care or juvenile justice system, children experiencing homelessness, LGBTQ students, and students who are at the intersection of these identities. I am here today to share our experiences with district-level book bans, and to ask you to take action to ensure students continue to have access to age-relevant, culturally affirming reading materials.

Pennsylvania has been at the forefront of an alarming national trend to ban books. Since 2021 there have been more than 2,500 decisions to ban books in public schools nationally and 458 book bans in Pennsylvania in 2022, ranking our state third in the nation.<sup>1</sup>

Nationally, during the first half of the 2022-23 school year alone, there were 1,477 instances of individual books banned, affecting 874 unique titles, an increase of 28% compared with the prior six months.<sup>2</sup>

Over the past two years, the trend toward book banning has accelerated. The Education Law Center has been contacted by parents in 15 communities across the Commonwealth who are alarmed by and opposed to book bans and censorship attempts by school boards and school leaders.

This censorship may occur through a formal process by a school board to modify a school district's long-standing book purchase and removal policies, but it also takes the form of soft, or informal, censorship in which school officials remove book titles in circumvention of established board policies. In just the past two weeks alone, ELC received reports of at least six school districts that appear to have practiced this form of soft censorship.

This trend is negatively impacting Pennsylvania students, who have less access to the diverse viewpoints and ideas expressed in the books being banned. It's worth noting that many of the districts banning books are predominantly white districts with few teachers of color banning books by authors of color.

The evidence is clear that book bans across the country and in Pennsylvania directly target

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<sup>1</sup> PEN America's Banned in the U.S.A.: Rising School Book Bans Threaten Free Expression and Students' First Amendment Rights (April 2022) available at <https://pen.org/banned-in-the-usa/> (listing book bans by state).

<sup>2</sup> PEN America's Update on Book Bans in the 2022-2023 School Year Shows Expanded Censorship of Themes Centered on Race, History, Sexual Orientation and Gender, available at <https://pen.org/report/banned-in-the-usa-state-laws-superchargebook-suppression-in-schools/>.

works that feature Black and Brown characters, address racism, and include LGBTQ+ characters.<sup>3</sup> Book bans not only deprive students of important learning, they directly undermine student self-esteem, erase identities, and treat students of color and students who identify as LGBTQ+ as inferior and unwelcome.

In addressing school district book bans, the General Assembly must address two legal issues: (1) the legal authority to review and remove books and (2) whether that authority is being exercised in a lawful way.

While school boards do have some authority to remove books, there are significant limitations and this authority is being unnecessarily exercised based on misinformation and fear, and is being targeted to works that center on the experiences of marginalized people, including people of color and those who identify as LGBTQ. Such targeted book bans violate the First Amendment. Moreover, in tandem with other practices, such book bans can and do result in a hostile learning environment for students of color and those who identify as LGBTQ.<sup>4</sup>

We agree that reading materials should be reviewed by qualified adults for age-relevance and appropriateness, a process that school districts already follow with the oversight of trained educators and school librarians.

We also agree that parents are important partners in education along with school personnel and students themselves. However, the efforts we have seen at the local level are the opposite of parental control and undermine this educational partnership. Instead, we see attempts by school boards, community members, outside organizations, and/or parents, who want to take away parental choice for others and impose their own perspective and agenda.

### ***Authority of School Boards to Ban Library Books***

While school boards have power to approve or remove books, those powers are limited by federal and state law, including the First Amendment. Students have a First Amendment right to read and receive information and school boards cannot target certain viewpoints to be prohibited. As the U.S. Supreme Court has explained, “the special characteristics of the school library” create additional First Amendment protections for students.<sup>5</sup> The Court ruled that books in libraries are different from mandatory school curricula, as libraries are intended as a “place to test or expand upon ideas presented to [a student], in or out of the classroom” and are distinct

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<sup>3</sup> *Banned in the USA: Rising School Book Bans Threaten Free Expression and Student’s First Amendment Rights*, PEN America (June 28, 2022), <https://pen.org/banned-in-the-usa/> (emphasis added).

<sup>4</sup> See e.g., Off. of Civil Rts., U.S. Dep. Of Ed., Letter to Forsyth County Schools Re: OCR Complaint No. 04-22-1281 (2023), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04221281-a.pdf>. (OCR investigated Forsyth County Schools in Georgia for the school district’s policy removing select books that depicted sexually explicit content. Through comments made at school board meetings, OCR found that the policy had an underlying motivation of targeting books due to gender identity, sexual orientation, or race, and therefore created a hostile environment for students of certain racial and gender identities.)

<sup>5</sup> *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 868 (1982) (“the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students”).

from materials included in the school’s curriculum, over which the board has greater discretion.<sup>6</sup> The court agreed that while school boards have discretion to transmit community values, that discretion is not unfettered, and libraries have a unique role different and separate from mandatory school curriculum.<sup>7</sup> Accordingly, a school board “may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge”<sup>8</sup> by imposing a narrow view of “community values” that limits the books available in a school library where the “opportunity at self-education and individual enrichment ... is wholly optional.”<sup>9</sup>

Moreover, the First Amendment requires school districts to have “established, regular, and facially unbiased procedures” governing the removal of noncurricular books.<sup>10</sup> Book removals by school districts that rely on irregular procedures without standards or a review process are more likely to violate the First Amendment. For example, courts have found that the removal of noncurricular books by school districts violated the First Amendment when those schools failed to provide a standard or review process regarding book removal,<sup>11</sup> where districts failed to follow their own policy and procedures regarding book removal,<sup>12</sup> or where that policy merely amounted to a disapproval of the ideas contained in certain books.<sup>13</sup>

This higher standard offers additional protections for students. The Supreme Court has held that school boards may not remove books from a school library “simply because they dislike the ideas contained in those books” or in an effort “to prescribe what must be orthodox in politics, nationalism, religion, or other matters of opinion.”<sup>14</sup> In practice, this means that school boards may not remove a library book because it does not agree with what is discussed, such as “controversial racial issues.” School boards also may not remove a book simply because it depicts gay or lesbian relationships.<sup>15</sup> Further, school boards may not remove or restrict a library book based on an unfounded “concern that the books might promote disobedience and disrespect for authority” or because a book deals with “witchcraft”—a common complaint against the *Harry Potter* series.<sup>16</sup>

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<sup>6</sup> *Id.*, 457 U.S. at 868-69 (citing *Right to Read Defense Committee v. School Committee*, 454 F.Supp. 703, 715 (Mass. 1978)).

<sup>7</sup> *Id.*, 457 U.S. at 869.

<sup>8</sup> *Id.*, 457 U.S. at 866 citing *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

<sup>9</sup> *Id.*, 457 U.S. at 869.

<sup>10</sup> *Pico*, 457 U.S. at 874.

<sup>11</sup> See *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 552-53 (N.D. Texas, 2000).

<sup>12</sup> See *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 876 (D. Kan. 1995) (ordering case to proceed to trial where the school officials’ motivations for removing books with LGBTQ themes from school libraries was a genuine issue of fact); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (law is unconstitutional under the Equal Protection Clause if race, sex, or gender is a motivating factor in its enactment).

<sup>13</sup> *Case*, 908 F. Supp. at 875-76.

<sup>14</sup> *Pico*, 457 U.S. at 872 citing *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>15</sup> *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864 (D. Kan. 1995).

<sup>16</sup> *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 1002 (W.D. Ark. 2003).

Additionally, board policies, including book policies, are unlawful if they are deemed impermissibly vague or arbitrary and capricious.<sup>17</sup> Vague language and overbroad prohibitions may be challenged as having a chilling effect on book choices and speech protected by the First Amendment. The reliance on vague, subjective criteria and failure to require consideration of a book in its entirety, including whether it has received critical acclaim, may be evidence that the policy is not tailored to be objective and to identify “educational suitability” but instead serves to impermissibly enforce a particular viewpoint.<sup>18</sup>

Courts also consider the context of proposed policies and the motivation of policymakers to determine if animus toward a particular population is a motivating factor.<sup>19</sup> And in a recent investigation by the U.S. Department of Education’s Office for Civil Rights (OCR), the agency found that Forsyth County (Ga.) Schools’ book removal policy created a hostile environment for LGBTQ students and students of color, with an underlying motivation of targeting books due to gender identity, sexual orientation, or race.<sup>20</sup>

Despite these legal protections and supporting caselaw, we find again and again that school districts in Pennsylvania are very clearly targeting and removing books that center the lived experience of people of color and people who identify as LGBTQ, causing direct harm to students. Such book bans alienate students from school, undermine student self-esteem, and treat students of color and students who identify as LGBTQ as inferior. As Ibram X. Kendi, author of the frequently challenged book *How to Be an Antiracist* explains, books that don’t say anything about Black people reinforce perceptions of Black inferiority and what our society believes constitutes education.<sup>21</sup>

### ***Authority to Restrict Curriculum***

Pennsylvania school boards have broader discretion over curricular decisions under state law, with responsibility to adopt a “course of study” that is adapted to the “age, development, and needs of the pupils” in schools. Together, school boards and superintendents have the authority

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<sup>17</sup> See e.g., *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp.2d 698, 704 (W.D. Pa. 2003) (holding a policy that prohibited “abuse, offense, and harassment” was overly vague because the terms were not defined in any way); *Bender v. Exeter Twp. Sch. Dist.*, 63 Pa. D. & C.4th 414, 425 (Berks Cty. Ct. C.P. July 18, 2003), *aff’d mem.*, 839 A.2d 486 (Pa. Commw. Ct. 2003) (holding that a transfer to an alternative school for minor misbehavior was arbitrary and capricious).

<sup>18</sup> *Pico*, 457 U.S. at 874-75.

<sup>19</sup> See e.g., *Case v. Unified Sch. Dist. No. 233*, 895 F.Supp.1463, 1470 (D. Kan. 1995) (ordering case to proceed to trial where the school officials’ motivations for removing books with LGBTQ themes from school libraries was a genuine issue of fact); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (law is unconstitutional under the Equal Protection Clause if race, sex or gender is a motivating factor in its enactment).

<sup>20</sup> Off. of Civil Rts., U.S Dep. Of Ed., Letter to Forsyth County Schools Re: OCR Complaint No. 04-22-1281 (2023), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04221281-a.pdf>. (OCR investigated Forsyth County Schools in Georgia for the school district’s policy removing select books that depicted sexually explicit content. Through comments made at school board meetings, OCR found that the policy had an underlying motivation of targeting books due to gender identity, sexual orientation, or racial orientation, and therefore created a hostile environment for students of certain racial and gender identities.)

<sup>21</sup> Zan Romanoff, Readers Digest, *Ibram X. Kendi on His New Book and Why Kids Today Need the Kinds of Books Being Banned* (Nov. 07, 2022), <https://www.rd.com/article/ibram-x-kendi-book-banning/>.

to select the textbooks and other curricular materials used by teachers and students in public schools. Federal courts have largely affirmed the discretion of school boards under the First Amendment to make these choices.<sup>22</sup>

Under state law in Pennsylvania, any school district's decision to adopt a new textbook or course of study requires an affirmative vote by a majority of all members of the school board. This vote must be recorded, showing how each member voted.<sup>23</sup> Pennsylvania law also requires a recommendation from the superintendent before a change in textbooks is made. A change in textbooks cannot be made without the superintendent's approval unless two-thirds or more of the school board votes for it.<sup>24</sup>

Over the past two years, we have seen school districts rush through book bans, curriculum changes, and other policy revisions outside of the normal process, using the boards' emergency powers to accelerate votes and limit debate. The notion that book restrictions serve to protect parents' interests belies the evidence we have seen in districts from Pennridge to Penncrest, where parents have fought vigorously and largely unsuccessfully to protect their children's freedom to read. These parents need your help.

For this reason, ELC strongly supports legislation that would protect students' First Amendment rights and prohibit unconstitutional and detrimental book censorship consistently across all school districts. While you will hear that Pennsylvania is a local control state, local control cannot and should not trump the constitutional rights of students. Instead, we need legislation at the state level to combat growing trends of unbridled censorship, which seeks to harm students and create a hostile environment – while maintaining the existing right of parents to determine at an individual level what books their own child may check out of school libraries.

H.B. 1506, Rep. Friel's bill, establishes a good balance. It maintains and enforces school district book review processes while offering a neutral body, the IUs, for the appeals processes, which will depoliticize the process and ensure that final decisions are made by trained educators. In addition, SB 926, Sen. Cappelletti's bill, prohibits libraries and school libraries from removing books because of partisan or doctrinal disapproval and withholds funds from library entities that practice unlawful censorship. While normally we are reluctant to withhold funding from public entities such as municipal libraries and public schools, we recognize that a disincentive may be necessary in this context to prevent extremists on elected school boards from taking actions that are unlawful and harmful to students and often do not take into account the important perspectives of current parents, students, teachers, and administrators.

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<sup>22</sup> *Virgil v. Sch. Bd. of Columbia Cnty.*, 862 F.2d 1517 (11th Cir. 1989) (finding school board's actions of removing certain materials from high school curriculum while allowing the same books to remain in school library was reasonably related to Boards legitimate concern regarding the appropriateness of materials for the age of students). See also *Pratt v. Independent School District*, 670 F.2d 771 (8th Cir. 1982) (ordering reinstatement to high school curriculum of films which had been removed by school board because of alleged violence and effect on students' religious and family values).

<sup>22</sup> *Pico*, 457 U.S. 853, 871 (1982) (“pervasively vulgar” and “educational unsuitability”); *ACLU v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, (11th Cir. 2009) (“factual inaccuracies”).

<sup>23</sup> 24 P.S. § 5-508.

<sup>24</sup> 24 P.S. § 8-803.

The Education Law Center has witnessed first-hand the devastating consequences of restrictive book bans that are motivated by political agendas, anti-LGBTQ discrimination, and anti-Black racism. These actions harm the ability of schoolchildren to learn, create hostile learning environments, and undermine our school communities. We need state legislation to address this growing problem, support inclusive schools, and ensure compliance with the constitutional rights of students and federal and state laws.