Book Challenges, Censorship, and Public Libraries

This information sheet is intended as a tool to assist in clarification and decision making for Public Library Directors and Boards. It is not intended as legal advice. Library Boards and Directors should consult with their library attorneys when determining a plan or policy for their libraries. This information was originally provided by the Library of Michigan and has been adapted to meet the needs of Idaho libraries.

Background on the Right to Information

The First Amendment of the United States Constitution secures the right of free speech for every person in the United States. In 1947, the U.S. Supreme Court confirmed in Martin v. City of Struthers, Ohio, (319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943)), that the framers of the constitution intended that freedom of speech under the First Amendment include the right to receive information:

> "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, Lovel v. Griffin, 303 U.S. 444, 452, 58 S. Ct. 666, 669, 82 L. Ed. 949, and necessarily protects the right to receive it."

The Martin case involved a municipal ordinance that prevented a religious group from distributing pamphlets door to door, but it is the first case to establish a right to receive information under the First Amendment. There have been several cases and opinions after Martin which follow the right to receive information, and some of those connect the exercise of this right to public library access:

> "At the threshold, however, this right, first recognized in Martin and refined in later First Amendment jurisprudence, includes the right to some level of access to a public library, the quintessential locus of the receipt of information." Kreimer v. Bureau of Police for Town of Morristown, 958 F 2d 1242 (1992)

Kreimer is a federal court of appeals case from the Third Circuit. Its analysis of the proximity of public libraries to the right to receive information has been a widely accepted legal precedent. In other words, people in the United States have a constitutional right to information and a fundamental way to exercise that right is through a public library.

Therefore, removing materials from a library simply because some members of the community object to the content is censorship, which is a violation of the First Amendment.

> "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read … and freedom of inquiry, freedom of thought, and freedom to teach … Without those peripheral rights the specific rights would be less secure." Griswold v. Connecticut, 381 U.S. 479 (1965).

Even though schools have some latitude with which to restrict materials to those which support a prescribed curriculum, the Supreme Court in Pico still determined that content-based removal of certain books from the school library was a violation of students' First Amendment rights. Bring this analysis to a public library situation (where there is little recognized authority to restrict access to information) and the bar against content-based removal is even more obvious.

> "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 means of opinion." Bd. Of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982).

Q: Don't public libraries restrict access to information simply by choosing to purchase some materials over others? Isn't that censorship?

Public libraries, and indeed all libraries, by necessity, must have comprehensive policies and procedures for determining what materials their collections should contain. No library, save the Library of Congress, has the space and resources to acquire and circulate every publication on every topic. Libraries make decisions according to objective criteria that consider, among other factors, their budget, the demographics of their community, the current circulation habits and demands of their patrons, contemporary societal issues and events, the literary or entertainment quality of the material (as considered by objective professional reviews, author reputation and experience, *etc*.), public libraries' through their collections, must anticipate the information that will be in demand and of use by their patrons, and must embody a broad representation within that information.

This detailed vetting process is called a library's Collection Development and Maintenance Policy, which details how materials are selected for inclusion into the collection.

So, while it is true that librarians do make choices between materials and between subject matter, the mission of most public libraries is to provide a well-rounded collection that represents multiple perspectives as well as the facts connected to a certain topic.

> "To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons. Although they seek to provide a wide array of information, their goal has never been to provide "universal coverage." Id., at 241. Instead public libraries seek to provide materials "that would be of the greatest direct benefit or interest to the community." Ibid. To this end, libraries collect only those materials deemed to have "requisite and appropriate quality." Ibid. United States v. Am. Libr.Ass'n. Inc., 539 U.S. 194, S. Ct. 2297, 156 L Ed. 2nd 221 (2003)

In other words, selecting materials for a public library using a professional process involving objective criteria is very different from removing material because the remover dislikes, or is made uncomfortable by, the content. One is collection development the other is censorship.

Q: But every right–including speech–has limits. Aren't there limits or exceptions to this idea of "right to information?" What if the information desired or available could cause harm, or does not align with "community standards," or reflects opinions and values that are objectionable?

As with most of our constitutional rights, freedom of speech and the right to information that flows from it are not absolute. There are circumstances under which information can be restricted, such as when part of a public school classroom curriculum (because a school has specific educational and curricular requirements that may necessarily involve the inclusion of some topics and not others, and a school can require students to read about specific topics and opinions), or in a private library or business (because private entities are not bound by the First Amendment when offering information), or within a religious organization. The only speech that can be restricted by content is speech that is found to be:

- Defamatory: Speech or information that is false and could harm the reputation of the individual discussed (especially if the speaker or writer knew the information was false).
- True Threats: Speech that promises a crime will be committed, *e.g.*, "I am going to kill you if you don't give me your money."
- Fighting Words: Face-to-face speech that when said has a high probability of provoking a physical fight or violence between parties. *Chaplinsky v. New Hampshire (1942)*.
- Inciting Words: Speech that is made in order to inspire "imminent lawless action," **and** is likely to actually cause the lawless action, *e.g.*, a speaker's deliberately rallying a crowd to riot or to commit another unlawful act, in a situation where the crowd was already excited and rowdy and likely to riot. *Brandenburg v. Ohio (1969)*.
- Obscenity: Probably one of the most misunderstood exemptions. The definition of "obscenity" as determined by the Supreme Court in Miller is a vague one that is only

really applicable to a court, since only a court can truly label content as "obscene". In Miller, the Supreme Court's test for defining obscenity is:

- Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. Prurient (adj.): Marked by, arousing, or appealing to sexual desire;
- Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
- See Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 2615, 37 L. Ed. 2d 419 (1973).

Generally, the label of obscenity seems to be applied to extreme representations of sexually explicit material, such as child pornography, bestiality, and other activities rejected on a societal level. It does not generally seem to apply to legal adult pornography or sexual content in literature—even age-appropriate content in literature aimed at younger readers. Material is not obscene simply because it is depicting activity that is controversial or non-conforming to what is considered "normal." The label seems to be intended by the court to be applied to "hard-core" sexual content. Webster's defines hard-core pornography as "Containing explicit descriptions of sex acts or scenes of actual sex acts."

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct." Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 2615, 37 L. Ed. 2d 419 (1973).

Idaho Code section 18-4101(A) defines "Obscene material" as

> (1) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and
> (2) Which depicts or described patently offensive representations or descriptions of:
> (a) Ultimate sexual acts, normal or perverted*, actual or simulated; or
> (b) Masturbation, excretory functions, or lewd exhibition of the genitals or genital area.
>
> Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.
>
> In prosecutions under this act, where circumstances of production, presentation, sale, dissemination, or publicity indicate that the matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter

and can justify the conclusion that, in the context in which it is used, the matter has no serious literary, artistic, political, or scientific value.

* This section of Idaho Code does not define the word *perverted*.

Q: I am hearing of librarians being accused of providing sexual content to minors. Can I be criminally liable if a patron or board member believes a particular library material to be "sexual content" or inappropriate?

Unless you are providing minors with sexual content with the intention of receiving or experiencing gratification or sexual activity, it is unlikely. Libraries and librarians concerned about any type of legal liability should always consult their library attorney, and or their personal attorney.

Q: Don't library boards and library directors have a responsibility to protect their community (especially children) from materials that expose patrons to inappropriate and harmful topics? If these boards and librarians wouldn't let their own kids watch or read this material, why permit any other child to?

The issue here is who decides what is "appropriate" and what is "harmful". Who gets to decide what topics or types of materials others are allowed to see/view/read/hear? Just because one segment of the community is uncomfortable with a topic, or has a religious or other objection, is not sufficient grounds to deny the rest of the community access to that material or to those ideas. The law already accounts for truly harmful content. The rest is a matter of personal and familial choice and culture. Public libraries do not stand in the shoes of parents with regards to the welfare of their children. They are not schools or childcare centers. They are public spaces that welcome people of all ages and types with the mission of providing the information, or the means and expertise to locate the information, that each individual wishes to access. Parents and guardians bear the responsibility and the right only to determine the materials they themselves and their minor children can access.

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion … if there are any circumstances which permit an exception, they do not now occur to us." Bd. Of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982).

Q: Can a library governing board dictate the content-based removal of library materials?

This is a tricky question. In Idaho, the governing board of the library sets the policy the library's staff implements. The governing board has authority to in the areas of Governance and Policy Making, Finance, Human Resources, and Service and Community Relations. However, as they say, "With great power comes great responsibility." An illegal, thoughtless, or ill-conceived decision could result in the board's being on the wrong side of a lawsuit, which can be very costly, not only in money, but community goodwill towards the library and damage to the board's reputation. In reality, the issues surrounding content-based censorship and book removal are so divisive in U.S. culture that even if there is no lawsuit brought, the damage to the library's reputation in the community is serves (and is funded by) could cause years of bad feelings. The question for the board becomes not 'can you?' but 'should you?' Is the content of the material so damaging that it is worth the potential ramifications involved in removing it—especially when the action could end up being temporary since the materials could be easily re-instated upon the arrival of new terms and board members?

> "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equity and integration. Our Constitution does not permit the official suppression of ideas. Thus, whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which the petitioners disagreed, and if this intent was the decisive factor in the petitioners' decision, then petitioners have exercise their discretion in violation of the Constitution." Bd. Of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982)

Q: Help! Our library is experiencing a book challenge. Where can I obtain more information and resources?

There are several good resources listed below. In addition, don't forget to reach out for help if you need it. You are not alone!

- Contact other Library Directors in the state. Chances are they have been through a challenge and can offer suggestions and support.

- Reach out to your ICfL Field Consultant. They assist libraries with issues in the areas of Library Development, Operations, and Support, such as Best Practices, Library Districting, Library Law, Meeting Facilitation, Open Meetings Law, Policy Formation, Strategic Planning, Succession Planning, Trustee Issues, Trustee Orientation and Development.
- Contact the ALA Office of Intellectual Freedom (OIF). They have legal and library professional who can advising you on managing the challenge. You do not have to be an ALA member to call!

Resources:

- **ALA Office of Intellectual Freedom (OIF)** – Website for managing and reporting book challenges. One of the most comprehensive sites on materials challenges.
- **Answering Questions about Youth and Access to Library Resources** – A document designed to help you explain how and why your library selects the resources it provides. It can also help you respond to questions and challenges about material that adults may consider inappropriate.
- **Book Censorship in Schools: A Toolkit** – WebJunction materials from the National Coalition Against Censorship (NCAC). Sample letters and tips on the book challenge process. Aimed at school libraries but contains information to use with public libraries too.
- **Selection & Reconsideration Policy Toolkit for Public, School, & Academic Libraries** – ALA OIF Toolkit for challenges, reconsideration policies, and book selection policies – includes separate information aimed at public and school libraries.
- **Intellectual Freedom Resources: Book Challenges** – Contains sample reconsideration policies and letters as well as tips on handling a reconsideration request.
- **Librarian Offers Tips for Handling Ugly Book Challenges** – An article with suggestions by a librarian who survived a contentious book challenge.
- **Uncle Bobby's Wedding** – Excellent example of a well-crafted letter responding to a book challenge by well known speaker and former library director, Jamie LaRue.
- ***The Idaho Trustee Manual: A Guide for Public Library Trustees*** – A convenient and reliable information source for current and prospective trustees and library directors on issues relating to public library governance.