ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Massachusetts

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May 16, 2023

Via Email
Ludlow School Committee
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Re: Proposed policy concerning library materials

Dear Members of the Ludlow School Committee:

I write on behalf of the American Civil Liberties Union of Massachusetts ("ACLUM") to express deep concerns about the policy that has been proposed with regard to school "Library Materials."

The proposed policy raises numerous legal issues, including free expression, vagueness and discrimination, and we urge the School Committee to reject it at the earliest opportunity.[1]

The Proposed Policy

We will not attempt to summarize in full the proposed policy, which is enclosed with this letter. Suffice it to say that the proposed policy would make acquisition of *any* new or replacement materials for any public school library subject to *prior* review and approval by the Superintendent and, after public input, the School Committee.[2] Policy pages 2-3. It would set extremely vague, overbroad and repressive standards for what materials can and cannot be in school libraries, with a particular obsession with any depiction or description of various body parts. Pages 1, 3-5. And it provides that any "District employee who fails to follow this policy may be subject to discipline, *up to and including termination* …." Page 7 (emphasis added).

Our understanding is that this policy is being proposed to replace an existing one under which parents can challenge the availability of individual

[1] This policy also seems completely misguided for educational reasons, but this letter will focus primarily on the legal issues.
[2] This aspect of the policy will inevitably deprive our children of access to new library materials for possibly months at a time for absolutely no good reason, particularly given the high quality of school librarians in the Commonwealth.

books in school libraries.[3] It is also our understanding that this process has been used unsuccessfully in the past by people seeking to restrict access to library materials about people who identify as LGBTQ+—not just for their own children but for children whose parents have no objection to the materials—and that the proposed policy may be an attempt to suppress such information through another means.

We are also aware that the proposed policy is a nearly verbatim copy of a policy proposed in Bucks County Pennsylvania—a district renowned for anti-LGBTQ+ bias and facing litigation by the American Civil Liberties Union as a result.

Legal Background

Students in public schools have a constitutionally protected right to receive information, as a part of their rights to free speech protected by both the First Amendment to the U.S. Constitution and, perhaps more robustly, Article 16 of the Massachusetts Declaration of Rights. *Bd. of Educ., Island Trees Free School Dist. v. Pico,* 457 U.S. 853, 866-67 (1982) (plurality opinion); *Massachusetts Coalition for the Homeless v. Fall River,* 486 Mass. 437, 440 (2020)(Article 16 "provides more protection for expressive activity than the First Amendment"). In Massachusetts, student free expression rights are also protected by state statute, G.L. c. 71, § 82. In addition, school personnel have free expression rights, including at school. *See, e.g., Kennedy v. Bremerton School District,* 597 U.S. __, 142 S. Ct. 857 (2022).

The right to receive information free of censorship holds special importance in the context of school libraries. In light of the special role of the school library, a school district's "non-curricular decision to remove a book . . . evokes the question whether that action might not be an unconstitutional attempt to 'strangle the free mind at its source.'" *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 190 (5th Cir. 1995) (quoting *West Va. State Bd. of Ed. V. Barnette*, 319 U.S. 624, 637 (1943)). And regulations that are in fact motivated by a desire to suppress certain viewpoints are certainly unlawful. *See, e.g., Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015)(discussing viewpoint suppression with regard to matters of race); *Parents, Fams., & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 897 (W.D. Mo. 2012) (censorship of LGBTQ-supportive websites in school library

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[3]We have not seen the school district's current policy. We note that it is important that schools establish and adhere to uniform, thoughtful and transparent procedures for evaluating calls to remove books. Such procedures generally include establishment of a review committee to carefully evaluate any challenged materials, receive input from stakeholders, and make written findings. They also ensure that no books are removed until the process is complete, consistent with due process principles. See, e.g., American Library Association Selection and Reconsideration Toolkit, https://www.ala.org/tools/challengesupport/selectionpolicytoolkit/formalreconsideration.

violated First Amendment); *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 532 (N.D. Tex. 2000) (restrictions on access to *Heather Has Two Mommies* in public libraries violated First Amendment); *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 875 (D. Kan. 1995) (removal of book depicting romance between two women from school libraries violated First Amendment).

Regulations that impact free expression are subject to a particularly rigorous vagueness analysis. *United States v. Williams*, 553 U.S. 285, 304 (2008); *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); *Commonwealth v. Abramms*, 66 Mass. App. Ct. 576, 581 (2006) ("An additional principle to be noted is that '[w]here a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.'"). These principles are particularly applicable here where District employees *can lose their jobs* for not complying with the proposed policy.

Regulations that have an impact on free expression are facially unconstitutional if they are overbroad and have a chilling effect on free expression. *Massachusetts Coalition for the Homeless,* 486 Mass. at 447.

In addition to the above, Massachusetts schools are forbidden from discriminating in the provision of the advantages and opportunities of an education on the basis of, among other criteria, gender, gender orientation or gender identity pursuant to both G.L. c. 76, § 5 and Article 1 of the Declaration of Rights. *Commonwealth v. Carter*, 488 Mass. 191, 202 (2021) (equal protection guarantees apply to sexual orientation and transgender status under the Declaration of Rights and U.S. Constitution).

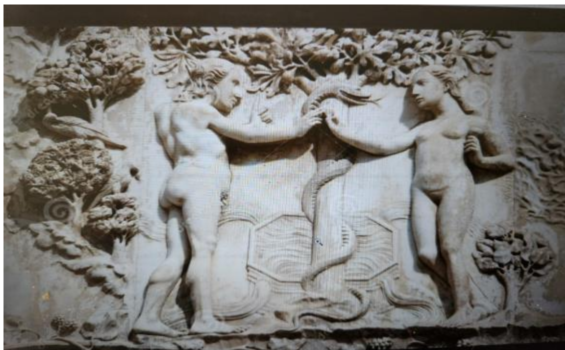
Legal Issues with the Proposed Policy

It would be difficult in a single letter to identify all the problems with this proposed policy, but a review of its pervasive vagueness and overbreadth may suffice for now.

First, the policy applies to "[a]ll materials, including print or digital materials, whether held in a formal school library, an online platform, or in a classroom, that are made available through the school library system for independent use by students and faculty outside the District's core educational program." Page 1. Yet, there is no definition of what constitutes "the District's core educational program," leading those impacted to have to guess what materials may or may not lead to a violation.

Second, the definition of “nude intimate parts”—depictions of which the policy would ban to various degrees at different educational levels—is impossibly vague and irrational, as well as discriminatory on the basis of gender. Page 1. It incorporates the definitions of “intimate parts” which include depictions or descriptions of “[h]uman genitals” and “pubic areas,” as well “the human female breast below a point immediately above the top of the areola,” including “a female breast” of which the “nipple or areola only are covered.” While it is certainly not clear, it would seem the policy therefore is preventing depictions and even descriptions of the sides, middle and/or bottom of a female breast (but not the top, thereby seemingly allowing a good shot of cleavage). It makes the description or depiction of these portions of the female breast a fireable offense, even though most children have been held, nestled and comforted throughout their formative years at such breasts.

Certainly, the policy would appear to categorically ban in both elementary and middle school library materials showing, or even describing, depictions of e.g. Jesus being nursed by his mother Mary and Eve in the Garden of Eden, including “classical” art such as this:



What exactly are children being “protected” from here, particularly given that in Massachusetts breastfeeding in a public place is explicitly lawful and interference with such basic human conduct can give rise to liability under G.L.

c. 111, § 221? There is simply no legitimate government interest in banning access to such information.[4]

Similarly, the definition of "intimate parts" encompasses "*covered* male genitals in a discernibly turgid state." (emphasis added). *What?* How is one to know whether *covered* male genitals are or are not in a "discernibly turgid state"? Turgid can be defined as distended. Are people at risk of losing their jobs if they acquire, share or describe pictures of or performances by athletes who often wear protective cups over their genitals that cause them to appear distended?

Is it a termination-worthy offense to introduce children to the joy of ballet, including by sharing depictions of male ballet dancers performing the Nutcracker, which is regularly marketed to children?

Must any film shown at school first be reviewed to determine if any actor at some point in the movie may be deemed to be looking "discernibly turgid" in their genitals? Does the rule mean that fully clothed men cannot be depicted if, without regard to any sexual arousal, they are "well endowed" and therefore

[4] In general, it is entirely unclear what actual problem is purportedly being resolved by the proposed policy and what legitimate governmental interest could justify this level of repression, particularly against the backdrop that our State Constitution requires that policymakers "cherish the interests of literature," promote the "arts," and inculcate "the principles of humanity and general benevolence . . . good humor, and all social affections, and generous sentiment." Mass. Const., Part the Second, Chapter V, Section II.

appear to exhibit some turgidity? And is this really what we want our school librarians and other school staff focusing on?

The definition of "nude intimate parts" encompasses the vague definition of "intimate parts" and defines "nude" as "uncovered *or less than opaquely covered*." Good luck figuring out what "less than opaquely covered" means. And how in the world does someone figure out whether or not or the extent to which "*covered* male genitals in a discernibly turgid state" are or are not encompassed by the ban on "*nude* intimate parts." The policy's vagueness could lead to suppression of depictions or descriptions of any portion of a "male" body below the waist so that school personnel can avoid the risk of termination.

The definition of "implied nudity" is also very interesting, shall we say, in that it encompasses "intimate parts [that] are *strategically* covered or *not shown* but where such depictions draw the viewers' attention to the person's intimate parts." (emphasis added) Where to begin? What are the controlling standards for determining whether a depiction in which intimate parts are not even shown draw viewers' attention to them? Is the standard met if any person looks in the direction of "intimate parts" even if not the intent of the artist? How can someone know whether or not intimate parts are "strategically" or non-strategically covered by the artist or filmmaker? And how can anyone know how, whether, and when a particular viewer will find their attention drawn to a person's intimate parts, particularly where they are "covered or not shown."[5]

In addition, "sexual acts" is broadly defined to cover "*any* touching of the sexual or intimate parts." Yet there is no definition of "sexual . . . parts" in the policy and no indication that touching of any such "parts" is verboten only if those "parts" are unclothed or uncovered. So someone could potentially lose their job for showing a movie in which a child touches their parents' fully clothed breasts or crotch areas. Indeed, the policy could mean materials cannot show a child sitting in someone's lap, given it would mean they are likely touching someone's "sexual or other intimate parts."

[5] Seemingly this definition would preclude showing or even talking about pictures, which appear in some Bibles and churches, of Adam and Eve after they allegedly donned fig leaves—which definitely draw attention to their private parts. *See, e.g.,* "The Expulsion from the Garden of Eden," by Masaccio which hangs in the church of Santa Maria del Carmine in Florence. https://en.wikipedia.org/wiki/Expulsion_from_the_Garden_of_Eden

A kicker in the proposed policy is that apparently people can lose their jobs not only for not complying with these vague and overbroad terms, they can lose their jobs for not "prioritiz[ing] the selection of materials which do *not* contain *other sexualized content*, *even though permitted*, such as visual depictions of nude body parts." Page 4. So people can lose their jobs for following the policy but not being able accurately to determine whether a non-banned picture could be deemed to be "sexualized conduct," a term which is not even defined in the policy. Although not at all clear, given that showing of even "classical works of art" would be forbidden in elementary school, it seems that the policy would treat "sexualized conduct" to include works of art such as Michelangelo's "David" or "The Creation of Adam" on the ceiling of the Sistene Chapel,[6] or Masaccio's "Expulsion from the Garden of Eden" (see footnote 1).

And goodness knows what is meant by the proposed policy's decree that non-fiction resources may include only "accurate and authentic factual content." Page 5. In an age when some of the same people pushing policies such as this claim, e.g. that there is no history and languishing effects of structural racism in America, the 2020 election was "stolen," and the January 6, 2021 insurrection at the U.S. Capitol was just a peaceful celebration of patriotism, one can only imagine how this provision could be wielded to suppress accurate reporting of historical and current events.

In addition to these examples of rampant vagueness and overbreadth, the policy on its face distinguishes in vague and likely unconstitutional ways between "male" and "female" body parts, thereby incorporating sexist stereotypes. *See, e.g., Free the Nipple-Fort Collins v. Fort Collins,* 916 F.3d 792 (10th Cir. 2019) (holding differential treatment of female and male toplessness likely violated equal protection principles, even under federal constitution where gender based distinctions only subject to intermediate scrutiny, in contrast to under Art. 1 of Mass. Constitution where such distinctions subject to strict scrutiny). It also leaves school personnel with no guidance as to how the policy is intended to apply to those who are transgender or non-binary, although one can imagine it is intended to deny such individuals' very existence, which is anathema to equal protection principles. *See, e.g., Commonwealth v Carter,* 488 Mass. 191, 202 (2021) (holding equal protection guarantee of Art. 1 apply to sexual orientation and gender identity).

[6] The policy would potentially (but not clearly) allow "classical art" to be available in middle schools and high schools but not in elementary school—yet does not define what qualifies as "classical" under the policy. Does it intend to restrict depictions to ancient Greek and Roman art, as some definitions would suggest, or allow any "high quality art" which can be encompassed by the term? And by what standards is either intention to be judged? The policy gives no clue. In addition to its vagueness, a distinction between "classical" and "modern" art reflects the policy's regressive mindset.

Conclusion

The problems with the proposed policy certainly extend well beyond those we have highlighted above and include questions of the basic wisdom of such a policy on educational and other grounds. We hope, however, that this letter gives a flavor of the grounds on which the proposed policy raises serious legal issues, as well as fundamental questions of how such a policy could ever be seriously considered, let alone implemented, in a free and enlightened Commonwealth.

ACLUM respectfully suggests that this policy proposal should emphatically be rejected at the earliest opportunity. If the School Committee or their legal counsel wish to discuss this matter with us, please do not hesitate to reach out.

Sincerely,

Ruth A. Bourquin

cc: Attorney David S. Lawless via DSL@robinsondonovan.com