

Memorandum

To: Board of Education

From: Board of Education Attorney

Subject: Merits of Ms. Murphy's Appeal Regarding Her Termination

I. BACKGROUND

Ms. Murphy, a highschool librarian, believes that books are an invaluable resource in guiding a teenage student in day to day issues. Therefore, when the Board of Education implemented the ban in question, she decided to keep several banned books in her possession to later distribute to students in her book club, for the purpose of off-grounds reading.

One banned book in particular deals with the struggle of “a gay teen’s self acceptance,” which Ms. Murphy provided to a student in hopes that it would prove helpful in his struggle with his sexuality.¹ When it was discovered that Ms. Murphy had lent this book to the student, she was immediately terminated. Ms. Murphy hopes to appeal her termination on the basis of two contentions. The first of her arguments asserts that the ban of this book prohibits certain First Amendment rights, which in turn allowed her to act against it. The second asserts that the Board of Education does not have jurisdiction to prohibit the distribution of this book as long as it is read off the premises.

In order to determine the validity of her assertions, the Board of Education should turn to the decades of Supreme Court rulings as precedent on the issue.

II. ANALYSIS OF CLAIMS

1.) The First Amendment

¹ Competition Prompt

In the words of the U.S. Supreme Court Justice Abe Fortas, it “can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” (*Tinker v. Des Moines Independent Community School District*).²

The case of *Lamont v. Postmaster General* provides an analogy to Ms. Murphy’s case that can be useful in understanding the First Amendment rights that both Ms. Murphy and her students’ possess. The issue of importance in this case was that the Postmaster General was required to intercept international mail that included, what the postmaster general determined to be, communist propaganda. The Supreme Court determined this policy to be unconstitutional because it prohibited one's First Amendment “right to receive,” an expansion of the freedom of press, established first by Justice Thurgood Marshall, that argued Americans “have the fundamental right ... to receive publication” without hindrance.³ In the words of Justice Hugo Black, “This freedom embraces the right to distribute literature, and necessarily protects the right to receive it,” (*Martin v. City of Struthers*).⁴

The “right to receive” has been applied to the context of book bans in the case of *Board of Education, Island Trees Union Free School District v. Pico*, which determines that “school officials may not exercise their discretion to remove books from a school library based on ‘narrowly partisan or political’ ” opinion of the public.⁵ This is due to the fact that inflicting the judgment of the public upon the school library, and therefore taking certain books out of the library, limits teachers’ “right to distribute” and students’ “right to receive.”

² Hudson, David L. “Tinker v. Des Moines Independent Community School District(1969).” The First Amendment Encyclopedia. Accessed February 20, 2023.

<https://mtsu.edu/first-amendment/article/694/tinker-v-des-moines-independent-community-school-district>.

³ Desai, Anuj C. “Lamont v. Postmaster General (1965).” The First Amendment Encyclopedia. Accessed February 20, 2023. <https://www.mtsu.edu/first-amendment/article/848/lamont-v-postmaster-general>.

⁴ Hudson, David L. “Right to Receive Information and Ideas.” The First Amendment Encyclopedia. Accessed February 20, 2023. <https://mtsu.edu/first-amendment/article/1549/right-to-receive-information-and-ideas>.

⁵ Desai, Anuj C. “Board of Education, Island Trees Union Free School District v. Pico (1982).” The First Amendment Encyclopedia. Accessed February 20, 2023.

<https://www.mtsu.edu/first-amendment/article/103/board-of-education-island-trees-union-free-school-district-v-pico>.

This precedent can be applied to the issue regarding Ms. Murphy. By banning this book, the School Board is establishing a barrier or hindrance for Ms. Murphy's students' access to said book, which infringes on their "right to receive" and her "right to distribute." Furthermore, parents who hear of this ban, and who have "sensitive positions" on the idea of homosexuality (a theme prevalent in the book), may prohibit their child from accessing the book from other sources, such as a town library or bookstore, further restricting their "right to receive."⁶

However, there is a caveat to this protection, being that if forms of speech unprotected under the First Amendment are found within these books, there is basis for removal. Therefore, to determine the validity of the ban, one must also determine if the book in question contains any speech unprotected by the First Amendment. For example, obscenity, or material that depicts explicit sexual activity, is not protected.⁷ In many cases of School Board bans on books, especially regarding books that include LGBTQ+ themes, the reason for implementation is argued to be that the books contain obscene material. The book of importance, entitled "Jack of Hearts (and other parts)," mentions sex multiple times, but whenever the main character Jack is assumed to be engaging in intercourse, the scene "[fades] to black."⁸

In order to determine whether this material constitutes as "obscenity" the board should turn to precedent from the case of *Miller v. California*. In this case, the Supreme Court established the "Miller Test" which requires a board, made up of community members, to determine whether or not the book of importance contains obscenity on the basis of a series of criteria (see *Opinion and Recommendations*).⁹

⁶ See note 3 above.

⁷ "First Amendment and Censorship." American Library Association, December 22, 2021. <https://www.ala.org/advocacy/intfreedom/censorship.>; Steiner, Ronald. "Community Standards." The First Amendment Encyclopedia. Accessed February 20, 2023. <https://mtsu.edu/first-amendment/article/901/community-standards>.

⁸ "Statement on Banning Jack of Hearts (and Other Parts)." Lev AC Rosen. Accessed February 20, 2023. <https://www.levacrosen.com/jack-statement>.

⁹ Steiner, Ronald. "Community Standards." The First Amendment Encyclopedia. Accessed February 20, 2023. <https://mtsu.edu/first-amendment/article/901/community-standards>.

2.) Board of Education's Jurisdiction

In regards to Ms. Murphy's second argument, there is little precedent that provides guidance on the extent of the Board of Education's jurisdiction in the context of the book bans. However, even if one agrees with her on the basis that the Board cannot prevent a staff member from providing a banned book to be read off-grounds, Ms. Murphy had no way of guaranteeing this. She in fact made it more likely for on-grounds reading due to her providing the book while on school premises. In fact, Gary, the student to whom the book was given, read the book on school grounds. Therefore, despite her intentions, she allowed for a banned book to be read by a student on school property, making her argument regarding the jurisdiction of the Board irrelevant and void.

III. OPINION AND RECOMMENDATIONS

While Ms. Murphy's second claim clearly proves no threat, the Board of Education should be wary of her first. As proven above, the ban on this particular book could infringe on the First Amendment rights of both Ms. Murphy and her students, leaving the School Board open to civil litigation. In order to prevent litigation against the Board I suggest the following:

- 1.) Rehire Ms. Murphy, and provide her with compensation for time lost. While Ms. Murphy may have broken a school rule, the above reasoning indicates the ban may be unconstitutional, and if that is the case, Ms. Murphy's actions should be excused. According to the aforementioned precedents, higher level courts tend to take the side of actors such as Ms. Murphy, especially in regards to their First Amendment rights.

However, Ms. Murphy may not have the stamina nor the resources to push this case to such courts. Therefore, the option to continue Ms. Murphy's termination is still open, and this matter is up to the Board's discretion.

- 2.) Establish a focus group composed of members of the community to determine the validity of the book ban.
 - a. Use the "Miller Test" to determine whether or not a book contains obscene material. The group should determine whether the books included in the ban:
 - i. "appeal to the prurient interest"
 - ii. "depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law"
 - iii. "lack serious literary, artistic, political or scientific value"¹⁰

If a book is found to pass this test, the Board should take the book off of the ban list in order to prevent litigation from employees or parents.

- 3.) Establish a standard that requires a certain level of specificity when it comes to informing staff on district wide policies. This may include holding required staff meetings regarding the intricacies of a policy, sending an email out that includes said intricacies, or having a resource page with said intricacies for a staff member to access if they may have questions. All of the aforementioned measures will help to ensure that staff members have the resources to follow school policies properly, and if they decide not to do so, the Board has leverage against them. If these policies are clearly laid out, unlike in the case of Ms. Murphy, the Board will be able to prevent future complications.

¹⁰ Ibid

Work Cited

- Desai, Anuj C. “Board of Education, Island Trees Union Free School District v. Pico (1982).” The First Amendment Encyclopedia. Accessed February 20, 2023. <https://www.mtsu.edu/first-amendment/article/103/board-of-education-island-trees-union-free-school-district-v-pico>.
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