

## INTELLECTUAL FREEDOM RESPONSIBILITIES for your Legal Pickle Tickler File

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I hope that during National Banned Books Week, all of you and your patrons experienced meaningful celebrations of Americans' First Amendment constitutional right to read. I have received disturbing calls and emails over the last couple years from librarians, trustees and city officials reporting on each other's self-censorship of library materials—attempts at heading off local controversies before they even arose—so I want to remind you of library staff and trustees' legal and ethical responsibilities to actively defend intellectual freedom.

Deborah Mikula, the Executive Director of the Michigan Library Association, and Loren Khogali, the Executive Director of the ACLU of Michigan, wrote in a September 30, 2022 opinion piece in the *Washington Post*, entitled "Have We Forgotten What a Public Library Is For?": *"Libraries fill a role central to any functioning democracy: upholding the rights of citizens to read, to seek information, to speak freely. As champions of access, librarians are committed to curating collections that allow everyone who enters the library to see themselves in the books and resources the library provides. It is especially crucial to serve people who belong to traditionally marginalized groups—such as the LGBTQ community—which have historically been underrepresented in the publishing industry."*

I understand that true freedom can be scary, at least for some. In a free society like America, where residents are protected by the First Amendment, parents can censor a good deal of that to which their children are exposed, but when a government agency (the public library), government officials (the library board) or government employees (library staff) do it, it's a clear violation of citizens' constitutional rights. Both the federal and state constitutions prohibit government at any level from censoring the free exchange of ideas and the free flow of information between, to and from all people. Furthermore, the U.S. Supreme court has repeatedly ruled that children, as well as adults, possess these First Amendment rights.

In the 1975 decision *Erznoznik v. City of Jacksonville* (422 US 205), the U.S. Supreme Court ruled that, *"Speech...cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."* For this opinion, the Justices relied on the 1969 U.S. Supreme Court decision from Iowa's own case, *Tinker v. Des Moines School District* (393 US 503), in which the justices ruled that parental rights do not transfer to the government, even if the parents request or demand it (which means that libraries cannot restrict children's access to library materials—an exercise of their First Amendment rights—even if their parents demand it). In *Counts v. Cedarville School District* (295 FSupp2d 996), the federal court ruled that libraries requiring parental permission for children to access certain library materials or services placed an undue burden on minors' constitutional rights.

The federal court wrote in *American Amusement Machine v. Kendrick* (244 F3d 572): "The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing the government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him rather than a right that is to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble." ... "We are not persuaded by the City's argument that whatever contribution to the marketplace of ideas and expression the games in the record may have the potential to make is secured by the right of the parent (or guardian, or custodian—and does that include a babysitter?) to permit his or her child or ward to play these games. The right is to a considerable extent illusory. ...and conditioning a minor's First Amendment rights on parental consent of this nature is a curtailment of those rights."

The federal court wrote in *Sund v. City of Wichita Falls, Texas* (121 FSupp2d 530): "The Wichita Falls Public Library, like all other public libraries, is a limited public forum for purposes of First Amendment analysis. ... In a limited public forum, the government's ability to restrict patrons' First Amendment rights is extremely narrow. Thus, the City cannot limit access to library materials solely on the basis of the content of those materials, unless the City can demonstrate that the restriction is necessary to achieve a compelling government interest and there are no less restrictive alternatives for achieving that interest. ... Moreover, if a parent wishes to prevent her child from reading a particular book, that parent can and should accompany the child to the Library, and should not prevent all children in the community from gaining access to constitutionally protected materials. Where First Amendment rights are concerned, those seeking to restrict access to information should be forced to take affirmative steps to shield themselves from unwanted materials; the onus should not be on the general public to overcome barriers to their access to fully-protected information."

In the U.S. Supreme Court decision *Brown v. Entertainment Merchants' Association* (564 US 786), conservative Justice Antonin Scalia wrote: "Under the Constitution, aesthetic and moral judgments about art and literature are for the individual to make, not for government to decree, even with the mandate or approval of the majority"; "While states no doubt possess legitimate power to protect children from harm, that power does not include a free-floating power to restrict ideas to which children may be exposed"; and "Disgust is not a valid basis for restricting expression."

All public library trustees should read the American Library Association's "Access to Library Resources and Services for Minors" and "Minors and Online Activity." Some trustees and city officials are dismissive of ALA's authority. It may be necessary to impress upon your board and

city officials that the American Library Association is to libraries what the American Medical Association is to physicians or the National Council of State Governments is to state legislators or the National Governors' Association is to our nation's governors. ALA's members set best practices, standards and ethics for professional librarianship, as well as employing experts such as attorneys to provide free advice and guidance to the nation's libraries and library trustees. Iowa's cities belong to the Iowa League of Cities and when mayors or city council members have questions about municipal governance, they contact the League, which, much like ALA, employs experts to offer wisdom and advice on relevant laws, regulations, court decisions, ethics and best practices for the work of city officials. ALA is such a well-respected organization that the U.S. Supreme Court justices quote ALA's "Library Bill of Rights" in a number of precedent-setting decisions pertaining to the First Amendment. Public library trustees across Iowa and the entire country respect and depend upon ALA for expert information and guidance.

In 1939, the American Library Association adopted its *Library Bill of Rights* (based on a document authored by Forrest Spaulding, then-Director of the Des Moines Public Library, interestingly). In response to the Civil Rights movement, Section 5 was added in 1961, to affirm that, "*A person's right to use a library should not be denied or abridged because of origin, background, or views.*" In 1967, the ALA Council added the word 'age' to read, "*A person's right to use a library should not be denied or abridged because of origin, age, background, or views.*"

In 1972, ALA adopted its interpretation of the *Library Bill of Rights* entitled "Free Access to Libraries for Minors" (now entitled "Access to Library Resources and Services for Minors") which says, "*Library policies and procedures that effectively deny minors equal and equitable access to all library resources and services available to other users violate the American Library Association's Library Bill of Rights. The American Library Association opposes all attempts to restrict access to library services, materials, and facilities based on the age of library users... Children and young adults unquestionably possess First Amendment rights, including the right to receive information through the library in print, sound, images, data, games, software, and other formats... Librarians and library governing bodies have a public and professional obligation to ensure that all members of the community they serve have free, equal, and equitable access to the entire range of library resources regardless of content, approach, or format. This principle of library service applies equally to all users, minors as well as adults. Lack of access to information can be harmful to minors. Librarians and library governing bodies must uphold this principle in order to provide adequate and effective service to minors.*"

A free, but very valuable, asset for library boards is THE IOWA LIBRARY TRUSTEE'S HANDBOOK (2021), available on the State Library's website. The Iowa League of Cities quotes from the TRUSTEE'S HANDBOOK in many of its written guides for city officials. It's considered to be an authoritative publication.

- In the Appendix, on pages 100-101, the section entitled "Code of Ethics," suggests that Iowa library boards adopt the "Public Library Trustee Ethics Statement" written by the national public library trustee association named United for Libraries. Some of the tenets include, *"Trustees comply with all the laws, rules and regulations that apply to them and to their library"; "Trustees, in fulfilling their responsibilities, shall not be swayed by partisan interests, public pressure or fear of criticism"; "Trustees shall not engage in discrimination of any kind and shall uphold library patrons' rights to privacy in the use of library resources"; "Trustees must also be aware of and in compliance with Freedom of Information laws"; and "Trustees shall support the efforts of librarians in resisting censorship of library materials by groups or individuals";* among others.
- In the Appendix on page 93, the "Full Library Board Assessment" lists: *"The board safeguards the public's First Amendment and Intellectual Freedom rights by protecting freedom of access, while also being open to the public's comments"; and "The board is aware of patron privacy protections under the Iowa Code and ensures that its policies are consistent with the law,"* among trustee competencies.
- Chapter 15 is entitled "Intellectual Freedom" and is essential reading for every public library trustee. It explains the role of a public library in a democratic society, the role of privacy in intellectual freedom issues, and guidance on defending intellectual freedom in the face of challenges. Many library boards assign a chapter of the HANDBOOK to read and discuss at each board meeting. Members of the Iowa Library Association's Intellectual Freedom Committee are also willing to make presentations at board meetings regarding boards' responsibilities in this area of the law.
- Chapter 8 is entitled "Evaluating Service and Advocating for Advancements" and the subheading "Intellectual Freedom Advocate" is on page 44. It says, in part, *"Finally, as a trustee advocate, you will be a defender of intellectual freedom defined by the American Library Association as the 'right of every individual to both seek and receive information from all points of view without restriction.' Once the board has established a collection development policy and library resources are purchased which respond to community needs, the trustee as advocate must recognize a sacrosanct responsibility to permit people access to those materials."*

Public libraries apply for and earn an accreditation status from the State Library by meeting or exceeding the public library standards enumerated in the publication entitled IN SERVICE TO IOWA (6<sup>th</sup> ed.), also available on the State Library's website. Most of our libraries have earned a "Tier 3" status and are accredited, which nets them thousands of dollars in state aid each fiscal year. The Standards were recently revised, which means the next time libraries apply for accreditation, they must meet even stricter standards in order to receive state aid. Standard 7, under the heading "Library Governance" (which means standards pertaining to library boards), says:

**"Required:** *The library's adopted circulation policy is consistent with the principles of the right to privacy and the Code of Iowa 22.7 (13), 'Confidential records.'*

**Required:** *The library's adopted collection development policy is consistent with principles of intellectual freedom as found in such documents as the U.S. Constitution, the American Library Association Intellectual Freedom Manual, and the Iowa Library Association Intellectual Freedom Resource Guide.*

**PLEASE NOTE:** *Federal appellate courts have extended library patrons' rights to privacy to also cover information sought or received and resources consulted, borrowed, acquired or transmitted. This information includes, but is not limited to, database search records, reference questions and interviews, interlibrary loan records, information about materials downloaded or placed on 'hold' or 'reserve,' and other personally identifiable information about uses of library materials, programs, facilities, or services. (See the American Library Association's 'Privacy: An Interpretation of the Library Bill of Rights.')*"

If a library wants continued accreditation and funding from the State Library, its board, staff and policies must comply with the laws, regulations, and court decisions pertaining to intellectual freedom and non-discriminatory access to library materials that are so neatly summed up by the collective wisdom that is the American Library Association.

Back to Mikula and Khogali, who ended their *Washington Post* opinion piece by concluding: "It is up to all of us who support free speech to resist book banning. Attend meetings and voice support for intellectual freedom and inclusion. ...The way to combat vocal attacks on free speech is with even more free speech. Otherwise, the censors win. And we all lose."