



May 16, 2024

Paul O. Burns, Ed.D.
Chancellor, Division of Public Schools
Florida Department of Education
325 W. Gaines Street, Suite 1502
Tallahassee, Florida 32399

Sent via U.S. Mail and Electronic Mail (Paul.Burns@fldoe.org)

Dear Chancellor Burns:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by a Florida Department of Education (FLDOE) memorandum that inaccurately states that HB 1069 categorically bans public school libraries from carrying material that “depicts or describes sexual conduct.” School districts throughout Florida appear to be relying on FLDOE’s constitutionally suspect memorandum to permanently remove hundreds of library books, including classic works of fiction, rather than follow HB 1069’s directive to evaluate the books’ suitability for different grade levels when they are challenged. Further, FLDOE’s proposed Library Media and Instructional Materials Training repeats the memorandum’s misrepresentation of HB 1069.² FIRE calls on FLDOE to issue revised guidance to school districts to avoid depriving students of access to age-appropriate library materials based on misinterpretations of state law.

Taking effect July 1, 2023, HB 1069 requires each Florida school district to establish a process for reviewing formal objections by parents or county residents to instructional and library materials.³ The “process must provide the parent or resident the opportunity to proffer evidence to the district school board” that the material:

- (I) Is pornographic or prohibited under s. 847.012;
- (II) Depicts or describes sexual conduct as defined in s. 847.001(19), unless such material is for a course required by s. 1003.46, s. 1003.42(2)(n)1.g., or s. 1003.42(2)(n)3, or identified by State Board of Education rule;

¹ More information about our mission and activities is available at thefire.org.

² FIRE intends to submit a separate public comment concerning the training at https://www.flrules.org/gateway/View_Notice.asp?id=28336530.

³ Our concerns focus on the memorandum’s application to library materials.

- (III) Is not suited to student needs and their ability to comprehend the material presented; or
- (IV) Is inappropriate for the grade level and age group for which the material is used.⁴

Under this law, if a school district, after reviewing challenged material through its established process, finds it meets the first condition—that is, the material is “pornographic or prohibited under s. 847.012” (Florida’s “harmful to minors” law)—the district “shall discontinue use of the material.”⁵ However, if the district finds that the material contains content meeting any of the other conditions—including depictions or descriptions of “sexual conduct” as defined under state law—the district “shall discontinue use of the material *for any grade level or age group for which such use is inappropriate or unsuitable.*”⁶

On October 13, 2023, FLDOE sent school district superintendents a memorandum informing them of their duties under HB 1069, and stating in part, as relevant here, that:

Any materials used in a classroom, made available in a school or classroom library, or included on a reading list *may not contain content* that:

- Is pornographic or prohibited under section (s.) 847.012, Florida Statutes (F.S.);
- Depicts or describes sexual conduct as defined in s. 847.001(19), F.S., unless such material is for a course required by ss. 1003.46, 1003.42(2)(n)1.g., or 1003.42(2)(n)3., F.S., or identified by SBE rule;
- Is not suited to student needs and their ability to comprehend the material presented; or
- Is inappropriate for the grade level and age group for which the material is used.⁷

⁴ Fla. Stat. § 1006.28(2)(a)(2)(b)(I)-(IV). Section 847.001(19) defines “sexual conduct” as “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.”

⁵ Fla. Stat. § 1006.28(2)(a)(2)(b). Material is “harmful to minors” under Florida law if it depicts “nudity, sexual conduct, or sexual excitement” and “(a) [p]redominantly appeals to a prurient, shameful, or morbid interest; (b) [i]s patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and (c) [t]aken as a whole, is without serious literary, artistic, political, or scientific value for minors.” Fla. Stat. § 847.001(7). Thus, material that merely depicts “sexual conduct” is not “harmful to minors” under state law.

⁶ Fla. Stat. § 1006.28(2)(a)(2)(b) (emphasis added).

⁷ Memorandum from Paul O. Burns, Ed.D., Chancellor, Div. of Pub. Schs., Fla. Dep’t of Educ., to Fla. Sch. Dist. Superintendents (Oct. 13, 2023), <https://info.fldoe.org/docushare/dsweb/Get/Document-10014/DPS-2023-90.pdf> (emphasis added).

On May 8, 2024, FLDOE proposed a rule revising the Library Media and Instructional Materials Training for school districts.⁸ Slide 13 of the training makes the same mistake as the memorandum, stating that if a book “[d]epicts or describes sexual conduct under s. 847.001(19), F.S.,” that alone requires its removal from all libraries.⁹

The memorandum and proposed library media training are contrary to HB 1069, which does *not* prohibit school or classroom libraries from containing content that “[d]epicts or describes sexual conduct” as defined under Florida law. Rather, HB 1069 requires school districts to allow parents and residents to formally object to library materials on that basis—and if the district finds the objection accurate, it must discontinue use of the material *only for grade levels and age groups “for which [] use is inappropriate or unsuitable.”*

In other words, HB 1069 affords districts discretion in evaluating age-appropriateness. For example, if a parent formally challenges a book for depicting sexual conduct, the district, after reviewing the challenge under its established procedures, may find it is inappropriate only for elementary and middle school students and retain it in the high school library (or, alternatively, that it is inappropriate only for elementary students and retain it in middle and high schools).

In codifying this individualized approach to evaluating challenged materials’ educational suitability and propriety for different grade levels, HB 1069 avoids the kind of sweeping, top-down content ban that a federal court recently held unconstitutional.¹⁰ Books vary widely in their depictions of sexuality—from their frequency, to the explicitness or subtlety, to how they fit within the context of the narrative. HB 1069 incorporates the common-sense judgment that not literally *every* book that “depicts or describes sexual conduct” is necessarily inappropriate or unsuitable for all K-12 students, including 18-year-old high school seniors.

The flat ban on material that “depicts or describes sexual conduct” that the FLDOE memo purports to impose would exclude many classic works of fiction from school libraries—as is happening in districts across the state. Many have removed hundreds of library books—including classic novels—that depict “sexual conduct,” under the mistaken assumption, driven by the FLDOE memo, that HB 1069 requires them to do so.

Notably, many of these removals were not the result of parental or constituent objections that went through the official challenge procedures that HB 1069 requires districts to establish. Rather, districts are so concerned about complying with a nonexistent ban on material

⁸ FLA. DEP’T OF EDUC., NOTICE OF PROPOSED RULE 6A-7.0715, CERTIFICATIONS AND PLANS FOR INSTRUCTIONAL MATERIALS AND LIBRARY MEDIA, *available at* https://www.flrules.org/gateway/View_Notice.asp?id=28336530.

⁹ FLA. DEP’T OF EDUC., LIBRARY MEDIA AND INSTRUCTIONAL MATERIALS TRAINING (eff. July 2024), https://web02.fldoe.org/rules/doc/6A-7.0715_3107.pdf.

¹⁰ *GLBT Youth in Iowa Sch. Task Force v. Reynolds*, No. 4:23-cv-00474, 2023 U.S. Dist. LEXIS 231840 (S.D. Iowa Dec. 29, 2023) (preliminarily enjoining as unconstitutionally vague and overbroad an Iowa law that required public schools to remove from libraries “any material with descriptions . . . of a sex act”); *see also Bd. of Educ. v. Pico*, 457 U.S. 853, 866, 870 (1982) (plurality op.) (“[The] First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library,” such that governmental discretion to control the content of school libraries “may not be exercised in a narrowly partisan or political manner.”).

depicting “sexual conduct” that they have initiated internal reviews to find and remove it. This misapplication of the law has led to unnecessary and likely unconstitutional censorship, emptying libraries of books that could have provided lasting educational value for many students.

For example, Collier County Public Schools (CCPS) proactively removed hundreds of books from its libraries merely because they depict or describe “sexual conduct.”¹¹ CCPS’s website makes clear the district mistakenly believes HB 1069 requires it to permanently remove these books from all its libraries, rather than to evaluate the books’ suitability for different grade levels upon parental challenge.¹² In many cases, district reviewers *did not even read the books or the allegedly problematic passages*.

CCPS removed *Anna Karenina* from all libraries because “reviews discuss sexual behavior but not specific page.”¹³ The district also removed *Brave New World* from all libraries because a review site characterized it as “permeated by sex, although there are no explicit descriptions of sex acts.”¹⁴ And apparently someone saying on Reddit that *The Once and Future King* “has sex in it” was a reason for its removal.¹⁵ CCPS also purged classics like *Atlas Shrugged*, *Catch-22*, *Dune*, *For Whom the Bell Tolls*, *Invisible Man*, *Slaughterhouse-Five*, *The Man in the Iron Mask*, and *Their Eyes Were Watching God*.

And CCPS is not alone. Orange County proactively pulled nearly 700 books from its classroom libraries, including classics like *East of Eden*, *Madame Bovary*, and *The Color Purple*, and placed some on a rejection list with this explanation: “Depicts or describes sexual conduct (not allowed per HB 1069-2023).”¹⁶ Polk County Public Schools’ “Prohibited Content Acknowledgment Form,” which members of the school library media committee must sign, copies the inaccurate part of the FLDOE memo almost verbatim, stating that “any material used in a classroom, made available in a school or classroom library, or included on a reading list shall not contain content” that “[d]epicts or describes sexual conduct as defined in s. 847.001(19).”¹⁷ Committee members must use the form to affirm they “understand that

¹¹ *CCPS Recommended Removed Titles*, COLLIER CNTY. PUB. SCHS., <https://www.collierschools.com/cms/lib/FL01903251/Centricity/Domain/1278/CCPS%20Recommended%20Removed%20Titles.pdf>.

¹² *Media Services*, COLLIER CNTY. PUB. SCHS., <https://www.collierschools.com/Page/19308> (“Below is the list of titles that have been removed based on the parameters outlined in Florida House Bill 1069 and that do not meet Florida Statute 847.001(19).”).

¹³ *Media Center September 2023 Review*, COLLIER CNTY. PUB. SCHS., <https://www.collierschools.com/cms/lib/FL01903251/Centricity/Domain/1278/HB1069%20%20Titles%20with%20Rationale.pdf>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Leslie Postal, *Orange school district pulls 673 books from teachers’ classroom shelves*, ORLANDO SENTINEL (Dec. 20, 2023), <https://www.orlandosentinel.com/2023/12/20/ocps-books>.

¹⁷ *Prohibited Content Acknowledgment Form*, POLK CNTY. PUB. SCHS. (2024) (on file with author).

material containing any amount of . . . sexual conduct as defined by Florida law is prohibited from all school and classroom libraries.”¹⁸

Again, this is *not* what Florida law requires. Notably, before recently signing a new bill into law that limits library book challenges, Governor DeSantis expressed concerns about “examples where books were put under review that are just normal books that have been in education for many, many years.”¹⁹

These process-free removals of all books allegedly depicting “sexual conduct” raise serious First Amendment concerns. As a Supreme Court plurality explained in *Board of Education v. Pico*, students’ constitutional rights are “directly and sharply implicated by the removal of books from the shelves of a school library,” as the First Amendment protects not only individual self-expression but the “right to receive information and ideas.”²⁰ While local authorities have discretion to determine the content of their school libraries, “that discretion may not be exercised in a narrowly partisan or political manner.”²¹ As the Court emphasized, public schools must adhere to established and unbiased procedures for reviewing library materials before removing them.²²

To ensure Florida’s students receive the highest-quality education, FIRE urges FLDOE to clarify to school districts that (1) HB 1069 does *not* absolutely ban school or classroom libraries from retaining material that “depicts or describes sexual conduct,” as defined by Florida law; (2) HB 1069 does *not* require school districts to remove such materials for review in the absence of a formal objection from a parent or county resident; and (3) although HB 1069 requires districts to have a policy that allows parents and county residents to object to library material that “depicts or describes sexual conduct,” districts must evaluate such objections on a case-by-case basis, following established and unbiased procedures, and discontinue access to the material only for grade levels, if any, for which the district determines the material as a whole is inappropriate or unsuitable.

We respectfully request a substantive response to this letter no later than the close of business on May 30, 2024.

Sincerely,



Aaron Terr
Director of Public Advocacy

Cc: Florida Public School Superintendents

¹⁸ *Id.*

¹⁹ Rebecca Falconer, *DeSantis signs bill limiting Florida school book challenges*, AXIOS (Apr. 16, 2024), <https://www.axios.com/2024/04/17/desantis-school-book-challenges-florida-law>.

²⁰ 457 U.S. at 866–67 (cleaned up). *See also Martin v. Struthers*, 319 U.S. 141, 143 (1943) (First Amendment “embraces the right to distribute literature and necessarily protects the right to receive it”) (cleaned up).

²¹ *Pico*, 457 U.S. at 870.

²² *Id.* at 874.