FIRE
Foundation for Individual Rights and Expression

June 16, 2025

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Sent via U.S. Mail and Electronic Mail (Davina.Sauthoff@schools.utah.gov)

Dear Ms. Sauthoff:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit that defends free speech, is concerned by guidance from the Utah State Board of Education (USBE) that interprets Utah Code § 53G-10-103 as an outright bar against certain books in schools—even prohibiting students from personally possessing them.[1] Because students have a constitutional right to speak and access information on school grounds, and the code restricts only classroom instruction, the USBE's guidance misreads the law and imposes restrictions that exceed what the First Amendment permits. FIRE accordingly calls on the USBE to revise its guidance to local education agencies (LEAs) so that it adheres to First Amendment limits.

I. Utah Code § 53G-10-103's Ban on "Sensitive Materials" in School Settings

In 2022, Utah enacted Section 53G-10-103 of the Utah Code,[2] prohibiting, among other things, non-obscene "sensitive materials" in K-12 schools, which the Code defines in relevant part as including materials that describe or depict "indecent public displays" including "human genitals in a state of sexual stimulation or arousal"; "acts of human masturbation, sexual intercourse, or sodomy"; or the "fondling or other erotic touching of human genitals or pubic region."[3] [4] Per the code, sensitive

[1] Utah State Board of Education, *FAQ for Titles Removed from Utah Public Schools* (rev. Jan. 15, 2025), https://usbe-my.sharepoint.com/:w:/g/personal/davina_sauthoff_schools_utah_gov/ESTM8eFrcVZMmNIClYlU8qsBeNmBhuTkjol8MOrTQsdNOw?rtime=vDls9CJR3Ug (USBE FAQs).

[2] UTAH CODE § 53G-10-103 (2024), *available at* https://le.utah.gov/xcode/Title53G/Chapter10/53G-10-S103.html.

[3] *Id.* § (1)(e). In defining materials that constitute "indecent public displays," the statute relies on how that term is "defined in Section 76-5c-208, under the non-discretionary standards described in Subsections 76-5c-207(1)(a)(i)(A), (B), or (C)." UTAH CODE § 76-5c-207, *available at* https://le.utah.gov/xcode/Title76/Chapter5C/76-5c-S207.html?v=C76-5c-S207_2025050720250507.

[4] While the statute says it "does not apply to any material which, when taken as a whole, has serious value for minors," it then categorically states that "a description or depiction of illicit sex or sexual immorality has no serious value for minors," making it impossible to evaluate works with such descriptions or depictions as a whole

materials "***are prohibited in the school setting***."[5]

The Code on its face limits "sensitive material" to only "instructional material,"[6] which is material, "regardless of format, used as or in place of textbooks *to deliver curriculum* within the state curriculum framework *for courses of study* by students, or to support a student's learning in any school setting."[7] Instructional material "includes reading materials, handouts, videos, digital materials, websites, online applications, and live presentations" and "does not mean exclusively library materials,"[8] but there is no indication it means students' personal property.

The Code requires LEAs to determine if material qualifies as "sensitive" and to "remove [it] from student access" unless the USBE vetoes the removal.[9] It in turn tasks the USBE with aggregating LEA determinations and creating guidance for LEAs to use to identify "sensitive materials."[10] The USBE toward that end has interpreted § 53G-10-103(2)(a) as banning "sensitive materials" not only for use as instructional materials, but also students' private possession of them. The guidance states: "***These titles should not be brought to school or used for classroom activities, assignments, or personal reading while on school property.***" [11] This guidance raises both statutory interpretation and constitutional concerns to the detriment of student rights.

II. The USBE's Guidance on § 53G-10-103 is Contrary to the Code

Even before considering constitutionality, the USBE guidance conflicts with the Code's definition of "sensitive materials," which applies only to specific types of "instructional material."[12] Thus, when the statute says "[s]ensitive materials are prohibited in the school setting," it means, in relevant part, *instructional materials* that meet the statutory definition of "indecent material." And the definition of "instructional material" includes only materials controlled by the school to deliver curriculum or instruct students, while explicitly excluding those used "exclusively" as library materials. It defies logic, therefore, that a student's personal copy of a book—which is even further removed from the definition of "instructional material" than library books—could fall within § 53G-10-103. And were there any legitimate question on that point, the First Amendment concerns outlined below compel that interpretation of the Code under the doctrine of constitutional avoidance.[13]

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and effectively rendering them "sensitive materials." UTAH CODE § 76-5c-207(5). "Serious value" is defined as "having serious literary, artistic, political, or scientific value for minors, taking into consideration the ages of all minors who could be exposed to the material." *Id.* § (1)(a)(ii).

[5] UTAH CODE § 53G-10-103(2)(a) (emphasis added).

[6] *Id.* § (1)(h)(i).

[7] *Id.* § (1)(a)(i) (cleaned up) (emphasis added).

[8] *Id* § (1)(a)(ii)-(iii) (cleaned up).

[9] *Id.* § (7).

[10] *Id.* §§ (7)(c), 8(a).

[11] USBE FAQs, *supra* note 1 (emphasis added).

[12] UTAH CODE § 53G-10-103(1)(e), (1)(h)(1) .

[13] *See, e.g.*, *U.S. v. Brune*, 767 F.3d 1009, 1023–24 ("as between multiple reasonable interpretations of a statute, we will always prefer one that sustains constitutionality to one that does not under the presumption of constitutional

III. The USBE's Guidance on § 53G-10-103 Violates the First Amendment

The USBE's guidance pertaining to Utah Code § 53G-10-103(2)(a)'s prohibition of "sensitive materials" in school settings also violates the First Amendment, which prohibits the state from barring students' private possession or reading of books that neither qualify as legally obscene nor cause material and substantial disruption in schools.

A. The state has no legal basis to ban minors from accessing non-obscene materials

The First Amendment protects expression through books, plays, movies, video games, and other art forms.[14] And it protects not only individual self-expression but the "right to receive information and ideas."[15] While "obscene" expression is one of the limited number of carefully crafted categorical exceptions to the First Amendment's protection, "obscenity" is a legal term of art with a narrow, precise definition. Expression does not lose First Amendment protection as "obscenity" simply because some or even most find it "explicit" or "offensive." In *Miller v. California*, the Supreme Court held that a work may be restricted as "obscene" only if when "taken, as a whole," the "average person, applying contemporary community standards" would find it "appeals to the prurient interest"; it depicts or describes "sexual conduct" in a "patently offensive" manner; *and* it lacks "serious literary, artistic, political, or scientific value."[16] Works must meet *all three prongs* of this test to fall outside the First Amendment's protection.

Furthermore, the U.S. Court of Appeals for the Tenth Circuit—the decisions of which bind Utah—has upheld an adaptation of the *Miller* obscenity test tailored for minors.[17] The modified test examines whether the work appeals to the "prurient interest in sex to minors" as determined by the "average adult person applying contemporary community standards," whether the work is patently offensive "to prevailing standards in the adult community with respect to what is suitable for minors," and whether the work lacks the same value "for minors."[18] As with the *Miller* test, all three prongs must be met, and the mere fact that a book describes or references sexual conduct does not automatically render it obscene as to adults *or* minors.

Nevertheless, consistent with USBE guidance, LEAs are not just removing books from classroom instruction—they are entirely banning students' personal possession of non-obscene books on all school property. This is no surprise, as the guidance mistakenly interprets the Utah Code to categorically ban personal books as "sensitive materials" on school property, and the Code's definition of "sensitive materials" encompasses materials that do *not* satisfy the test for legal obscenity (as to adults or minors). For example, it includes materials that describe or depict "acts of … sexual intercourse" regardless of whether they satisfy any of the three adapted *Miller* prongs

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validity"), citing, *inter alia*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 30, 57 (1937); *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994).

[14] *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011).

[15] *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (school board's removal of books from a school library based on disagreement with the views expressed in the books violated students' First Amendment right to access ideas) (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

[16] 413 U.S. 15, 24 (1973) (internal quotation marks omitted).

[17] *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983).

[18] *Id.* at 1296.

(let alone all three). While the state may decide not to use such books as instructional materials—which is all the law does—it may not restrict students' personal possession of them. Doing so infringes on students' First Amendment right to receive information.

There are currently 18 books banned statewide.[19] While they may deal in part with sexual themes or describe sexual acts within the context of a literary narrative, they do not meet any of the obscene-as-to-minors prongs. They do not, taken as a whole, predominantly appeal to the prurient interest of minors in sex, let alone depict "patently offensive hard core sexual conduct" as contemplated by *Miller*, nor is there any credible argument that banned novels by renowned authors like Judy Blume and Margaret Atwood lack serious literary value for K-12 students, particularly high school students.[20] Peter Bromberg, associate director of a national non-profit EveryLibrary and member of the Let Utah Read advocacy organization, said it best: "I think most common-sense Americans and most Utahns understand the difference between a Hustler magazine and a National Book Award-winning novel."[21] Students have a constitutional right to personally possess and read these books on school property.

B. Schools have no legal basis to ban minors from private possession of materials which do not cause a material and substantial disruption

While public schools may restrict otherwise-protected speech in limited instances for certain limited purposes, they "do not possess absolute authority over their students."[22] In *Tinker*, the Supreme Court made clear public schools may restrict students' speech only when it "would materially and substantially disrupt the work and discipline of the school" or "inva[de] the rights of others."[23] Substantial disruption is a "demanding standard"[24] that requires more than "undifferentiated fear or apprehension of disturbance."[25] And the standard is not satisfied by *any* disturbance, but only a *material and substantial* one.[26]

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[19] Utah State Board of Education, *Sensitive Materials Removed in a Public School Setting Statewide*, revised May 5, 2025, https://usbe-my.sharepoint.com/:x:/g/personal/davina_sauthoff_schools_utah_gov/EbrZ_-SSE5RMqDxBhGxrmCUB_U3991VFqWry09cvgWRBZg?rtime=GXY3N_2M3Ug.

[20] *Id.* at 27. *Brown*, 564 U.S. at 808 (Alito, J., concurring) (the government may not restrict works that fall outside the "threshold limitation that restricts" obscenity to the kinds of "specifically described 'hard core' materials" *Miller* identified) (citing *Miller*, 413 U.S. at 23–25).

[21] Martha Harris, *With Utah's statewide book bans, 2 school districts have steered the conversation*, KUER 90.1 (Dec. 6, 2024), https://www.kuer.org/education/2024-12-06/with-utahs-statewide-book-bans-2-school-districts-have-steered-the-conversation.

[22] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969); *see also id.* at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

[23] *Id.* at 513–14.

[24] *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 193 (2021).

[25] *Tinker*, 393 U.S. at 508.

[26] *See, e.g.*, *C1.G v. Siegfried*, 38 F.4th 1270, 1279 (10th Cir. 2022) (four emails from parents, an in-school discussion, and news reports about a student's social media post did not satisfy "*Tinker's* demanding standard" of a "reasonable forecast" of material and substantial disruption).

Since *Tinker*, the Court has recognized only "three specific categories of student speech that schools may regulate in certain circumstances."[27] Education officials may restrict or prohibit plainly "vulgar" or "lewd" speech "in public discourse,"[28] school-sponsored curricular speech when the restrictions are reasonably related to legitimate pedagogical concerns,[29] and speech advocating illegal drug use.[30]

As a preliminary matter, possessing or reading a book is not "speaking" in the sense governed by *Tinker* and its progeny—rather, it is simply an exercise of students' right to access information—so it is doubtful that school authorities can rely on these precedents to ban students from privately possessing or reading their own books on their own time on school grounds. But even if *Tinker* applies to students' exercising their right to receive information, those precedents still will not justify the bans at issue.

As none of the categorical post-*Tinker* exceptions apply here,[31] LEAs would have to reasonably forecast a student's private possession of any of these books at school would cause a material and substantial disruption of school activities—something more serious than a few offended students or administrators[32]—which the LEAs have not demonstrated with respect to any of the books that have been banned. Nor are there any other grounds that justify banning private student possession of these or other non-obscene books. [33] It is difficult to imagine any scenario in which a student reading any such book on their personal time (or simply possessing it) causes a disruption, let alone a material and substantial one.

To put into stark relief the USBE's problematic guidance here, compare how a federal court applied the above precedents to block a school district from categorically banning a book about the Vietnam War that contained expletives. In *Sheck v. Baileyville Sch. Comm.,* the court emphasized that the ban extended beyond library shelves to "peaceable possession of private copies … anywhere on school property," without regard to the "age or sophistication" of potential readers.[34] The court

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[27] *Mahanoy*, 594 U.S. at 187–88.

[28] *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). Even if a book could be labeled "lewd" or "vulgar," *Fraser* does not authorize punishment for a student's private possession or quiet reading of it. *Fraser* concerned public speech directed at others during school activities. A student reading a book to themselves is not "expressing" anything in the sense that *Fraser* governs.

[29] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). As outlined above, the discussion here pertains exclusively to non-instructional materials.

[30] *Morse v. Frederick*, 551 U.S. 393 (2007). This is entirely irrelevant for present purposes.

[31] *See* notes 28, 29, and 30, *supra*.

[32] *Tinker*, 393 U.S. at 508.

[33] There is also no serious argument that a student reading a personal copy of a book at school "invades the rights of others" pursuant to *Tinker.* The act of quietly reading a book does not even direct speech at another student, let alone in a way that interferes with their rights. *See, e.g.*, *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1071–72 (9th Cir. 2013) (threat of school shooting impinges on rights of other students; but for speech to invade the rights of others in the educational context, "it is certainly not enough that the speech is merely offensive to some listener").

[34] 530 F. Supp. 679, 692–93 (D. Me. 1982).

held that this "unnecessarily broad" prohibition likely violated students' First Amendment right to receive information.[35]

Like the ban in *Sheck*, the USBE's guidance to LEAs goes far beyond directing removal of books from curricula (over which the government retains broad discretion), or even libraries, where school officials have some discretion to remove books—though it is not limitless.[36] Rather, it applies to all K-12 schools, without consideration of the maturity differences between elementary and high school students.

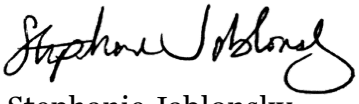
Thus, even assuming *Tinker* and its progeny allow school authorities to restrict students' personal access to information in certain circumstances, personal possession of the books identified as falling within § 53G-10-103 meets neither the *Tinker* "substantial disruption" standard nor any post-*Tinker* categorical exception. As a result, the flat ban on their possession infringes students' right to receive information.

IV. Conclusion

Schools should be a place where students can freely explore ideas. School districts and the state of Utah have authority to exclude books from the curriculum or instructional use, and to prevent substantial disruption of school operations. And parents may decide to keep certain content beyond their children's reach. But Utah schools must not infringe students' First Amendment right to receive ideas, which entails the ability to possess and read books at school on personal time. FIRE thus calls on the USBE to revise its guidance to LEAs in accordance with the Code and First Amendment.

We respectfully request a substantive response to this letter no later than June 30, 2025.

Sincerely,



Stephanie Jablonsky
Senior Program Counsel, Public Advocacy

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[35] *Id.* at 692.

[36] A Supreme Court plurality opinion held that 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." *Pico*, 457 U.S. 853, 870 (1982) (plurality opinion). Justice Harry Blackmun's concurring opinion likewise explained that school authorities "may not remove books for the purpose of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved." *Id.* at 879–80 (Blackmun, J., concurring in part and concurring in the judgment). *See also Crookshanks v. Elizabeth Sch. Dist.*, No. 1:24-CV-03512-CNS-STV, 2025 WL 863544, at *7–8 (D. Colo. Mar. 19, 2025), *appeal docketed*, No. 25-1105 (10th Cir. Mar. 21, 2025) (ordering school district to immediately return to library shelves books removed "based on the authors' and books' content and viewpoints on issues such as race, sexual orientation, gender identity, [and] LGBTQ content," because those "ideological justifications for removal fail under all the potentially relevant First Amendment standards").