

# INSIDE School Law

SENSIBLE STRATEGIES AND PREVENTIVE PRACTICES

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## Controversial Content: The Legal Landscape

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Courts are traditionally reluctant to wade into educational decisions, especially on issues such as curriculum. Judges prefer to leave these matters to the experts: school boards and administrators. But they will intervene to protect the legal rights of students and parents.

Many curriculum disputes arise from clashes of religious sensibilities in our pluralistic society. Complicating these matters is that they often involve activist organizations committed to advancing their legal and political agendas through the public schools.

This issue of *Inside School Law* provides some quick pointers about the legal considerations in various curriculum controversies. It also makes suggestions about policies your board may want to consider adopting.

### Curriculum decisions

Curriculum-related lawsuits usually result from disputes over content. While courts usually defer to schools, a board's curricular discretion—either to require content or to censor it—has limits. Decisions are especially vulnerable if they run afoul of the First Amendment's religious freedom guarantees. While it is always best to consult legal counsel when confronting a sticky issue, here are some useful do's and don't's:

#### Schools may:

1. Require students to learn controversial content. Even if the content may offend the ideological or religious sensibilities of some in the community, it can be required.

2. Teach about religion. In fact, the Supreme Court has recognized that an education "may not be complete" without study of comparative religion and religion's role in history. Studying the Bible or Hindu religious stories as literature is acceptable.

3. Require values or character education. Courts have rejected legal attempts to paint values education as establishing religion. The fact that some secular values may parallel religious tenets does not taint a program. Similarly, courts have rejected arguments that Earth Day programs or

8. Require a teacher to teach content he or she finds objectionable. The Free Exercise Clause does not entitle a teacher to decline to teach evolution, for example.

9. Discipline a teacher for violating curricular guidelines or common sense propriety. Academic freedom does not permit a teacher to show an R-rated movie to young students or in violation of school guidelines.

#### However, schools may not:

1. Make arbitrary curriculum decisions without rational reasons. A decision must be rationally related to a legitimate gov-

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“secular humanist” themes somehow constitute “religion.”

4. Hold or require activities based on cultural traditions or fantasy, as long as they do not border on religious ritual. Courts have rejected arguments that card games about magic or play-acting about witches and sorcerers established “religion.” Requiring students to read or discuss ideas generally does not encroach on their religious freedom.

5. Teach about religious holidays.

6. Include religious music in a school music group's repertoire.

7. Restrict content based on legitimate pedagogical grounds. These include age appropriateness, professional acceptance, consistency with general educational objectives, or currency.

ernmental interest. For example, a xenophobic state law forbidding instruction in any language other than English was struck down as lacking a rational purpose.

2. Ban academic content solely because it's controversial or offensive to the religious or family values of some in the community. Courts have held that students have certain legal rights to receive information, even if controversial.

3. Engage in religious instruction. Teaching about religion is valuable, but promoting or denigrating religion is unconstitutional. Courts are vigilant in protecting impressionable students from religious pressure. A Bible study course that is motivated primarily by religion or that presents religious scriptural passages as factual is unconstitutional.

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## About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Hawaii, and the U.S. Virgin Islands.

## About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join provided they are members in good standing of their state school boards association.

## About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

4. Fail to address abuses of discretion by teachers. Neither the possibility of abuse nor the need to monitor a program entangles a school impermissibly in religion. But if a teacher implements an acceptable curriculum in an inappropriate way, the school must intervene. One school defeated a lawsuit against its values education program, despite evidence that teachers and volunteers had crossed the line by promoting Christianity, because it had promptly corrected the abuses.

5. Teach religion in the guise of other subjects. Courts have struck down programs that presented Christian doctrine as science or history.

6. Hold activities that border on religious practice. An activity that requires students to profess or deny belief, or to engage in or refrain from religious practice, is unacceptable. Requiring students to engage in religious play-acting or religious art activities may be impermissible.

7. Hold religious celebrations.

A school district may wish to establish an "opt-out" procedure for students to be excused from certain classes. Such a policy is not necessary, but it can help ease controversies. As a legal matter, an opt-out makes it even more likely that a court will reject a challenge to an assignment.

## Textbooks and instructional materials

In some states, state law dictates what textbooks are permitted in local schools. Otherwise, the rules for making textbook decisions are similar to those for curriculum decisions.

### Schools may:

1. Require assignment of materials even if some parents object to some of the ideas in them. Thus, a school can require students to read *Huckleberry Finn*, despite racial sensitivities.

2. Assign readings about Halloween, witches, goblins, and so on. Such readings have been found not to establish the "religion" of witchcraft.

3. Forbid use of textbooks or materials in class because of vulgarity or graphic treatment of sexual matters. Even where material has great literary value, such as Chaucer's *The Miller's Tale*, a school may exclude it from class based on these considerations.

4. Rely on motion picture ratings to determine the appropriateness of films for students.

5. Use religious materials in class to teach about religion and culture.

However, a school may not remove

instructional materials from the curriculum based solely on religious and ideological beliefs.

The federal government has addressed such controversies. The No Child Left Behind Act (NCLB) requires any district that receives NCLB funds to adopt local policies giving a parent the right to inspect any instructional material, regardless of format, used as part of the educational curriculum. The district must establish procedures for granting a parent's request for reasonable access within a reasonable time period. These policies must be developed in consultation with parents. The district must provide reasonable notice to parents that the policies have been adopted or continued; this notice must be given at least at the beginning of each school year and within a reasonable time period after any substantive change to the policies.

## Library materials

Harry Potter may be wildly popular with young readers, but J.K. Rowling's novels are the latest target of attempts to exclude books from school libraries. Some administrators understandably may wish to pull disputed books quietly off the shelves to sidestep a distracting confrontation. But this can invite legal liability.

Courts usually apply a stricter standard

## INTERNET FILTERING

The federal Children's Internet Protection Act (CIPA) requires public libraries and schools receiving federal Internet subsidies to block Internet access to material that is harmful to minors. A federal court has held that CIPA violates the First Amendment because screening software fails to exclude some harmful content (such as pornography) and inadvertently excludes some legally protected content (such as health care information). The decision has been appealed to the U.S. Supreme Court.

NSBA has filed an amicus curiae (friend of the court) brief to remind the Court that the First Amendment applies differently to public school students than to adults in libraries. NSBA wants the Court to avoid issuing a sweeping opinion that might be used to challenge use of filters by schools. *United States v. American Library Association* is scheduled for oral argument on March 5, 2003.

of review to decisions to restrict student access to library materials than to classroom materials. Judges are less deferential to non-curricular decisions. The rights of students to receive information cannot be infringed just because ideas are controversial or may be distasteful to some. In fact, a school that preserves access to materials in the library is legally better able to defend a decision to exclude them from the curriculum.

Nevertheless, a school board can exclude materials even from the library if they are not “educationally suitable” or are “pervasively vulgar.” A school board may wish to establish a standard procedure to handle challenges to library materials.

### Alternate theories of evolution

One of the most persistently divisive curriculum issues is the theory of evolution, which some religious activists find incompatible with their beliefs. Out of

their shifting legal strategies has come the following court guidance:

1. Prohibiting the teaching of evolution violates the Establishment Clause.

2. Requiring “creation science” to be taught if evolution is taught is impermissible. Schools may not teach religion as science.

3. Requiring disclaimers about the theory of evolution will be struck down if motivated primarily by religious concerns. A court may look beyond a stated secular purpose and determine that the purpose was a pretext for religious motives.

4. Teaching evolution without exploring alternative theories of the origins of species does not violate the Establishment Clause. Adding “-ism” to the word “evolution” does not transform the theory into a “religion.”

The most recent variation on the theme advanced by evolution opponents is “intelligent design” theory, which posits

that the complexity of life on Earth could have resulted only from intelligent intervention. Proponents of this approach are careful to present it as a scientific critique of evolutionary biology, not as a religious argument.

The Ohio State Board of Education recently adopted a “teach the controversy” approach to biology standards requiring that students examine criticisms of evolution. The policy states that it should not be construed as endorsing intelligent design theory and that only evolution will be tested on state standardized tests.

Ohio’s approach appears to represent an attempt to conform to the 1987 holding in *Edwards v. Aguillard*, in which the Supreme Court indicated that exploring other scientific theories of the origins of species might be acceptable. The Court indicated that such an approach would be closely scrutinized for acceptable secular motives. CONTINUED ▶

## For the Board: A Policy Checklist

School boards must adopt the policies described above to comply with NCLB. In addition, rather than waiting until your school staff is confronted with a difficult issue, consider adopting written policies on the following:

### Selecting instructional materials

- Establish a written policy for criteria and procedures for selecting materials.
- Require personnel to adhere to the policy consistently.
- Establish the degree of teacher discretion over textbooks and materials by doing one of the following: (1) Establish a preapproved list and require the principal or department head to approve use of materials not on the list. This restrictive option creates the most red tape, so the board may want to establish such a list only for certain subjects. (2) Prohibit the use of certain materials, or require the principal or department head to approve use of those materials, but allow teachers to use materials not on the list. (3) Leave selection of materials to teachers, subject to common sense propriety (for example, obscene or illegal materials) and to the requirement that materials be relevant to the subject matter.

### Opting out of classes and activities

- Allow students to be excused only if participation in the specific activity would

violate their religious beliefs. Remember that courts usually find that mere exposure to ideas, questions, and discussion does not violate beliefs. It’s also hard for a school to tailor curriculum and instruction around the preferences of every student.

- Think through how to reconcile the opt-out policy with the legal obligation to teach students in accordance with required content standards.
- Require that opt-out requests be made in writing and signed by the parent.
- Have the principal review each request and make the determination.
- Set procedures for appeal of the principal’s decision.
- Require that the excused student be assigned alternate class work.

### Challenges to instructional and library materials

- First attempt to resolve complaints informally.
- Require that the challenge be in writing, and set a standard time frame to process it.
- Establish helpful guidelines for the decision. Base decisions on legitimate pedagogical grounds, not because someone may object to ideas. Set a higher standard for removal of materials from the library than from the classroom.
- Refer challenges to a standing review

committee, to include professionals, parents, and other community members. Don’t set or change the membership in response to the current controversy.

- Require the committee to read challenged material, to issue a written decision that explains it with reference to the guidelines, and to be able to explain its decision with particularity.
- If allowing an appeal to the board, adhere to the appeal policy consistently. Be careful about overruling the committee: Read the material, and explain a decision to ban materials and to reject the committee’s recommendation. If the committee includes a board member, require the member to be recused from appeal.
- Consider steps short of banning materials, such as limiting access by age or requiring parental consent.
- Don’t restrict the material while the challenge is pending.
- Keep the process open, and provide information to parents, the media, and others.

Because of the potential for litigation, and because state legal requirements vary, consult legal counsel when developing policies. Your state school boards association can probably provide additional assistance. Finally, if you adopt a policy, be prepared to follow it: otherwise, it may just provide another way to challenge the board’s action. ■

However, a school board's decision to implement Ohio's approach by allowing "intelligent design" into science classes is not without legal risk. It is at least debatable whether "intelligent design" is science or religion, and the American Civil Liberties Union has vowed to challenge its inclusion in science instruction. The willingness of courts to reject an official, secular purpose as a sham raises concerns. Selective use of a "teach the controversy" approach to engage students in critical thinking may appear suspicious, since its benefits presumably should apply equally to other scientific topics or controversial subjects. The controversy over evolution is arguably not scientific, but religious.

Schools boards considering a "teach the controversy" approach should proceed cautiously:

1. Be careful about requiring the teaching of intelligent design in science courses. A religion or other social studies course is a legally safer place to discuss such ideas.

2. Be careful about "teaching the controversy" only with respect to evolution. On the other hand, recognize that applying the approach more consistently, even if it proves effective, may run up against time pressures as teachers struggle to meet increasing test standards.

3. Require teachers to maintain strict neutrality of religious views, pro and con. A school district must be vigilant about ensuring that teachers do not inject their religious perspectives into instruction.

### Sex education and 'abstinence only' curricula

Another hotly disputed subject is sex education. The latest controversy is between advocates of "comprehensive" programs, which include information on contraception, and "abstinence only" programs, which typically teach that sex is acceptable only in marriage and provide little information on contraception other than failure rates. Courts have offered the following guidance:

1. Schools may require all students to take a sex education course. Mere exposure to ideas or questions that offend religious sensitivities doesn't create a constitutional issue. For example, a court held that any burden an AIDS curriculum placed on religious beliefs was outweighed by the state's compelling interest in fighting the spread of AIDS.

2. Editing curriculum content to conform with the religious views of some students risks a constitutional violation.

3. "Abstinence only" instruction can pass constitutional muster. In the absence

of evidence that the program is primarily motivated by religion, it is not establishment of religion per se.

Some states have laws limiting local control over sex education. NCLB has something to say about sex education, too. The act prohibits the use of funds authorized under NCLB for:

1. Sex or HIV-prevention education unless it is age appropriate and discusses health benefits of abstinence. In the absence of other legal guidance, age appropriateness presumably is a matter for the local school board. Defenders of comprehensive education argue it already includes discussion of the benefits of abstinence.

2. Materials, programs, or courses directed at youth that are "designed to promote or encourage" sexual activity, heterosexual or homosexual. The significance of this is unclear, since it is doubtful that a public school sex education program is "designed to promote" sexual activity, especially when it must include discussion of abstinence.

3. Distributing or helping distribute "legally obscene" materials to minors on school grounds. Here, the Supreme Court's legal standard for obscenity is whether the materials would appeal to the "prurient interest" as defined by "the average person applying community standards"; whether they describe or depict

sexual conduct defined by state law in a "patently offensive" way; and whether they lack any serious scientific value. Legitimate instructional materials are not likely to fit this definition.

4. Distributing contraceptives in schools.

NCLB otherwise affirms federal deference to school boards. It specifically states that no federal official shall mandate, direct, review, or control state and local sex education programs. ■

### FOR MORE INFORMATION

For a list of additional resources, log on to the National Affiliate page of the NSBA Web site, [www.nsba.org](http://www.nsba.org), and click on the *Inside School Law* link at the bottom.

The following publications from NSBA's Council of School Attorneys may be ordered online on the Publications page of the NSBA Web site: *Religion & Public Schools: Striking a Constitutional Balance* (Item no. 06-181); *School Law Primer, Part III* (Item no. 06-186).

For sample policies, consult NSBA's National Education Policy Network. Contact Julie Arrighetti, (703) 838-6727; [jarrighetti@nsba.org](mailto:jarrighetti@nsba.org).

### SOME KEY COURT CASES ABOUT CURRICULUM

- *Meyer v. Nebraska*, 262 U.S. 390 (1923): Curriculum decisions must be rationally related to a legitimate governmental interest, not arbitrary.

- *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988): A school can limit student free speech rights for legitimate pedagogical reasons, as opposed to political reasons.

- *Virgil v. School Board of Columbia County*, 862 F.2d 1517 (11th Cir. 1989): A school can ban even great literary works from class for legitimate concerns such as vulgarity, especially where students have access to the works in the library.

- *Board of Education, Island Trees Free School District No. 26 v. Pico*, 457 U.S. 853 (1982): A school board's discretion over library content is more limited than its discretion over curriculum; students have a free speech right to receive information.

- *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184 (5th Cir. 1995): A school board can exclude educationally unsuitable or pervasively vulgar materials from the library.

- *Mozert v. Hawkins City Board of Education*, 827 F.2d 1058 (6th Cir. 1987): Mere exposure to ideas does not infringe on students' free exercise of religion.

- *Epperson v. Arkansas*, 393 U.S. 97 (1968): A state cannot prohibit the teaching of evolution because it may offend religious sensibilities.

- *Edwards v. Aguillard*, 482 U.S. 578 (1987): A state cannot require "creation science" to be taught if evolution is taught; a law's stated, secular purpose may be just a pretext for inappropriate religious motives; a school could teach about scientific debates over evolution, but a court should examine its motives closely.