JESSICA B[redacted]

Appellant,

v.

CARROLL COUNTY BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Order No. OR24-13

ORDER

This appeal concerns a facial challenge involving a quasi-legislative decision of the local board to implement a local board policy that prohibits all instructional materials that contain sexually explicit material, other than those related to Family Life and Human Development or as otherwise approved by the Superintendent. The local board adopted the revisions to Policy IIAA − Selection, Evaluation, and Adoption of Instructional Materials by unanimous vote on January 10, 2024. (Local Bd. Ex. 4 and Shockney Affidavit). The policy states as follows with the newly adopted language in bold:

> The Board of Education of Carroll County recognizes that instructional materials should effectively support and enrich the educational programs of the school system. Instructional materials are defined as instructional content approved for system-wide use and provided to the student regardless of format, including printed or digital materials. **The Board of Education of Carroll County recognizes that all instructional materials, including supplemental materials, shall meet the established general selection criteria. Aside from the instructional materials approved for instruction related to family life and human development or as otherwise approved by the superintendent, all other instructional materials, including supplemental materials, shall not contain sexually explicit content. Sexually explicit content is defined as unambiguously describing, depicting, showing, or writing about sex or sex acts in a detailed or graphic manner.**

Id. While there are exceptions for certain materials, the newly adopted language is broad in sweep and provides no variation of standards depending on grade level.

The policy delegates enforcement responsibility to the Superintendent with the directive to communicate the policy to all relevant parties and provide necessary instructions and/or administrative regulations, as appropriate, to all staff members. *Id*. Consistent with this delegation, Caroll County Public Schools ("CCPS") has, since 1986, used an internal "Selection, Evaluation, and Adoption of Instructional Materials Handbook" ("Handbook") to provide guidance and criteria for the selection, acquisition, and reconsideration of instructional and supplemental materials. (*See* Local Bd. Ex. 2). The Handbook identifies "does not include

sexually explicit content" as one of the several listed general criteria used in selecting and evaluating instructional materials.[1]

The Appellant, a parent of a CCPS student, filed this facial challenge to Policy IIAA maintaining that as revised it is so broad and vague that it is arbitrary, unreasonable, and a violation of the First Amendment of the United States Constitution. Because this is an appeal of a quasi-legislative decision of the local board, the State Board reviews only whether the local board acted within its legal boundaries of State and federal law and will not substitute its judgment for that of the local board. *Harford Cnty. Arts and Cultural Alliance v. Harford Cnty. Bd. of Educ*., MSBE Op. No. 16-48 (2016). Thus, we consider only the Appellant's First Amendment claims of unconstitutionality and we conclude that the Appellant has failed to carry her burden to demonstrate that the policy on its face violates the Constitution. In the First Amendment context, a law may be invalidated as overbroad if "a 'substantial number' of its applications are unconstitutional, ' "judged in relation to the statute's plainly legitimate sweep." ' " *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008).

Public school boards have broad but not unfettered discretion to exercise their pedagogical authority to determine which materials will be made available in their schools. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1998). They have the power to remove or restrict the use of books and other instructional materials that are pervasively vulgar or profane. *See Id*. at 271-272; *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982). However, the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). In *Pico*, the Court noted that while school boards are accorded broad discretion in structuring educational programs, they may not exercise that discretion in a "narrowly partisan or political manner" or to "suppress ideas" with which they disagree. *Pico*, 457 U.S. at 871(plurality opinion). Nor may school officials remove books "to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" when removal is motivated simply by disapproval of those ideas and perspectives by the school official. *Id*. at 872 (plurality opinion), 876-880 (Blackmun, J., concurring).

The local board argues that the adopted policy is Constitutional because it only restricts the use of books for their vulgarity or prevents speech that is determined to be "vulgar and lewd"

[1] We do not construe Policy IIAA so narrowly to interpret it as applying only to the selection of instructional materials and not to the removal of such materials, particularly the supplementary materials from the school libraries. The plain language of the policy contains no verbiage limiting its application to only the initial selection of the material. Nor can we ignore the Handbook, developed per the delegation directive of the policy, which serves as the framework for implementation of the policy and the evaluation of all school system instructional materials whether for their initial selection or their removal. The policy and Handbook do not exist in a vacuum, and the procedures for the reconsideration of instructional materials necessarily must implement the new policy standard prohibiting instructional materials that contain sexually explicit content.

in accordance with Supreme Court precedents. Local Bd. Reply at 3.[2] On its face, the policy as drafted does not use the term "vulgar" but instead uses the term "sexually explicit" which is defined in a broad way as "unambiguously describing, depicting, showing, or writing about sex or sex acts in a detailed or graphic manner." *See* Local Bd. Ex. 4. It is too early in the review process of this policy to determine if the policy will be applied in a nondiscriminatory manner related to legitimate pedagogical concerns of educational suitability in accordance with the Constitution, federal and State law. But at this stage in the challenge, we must accept the local board's intention regarding its interpretation and future application of its policy.

We have concerns about how the policy will be applied in the future because it gives the Superintendent unfettered discretion to select and remove library books and curriculum material. This broad authority could "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" in a manner that could violate the CCPS students' First Amendment rights under the Constitution based upon Supreme Court precedent. *See Pico*, 457 U.S. at 872 (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624. 642 (1943)). Unfettered application of the policy could interfere with the local board's obligations to implement a curriculum that meets State standards. Many traditional curriculum materials such as the dictionary, history and science textbooks, and classic literary novels could arguably be banned under this policy, depending on its application.

Further, we have concerns about the impact the policy may have on the local board's obligation to provide educational equity to all students and that an equity lens be used in reviews of curriculum, pedagogy, and instructional materials in accordance with our equity regulations. *See* COMAR 13A.01.06. However, a challenge in the application of the local board policy is not before us for review under Md. Code Ann., Educ. §2-205(e).

Because the Appellant cannot meet her burden to demonstrate that Policy IIAA is unconstitutional on its face, we deny the appeal.

Accordingly, for the reasons stated above, it is this 23rd day of July 2024, by the Maryland State Board of Education, ORDERED that the appeal referenced above is hereby denied.

MARYLAND STATE BOARD OF EDUCATION

Signatures on File:

_____

Joshua L. Michael
President

[2] The local board cites to the Supreme Court's plurality decision in *Pico,* 457 U.S. at 871 (Blackmun, J., concurring)(internal citations omitted) (It would be "perfectly permissible" if the school board in that case "had decided to remove the books at issue because those books were pervasively vulgar" or if the "removal decision was based solely upon the 'educational suitability' of the books in question") and the Supreme Court's decision in *Bethel Sch. Dist. v. Fraser,* 478 U.S. 675, 684-685 (1986), that there is no protected First Amendment right to engage in speech that is determined by school officials to be "vulgar and lewd."

_____
Monica Goldson
Vice-President

_____
Chuen-Chin Bianca Chang

_____
Clarence C. Crawford

_____
Susan J. Getty

_____
Nick Greer

_____
Irma Johnson

_____
Joan Mele-McCarthy

_____
Samir Paul

Abstained:
Rachel McCusker