July 23, 2014

BY EMAIL
Cape Henlopen Board of Education
c/o David H. Williams, Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, DE 19899-2306

Re: *The Miseducation of Cameron Post*

AMERICAN CIVIL LIBERTIES UNION FOUNDATION of DELAWARE
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PRESIDENT

KATHLEEN M MacRAE
EXECUTIVE DIRECTOR

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LEGAL DIRECTOR

Dear Board Members:

The Cape Henlopen Board of Education's June 12, 2014 decision to remove *The Miseducation of Cameron Post* from the books students may choose to fulfill the summer reading requirement violated the law in three respects: (1) it was taken in violation of the Freedom of Information Act, (2) the district failed to comply with its own procedural requirements – either as they were prior to the board meeting or as they were after they were amended at the board meeting, and (3) it violated students' First Amendment rights. The decision also contradicts the Cape Henlopen School district's educational mission and disadvantages students, as detailed in the analysis of librarian Pat Scales, which is being sent to you by the National Coalition Against Censorship.

I am writing to urge the Board to recognize that the June 12, 2014 decision to remove the book was a nullity and that if people still want to press the matter the district must start over and follow its rules.

Freedom of Information Act Violation

Boards of Education are required to comply with the sunshine law provisions of the Freedom of Information Act. *See Levy v. Board of Educ. of Cape Henlopen School Dist.,* 1990 Del. Ch. LEXIS 163, *1-2. The means that an agenda setting forth the major issues expected to be discussed at a board meeting must be published before the meeting. 29 *Del. C.* §§10002(f), 10004(e). This requirement was not satisfied with regard to the decision to remove *Cameron Post* because the published agenda for the June 12, 2014 meeting did not give notice that there would be discussion of removing books from the summer reading list.

There are exceptions for additional items that arise at the time of the meeting, 29 *Del. C.* §10004(e)(2), but that exception does not apply in this matter because the issue arose prior to the meeting. According to a statement by board member Sandi Minard at the June 12 meeting, she had time to meet with district parents to look at the book and discuss their concerns prior to the board meeting.

When she was arranging that earlier meeting with parents, she could have asked to have the issue placed on the agenda for the forthcoming board meeting. But a supplemental agenda showing that issue was never issued.

As a result there was no compliance with the FOIA statute. This means that the June 12, 2014 decision to remove the book may be voided by Chancery Court. 29 *Del. C.* § 10005(a). The failure to comply may not be cured by an after the fact notice and perfunctory approval at the forthcoming board meeting, *see Levy*, *supra*, at *20-21, so the district must begin the process anew, if anyone wants to revisit the issue. The matter is clear and there is no reason why resort to court should be necessary.

Violation of Board Policy

Board Policy No. 110 governs objections to materials, such as books, that are "used to develop, support, and enrich the curriculum of the district and to provide for the personal needs of students and teachers." §1.A. The books used to fulfill the summer reading requirement are undeniably used to support and enrich the curriculum, so a challenge to any of those books must comply with Policy No. 110.

Policy No. 110 requires that persons who wish to challenge materials "register their criticism with the school principal. All criticism shall be in writing" and the written statement must include the information required by a specific district form. §1.C(1). Under the version of Policy No.110 in effect prior to the June 12 board meeting, following submission of the written criticism the principal was required to appoint a committee consisting of the librarian and two teachers, one a specialist in the subject area, to reevaluate the materials being questioned and to make recommendations." §1.C(2). The principal would decide whether to exclude the challenged material and the appropriate director would then review the principal's decision in terms of applicability to the district's curriculum. This procedure was not followed with regard to *Cameron Post* in any respect.

The Cape Henlopen Board could have changed its rules to provide different requirements, and then followed those new rules, if it complied with the sunshine law requirements of the Freedom of Information Act. But it did not do that. Ironically, while the Board changed Policy No. 110 at the June 12 meeting, the revised Policy No. 110 does not eliminate the foregoing requirements. The Policy still requires that any challenge be in a writing submitted to the school principal and that the challenged materials be reevaluated by a committee consisting of the librarian and two teachers before a decision on the complaint is made. Again, none of those requirements were met before the Board voted to remove *Cameron Post* from the books students could choose for the summer reading assignment. A government agency is required to obey its own rules. *Couch v. Delmarva Power and Light Co.*, 593 A.2d 554, 561 (Del. Ch. 1991) ("When the government violates its own rules, without a justifying emergency, persons who are adversely affected by that action have avenue of relief. [citation omitted] Such an action arises directly from the Fourteenth Amendment to the United States Constitution and

from Section 9 of Article 1 of the Delaware Constitution (1897)."). (internal citations omitted). Thus, the Board's failure to comply with Policy No. 110 renders its action void and subjects it to an order under state law directing it to return *Cameron Post* to the reading list.[1]

In addition to providing a basis for relief under state laws, the irregular manner in which the Board removed *Cameron Post* from the reading list and its disregard of established policy and procedure is important evidence of improper motivation, so it supports a finding that removal of the book violated students' First Amendment rights. *See, Board of Education v. Pico,* 457 U.S. 853, 874–75 (1982) (plurality opinion) (stating that Board's disregarding superintendent's recommendation that removal decision be approached through established channel was "the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivations");[2] *Campbell v. St. Tammany Parish Sch. Bd.,* 64 F.3d 184, 190-91 (5th Cir. 1995) (noting that school board's failure to follow its own procedures raised suspicion that the motivation of the board was unconstitutional); *Case v. Unified Sch. Dist. No. 233,* 908 F. Supp. 864, 875 (D. Kansas 1995) (same).

First Amendment Violation

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Bd. of*

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[1] The minutes of the June 12, 2014 meeting refer to a statement, perhaps made by board member Andy Lewis, that Policy No. 110 does not include books on summer reading lists. That view is refuted by the definition of "materials" in the Policy. But even if it were correct, it would not preserve the Board's decision to remove *Cameron Post.* If Policy No. 110 were inapplicable, the challenge to *Cameron Post* would have been governed by Policy No. 906, which gives district residents a general "right to present a … complaint concerning … the program or the operations of the district." Policy No. 906 requires that a complainant begin by expressing the complaint to the principal or administrator who is directly responsible. If that does not result in an informal resolution of the matter, the complainant "may submit a complaint in writing to the superintendent." One who is dissatisfied with the result at that level may appeal to the Board. In this matter, there was no complaint to the high school principal or the superintendent before the complaint about *Cameron Post* was taken to the Board.

[2] During the Board's June 12, 2014 discussion about removing *Cameron Post* from the reading list, Superintendent Fulton told the board: "I understand that there is concern about this book but I'm just trying to follow our policy and if a parent wants to share a concern I think they should just do it the proper way following policy in view of the topic it's on and we need to encourage them to do so." The Board disregarded his advice.

Regents, 385 U.S. 589, 603 (1966). Thus, while "local school boards have broad discretion in the management of school affairs, *Pico*, 457 U.S. at 863 (internal citations omitted), "the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the first Amendment." *Id.* at 864 (internal citations omitted). Thus, in *Pico*, the Supreme Court focused on the motivation behind the board's removal of books from school libraries to determine whether there was a First Amendment violation. *Id.* at 871. Likewise, in *Case v. Unified Sch. Dist. No. 233, supra,* 908 F. Supp. at 875, the court stated that "[i]f the decisive factor behind the removal of [book] was the school board members' personal disapproval of the ideas contained in the book, then under *Pico* the removal was unconstitutional.

The summer reading list for incoming ninth graders is comprised of winners and nominees for the Blue Hen Book Award, which is administered by the Youth Services Division of the Delaware Library Association. *The Miseducation of Cameron Post* was selected. It is said to have been removed because of the author's repeated use of the word "f___". But at least three of the books on the reading list include that word repeatedly, and only *Cameron Post* was removed.

What really distinguishes *Cameron Post* is that is has a lesbian protagonist. The board member who prompted the motion to remove *Cameron Post*, Sandi Minard, candidly admitted that she disagreed with the ideas in the book: "We had a thing earlier in the year about we can't teach the history of the bestselling book [the Bible] and its influence in our country but we can mock it in marriage in this book." Likewise, board member Andy Lewis, who moved that *Cameron Post* be removed from the reading list, was clear about his motivation:

> [Y]ou don't even have to pick up this book and read any of it to understand that it was questionable. All you needed to do was spend 5 minutes Googling it and it would be questionable immediately for you, for somebody. So that's the type of thing that I'm looking for is that we just set up a policy that says somebody is going to take the 5 minutes to go down every, all 10 books that are on there and Google them and find out is there something, is there you know any controversy. Is there any kind of negativity about this that maybe we should consider it.

Dislike for a story's message and fear of controversy and negativity are not constitutional bases for rejection of the story. *See, e.g., Pratt v. Independent Sch. Dist. No. 831,* 670 F.2d 771, 779 (8th Cir. 1982) (protecting students' right to receive information and to be exposed to controversial ideas presented in film of controversial short story; finding First Amendment violation where school board banned film because a majority of its members objected to the films' religious and ideological content and wished to prevent the ideas contained in the material from being expressed in the school).

It is no defense that *Cameron Post* was not removed from the district libraries when it was removed from the reading list. *See, e.g., Counts v. Cedarville*

School District, 295 F.Supp. 2d 996 (2003) (holding that restricting access to book to students whose parents sign a permission slip constituted First Amendment violation even though student was not prevented from reading book); *Pratt, supra,* 670 F.2d at 779 (rejecting board's argument that banning film from curriculum did not violate First Amendment where the short story remained available to teachers and students in the library in printed form and a photographic recording). As the court explained:

> Restraint on protected speech generally cannot be justified by the fact that there may be other times, places or circumstances for such expression. The symbolic effect of removing the films from the curriculum is more significant than the resulting limitation of access to the story. The board has used its official power to perform an act clearly indicating that the ideas contained in the films are unacceptable and should not be discussed or considered. This message is not lost on students and teachers, and its chilling effect is obvious.
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> ….
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> What is at stake is the right to receive information and to be exposed to controversial ideas-a fundamental First Amendment right. If these films can be banned by those opposed to their ideological theme, then a precedent is set for the removal of any such work.

…. As the Supreme Court stated in *Epperson v. Arkansas,* 393 U.S. [97], 104 [(1968)]:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. * * * "(the) vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

670 F.2d at 779-80 (internal citations omitted).

Sincerely yours,

Richard H. Morse

Richard H. Morse

cc: Robert S. Fulton, M.S.Ed. (c/o David H. Williams, Esquire by email)