January 8, 2015

BY EMAIL

Mr. Norm Abrams
President, Board of Education
811 Dexter Corner Road
Townsend, DE 19734

Ms. Charlisa Edelin
Member, Board of Education
44 Haggis Road
Middletown, DE 19709

Mr. Richard Forsten
Vice President, Board of Education
1603 Levels Road
Middletown, DE 19709

Ms. Julie Johnson
Member, Board of Education
151 Back Creek Road
Middletown, DE 19709

Ms. Kelly Wright
Member, Board of Education
215 Snow Goose Drive
Middletown, DE 19709

AMERICAN CIVIL LIBERTIES UNION FOUNDATION of DELAWARE
100 W 10TH ST, SUITE 603
WILMINGTON, DE 19801
T/302-654-5326
F/302-654-3689
WWW.ACLU-DE.ORG

NORMAN M MONHAIT
PRESIDENT

KATHLEEN M MacRAE
EXECUTIVE DIRECTOR

RICHARD H MORSE
LEGAL DIRECTOR

Dear Board Members:

We have been contacted by a number of Appoquinimink parents who are concerned about new processes to govern both the withdrawal of materials from the library media center and school assignments that were recently announced. Secondary Curriculum Director Ray Gravuer made a presentation about the processes at the December 9, 2014 Board meeting. They have not yet been implemented, but Mr. Gravuer said that they may be implemented without Board approval because they are a “procedure” not a “policy.” Review of materials on the Appoquinimink website shows that he is wrong about that, but is not why I am writing you. More important to the interests the ACLU works to protect, implementation of the new processes would infringe on Appoquinimink students’ First Amendment rights. Because we have heard that district personnel are working on implementation, I ask that you promptly take up this matter and prohibit the administration from implementing the new approach. The adoption of policies like the one described by Mr. Gravuer have led to litigation elsewhere, and that should not have to happen in Delaware.

Under the plan described at the December 9, 2014 Board meeting, district employees, presumably school librarians, will be required to designate as “Young Adult” all books and other materials in the school libraries that contain mature or explicit themes. Each student’s parent will be able to submit a form to the district instructing it that the student may not check out Young Adult materials from the school library and media center. In addition, teachers will not be permitted to include Young Adult material in a student’s assignment to unless the student’s

parent has signed a permission slip allowing the student to see that specific material.

It is basic law in this country that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). The right to receive information, like the right to provide information through speech, is protected by the First Amendment. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n. 5 (9th Cir. 1998) (It "is an inherent corollary of the rights of free speech and press, because the right to distribute information necessarily protects the right to receive it.") (quoting *Board of Education v.Pico*, 457 U.S. 853, 866 (1982) (plurality opinion)). *See also, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756 (1976); *Counts v. Cedarville School District*, 295 F. Supp. 2d 996, 999 (W.D. Ark. 2003). Students, like the rest of us, are guaranteed this right.

The federal court decision in *Counts v. Cedarville School District* arose from a practice similar to the practice described by Mr. Gravuer. Because of a challenge to several books, the Cedarville School Board decided that those books could not be checked out of the high school library by a student unless the student had a permission statement signed by the student's parent or guardian. When that decision was challenged, the court recognized that requiring parental permission to check out a specific "book constitutes a restriction on access." 295 F. Supp. at 1002. As a result, it ruled that by requiring a student to have parental permission to withdraw those books the school district had violated the student's First Amendment rights. The court ordered that the books be returned to their normal location on the library shelves, where there would be no requirement of parental approval for withdrawal by students, and that the plaintiff be awarded counsel fees for bringing the case.

I have not seen any case in Delaware where a student or student's parent has had to bring suit to challenge a practice like the one described to you at the December 9, 2014 Board meeting. However, there is a ruling by the United States Court of Appeals for the Third Circuit, which covers Delaware, confirming that school districts may not make a student's ability to exercise her First Amendment rights conditional on the student obtaining parental approval. The case, *Circle School v. Pappert,* 381 F.3d 172 (3d Cir. 2004), involved a student's First Amendment right not to say the Pledge of Allegiance at the start of the school day. That right, like the right to read books and watch movies of ones choosing, has long been recognized by American law. Pennsylvania passed a statute requiring school officials to notify parents or guardians whenever a student exercised that right and declined to say the Pledge. The law was challenged in court, and the district court ruled that it was unconstitutional.

An appeal was taken on the issue of whether the parental notification provision violated students' free speech rights. The Court of Appeals affirmed the district court decision, ruling "that the parental notification clause of [the statute]

unconstitutionally treads on students First Amendment rights" because it might deter students from exercising the right not to say the Pledge. 381 F.3d at 181. The court found that merely reporting a student's exercise of the right not to say the Pledge to parents violated the student's First Amendment rights because it provided a "disincentive" to the student's exercise of those rights. 381 F.3d at 180. The ruling followed from Supreme Court cases cited by the Court of Appeals:

> The Supreme Court has repeatedly stated that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996) (quoting *Laird v. Tatum*, 408 U.S. 1, 11, 33 L. Ed. 2d 154, 92 S. Ct. 2318 (1972)); *see Trotman v. Bd. of Trustees*, 635 F.2d 216, 228 (3d Cir. 1980).

381 F.3d at 181.

The requirements that would be imposed if Appoquinimink implements the new processes do more than deter students from exercising their First Amendment rights to freely choose which school library materials to read or watch. They would prevent students from choosing some materials without parental approval. The decisions in *Counts* and *Circle School* show that Appoquinimink may not implement the new policy because it violates the Constitution. That is not to say that parents cannot, as a matter of parental discipline, tell their children they may not read a specific book or watch a specific video. A parent who decides to censor what his child reads or views may enforce that decision the same way he enforces other parental disciplinary decisions. But the First Amendment prevents school districts from collaborating in that parental action.

This properly respects the national interest in protecting free speech and high quality education and the parental interest in guiding one's child in accordance with family beliefs. Protection of free speech and quality education is so important that the "federal courts have rejected free exercise claims seeking exemptions from schools' assignment of particular books." *Parker v. Hurley*, 514 F.3d 87, 104 (1st Cir. 2008). Thus, for example, even in a case where parental religious beliefs, which are entitled to great constitutional protection, were involved, the court in *Parker* rejected parents' claims that they were entitled to have their children exempted from reading material they found religiously offensive. The court rejected the parents claim that the exposure of their young children to ways of life contrary to the parents' religious beliefs violated their ability to direct the religious upbringing of their children. The court explained:

> A parent whose "child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in

> the family's moral or religious context, or to supplement the information with more appropriate materials."

514 F.3d at 105 (quoting *CN v. Ridgewood Bd. of Educ.,* 430 F.3d 159, 185 (3d Cir. 2005).

That is the right that parents have. They may not determine what materials the professional educators make available and assign. While the Constitution guarantees parents the right to home school their children, to send them to religious schools and to send them to private schools, that freedom does not "encompass[] a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children." *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 533 (1st Cir. 1995), *cert. denied,* 516 U.S. 1159 (1996). The *Brown* decision was relied on by the Third Circuit Court of Appeals in *CN v. Ridgewood Bd. of Educ. Id.* at 182.

If Appoquinimink enforces a parental objection to a book selected by the district librarians or teachers, it will have violated the student's rights because "a student's *First Amendment* rights are infringed when books that have been determined by the school district to have legitimate educational value are removed from a mandatory reading list because of threats of damages, lawsuits, or other forms of retaliation." *Monteiro*, *supra,* 158 F.3d at 1029 (holding that a parent had no right to sue the school district because she viewed as offensive was kept in the school curriculum).

I understand that Appoquinimink administrators announced the new processes in response to a parent who feels strongly about limiting student access to certain materials. The administrators would like to satisfy him. But they and the Board of Education have a higher responsibility: to follow the law and not to disregard the district's obligation to comply with the Constitution. If the district fails to do that and lets the new policy be implemented, it will be doing more harm than good for two reasons.

First, it will be enabling some parents to deprive students of education the educators have determined is valuable. Second, it will be setting a terrible example. As a leading Supreme Court justice wrote, in words that are as true today as they were eighty-five years ago:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting).

Educators are at the top of the list of government officials who must teach by example. The Appoquinimink Board of Education must reject the new policy promptly and conclusively.

Sincerely yours,

Richard H. Morse

cc: Mr. Matthew Burrows, Superintendent (by email)
William W. Bowser, Esquire (by email)
Michael P. Stafford, Esquire (by email)