



*The Mission of Promontory School of Expeditionary Learning is to provide a rich educational environment that views learning as an Expedition and uses the study of Great Thinkers to cultivate the value of excellence and the love of knowledge. Using investigation and discovery to make connections to ideas and our community, we empower children to embrace challenge, act with humanity, and become the Great Thinkers of the 21<sup>st</sup> century.*

**BOARD OF DIRECTORS MEETING  
BOARD RETREAT  
AGENDA**

Thursday, April 25, 2024  
2830 N 4800 W  
Corinne, UT 84307

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9:00 AM – **CALL TO ORDER:** Welcome, Pledge, and Mission Statement –Becca Ashby

9:10 AM – **MINUTES**

- April 18, 2024 Minutes

9:15 AM – **PUBLIC COMMENT**

- *PUBLIC PLEASE NOTE: All public input will be taken into consideration, but not be discussed by the board during this meeting. Comments will be limited to three minutes each. We appreciate your input and invite your comments.*

*- Promontory Board of Trustees*

9:20 AM– **TRAINING:** Bylaws/Structures Policy  
Internal Audit Training

10:30 AM – **BUSINESS ITEMS**

- UAPCS Circle of Excellence Award
- Committees
- Library Materials Policy

11:30AM– **TEAM BUILDING ACTIVITY**

12:00-12:30 PM– **LUNCH BREAK**

12:30-1:30 PM—**ACTION ITEMS**

- New Board Members
- Dress Code Policy
- Digital Surveillance Use & Storage Policy

1:30-2:00 PM– **TEAM BUILDING ACTIVITY**

2:00 ADJOURN

\*Next scheduled Board Meeting: May 16, 2024

*In compliance with the American with Disabilities Act, persons needing auxiliary communicative aids and services for these meetings should contact Tammy Stutznegger at giving at least three working days notice. "This institution is an equal opportunity provider and employer.*



# PROMONTORY

school of expeditionary learning

April 18, 2024  
7:00PM  
1051 W 2700 S  
Perry, UT 84302

**Trustees:**

Michelle Flynn  
Josie Beth Archibald  
Becca Ashby  
Karen Braithwaite  
Stephanie Quintero  
Zach Davis--Zoom  
Emily Morgan-

**Officers:**

Amber Jenks

**Absent:**

Amy Rich  
Dorothy Dobson

**Director:**

Amber Edelman

**Visitors:**

Tammy Stutznegger  
Brian Cates—Zoom  
Holly Jenks  
Kiersten Baker  
Susan Bennett--Zoom  
Darnelle Earl--Zoom  
Riley Riser  
Hilary Gerhardt  
Tami Hirleman  
Amanda--Zoom

7:02 PM – **CALL TO ORDER:** Michelle Flynn

· Welcome/Mission Statement and Pledge: Josie Beth Archibald

7:09PM – **PUBLIC COMMENT**– No public Comment

7:15 PM –Training: Reviewed USBE Legislative Summary Bill Booklet

7:20 PM – **FINANCE REPORT**

· Budget Review – Brian Cates: Decrease in overall revenue due to reduction in ESSR funds being spun down. Forecasts are showing that interest rates will be decreasing in the next year. We will start to put together our 2025 budget, will have a draft to review next month. Will be approved in June. PTIF still doing very well. Great place to have our cash reserve. Rates did increase slightly in the last month. Little over \$55,000. Budget Summary–75% through fiscal year. Margin of about 3.25% forecasted. Still in a good spot, slightly tighter than we have been in. Cash balance slight downward trend which is typical for this time of year. 438 enrollment as of end of March. Overall, we are in a pretty good position. Audit hasn't begun,

but we have started to look at what is going to be tested this year. List of items that they will be looking at—forwarded us a list of items that we need to check off. **Fraud risk assessment training:** Completed in finance committee meeting. Same as last year, except now Redapple has a CPA on staff. #8 is N/A only required for larger schools. 375/395 very low risk. Completed report and reflected in minutes.

#### 7:30 PM – MINUTES

- 3-21-2024 Board Meeting Minutes— New updated dress code will need to be updated. No concern about hair color. Teacher would like to enforce the fieldwork shirts when on fieldwork. Leggings were brought up for discussion. Karen motions to approve. Becca seconds. Motion is carried. Stephanie abstains.

#### 7:33 PM – BUSINESS ITEMS

- **Intensive Update**—  $\frac{3}{4}$  collaborating with  $\frac{7}{8}$ . Some were not able to be accessed. Paint a mural on back wall of choir room. Josie Beth suggested that we have a generic form for teachers to fill out.

- **Elevate Grant Committee**— Not ready to appoint anybody to committee. Amber and Teresa Lee spliced—only \$375K over the course of three years. State grant that gives us access to bring in a team in September to observe our school and see where we can improve. Create a plan of where we can use that money. Money will be put into our account first part of January. Once we get the funding and write our plan, we can have more flexibility. 8th of May will be our site visit. Committee needs to consist of Board member, two parents, and two staff members—reach out to Michelle and let her know if you are interested.

- **Reunification Drill**—Tami Hirleman did a training in January. House Bill 84 has changed—stated that we need a safety specialist in each school, need an SRP. Discussed the reunification instructions for next week's drill. Ms Tami has updated classroom first aid kits. Drill will be done annually. Need to have an armed security guard at all times. Trying to come up with funding and options of what is best. Have until December to figure out. Safety protocols haven't been updated in years.

- **Employment of Relatives Policy**—Reviewed it a couple of years ago. Formatting needs to be updated. Dorothy help with verbiage and formatting. Will bring to board if any updates are made.

- **Employee Breastfeeding Policy**—Reviewed a couple of years ago. Code is correct. Suggested to add another code. Everything else looked correct. If new code is added, we will vote on it at next meeting.

#### 8:05 PM ACTION ITEM

8:10PM· **Fall Expeditions:** Becca motions to approve. Zach seconds. Motion is carried.

8:12PM· **Dress Code Policy:** Hair color was left vague—as long as it is not distracting. Discussed need to enforce the dress code more strictly. Amber brought up the option to a more strict dress code, but it would be enforced beginning next school year. We do have an employee dress code. Table to the retreat.

8:23PM· **Emergency Plan:** Changes that we had already approved. Tami discussed changes. Karen motions to approve with stipulation that changes are made that were discussed. Stephanie seconds. Motion is carried.

8:24PM· **Emergency Response Plan Policy**—No changes.

8:25PM· **Audit Committee**—Finance committee is our audit committee- Michelle, Stephanie, Emily, Amber, Shawna, and Brian Cates. Stephanie motions to approve. Josie Beth seconds. Motion is carried.

#### 8:26 PM **DIRECTOR'S REPORT**

- Staffing Update: Working on filling all full-time positions next year. Have job interviews next week, and starting to find out if I need to fill any Aide positions. We'll be looking at this budget closely next week with Red Apple.
- Enrollment—If all offers are accepted, we have 455 enrolled for next school year.
- Student Achievement—Showed pictures of students achievements.
- Professional Development: Training for New Safety Protocols being held tomorrow, Weekly PCBL training with Gwen, Aide training monthly meetings, Blind Mule Training tomorrow for Sped and Admin, Upcoming training for staff at Lava Hot Springs. This will be paid for with PCBL funds, Site visits- Charter Librarians, and Provo Schools for our gifted program
- Public Relations: Mega Celebration on May 2<sup>nd</sup>, Passage panelists for 8th grade volunteers are being contacted by the front office, Starting interviews Next week for next years staff!

8:50PM CLOSED MEETING—No Closed meeting.

8:39 PM – ADJOURN—Josie Beth motions to adjourn. Stephanie seconds. Motion is carried.

\*Next scheduled Board Meeting Thursday, April 25, 2024 (Board Retreat)

## Digital Surveillance Use and Storage Policy

Promontory School of Expeditionary Learning recognizes its right to use video surveillance on school property to ensure the health, welfare, and safety of all staff, students, and visitors on campus, and to safeguard school buildings, grounds, and equipment. Specifically, the use of video surveillance promotes the safety of all individuals on school property; assists in providing physical security for school assets; provides visual resources to areas having an absence of adult supervision; assists administration and law enforcement during an emergency; provides retroactive and investigative support to administrators; and acts as a deterrent to inappropriate or criminal behavior.

The purpose of this policy is to establish procedures for the use of video surveillance on school property in a manner that enhances security and aids enforcement of school rules, board policies, and state laws, while respecting the privacy expectation of staff, students, and community members. The existence of this policy does not imply or guarantee that security camera equipment will be used in any particular location or monitored in real time continuously or at any given moment. This policy also serves as notice to all who enter Promontory School of Expeditionary Learning of said recording devices being used on and within the school premises.

Video surveillance equipment may only be used for legitimate business-related purposes and may not be used to harass, stalk, intimidate, or inappropriately monitor any individual. Promontory School will comply with all applicable laws and regulations pertaining to the use of video surveillance, including those related to maintaining and sharing video footage. Video equipment and footage may only be accessed by authorized personnel or school officials, and may not be accessed for personal, inappropriate, or unlawful reasons.

Cameras will only be placed in classrooms and learning environments on a case-by-case scenario, if deemed necessary by the guidelines listed above. Any video footage that is being captured in these incidents will not be available for live stream feed outside of the school building. This footage will only be stored for 48 hours and is available upon formal request and following state and federal laws. Any classroom footage must be viewed in person, on campus; no footage will be sent digitally off campus, without a court order, State or Federally mandated, or for the purposes of investigations by law enforcement.

Requests for surveillance video footage may come from many sources, including news media, law enforcement, vendors, parents, employees, students, and community members. Upon formal request, Promontory School will thoroughly review each request to ensure compliance with all applicable state and federal laws, including open records and student data privacy laws, board policies, and lawfully issued subpoenas and warrants. Records released will be documented according to state and federal laws, board policies and student data privacy laws.

# Dress Code Policy

## DRESS CODE

Dress codes at Promontory School of Expeditionary Learning are mandatory. Dress and grooming standards are part of the dress code policy.

The purpose of the dress code policy is to help create a safe environment, improve the classroom-learning atmosphere, and promote the concept of crew. Promontory School believes that dress codes will promote a sense of school unity and ensure that every child comes dressed to learn, while instilling responsibility and respect for themselves and their peers.

It is expected that students will adhere to the following dress code policy guidelines and that parents will support their students and the school in enforcing the dress code policy.

## STUDENT PRESENTATION & GROOMING

Students must present a modest, clean, and neat appearance at all times.

- ❖ All clothing must be clean, appropriately sized, and worn correctly. Pants/shorts/skirts must be worn at the waist. Shoes must be tied or fastened. Clothing shall not be excessively worn or have holes.
- ❖ Hair must be clean and have a combed appearance and be appropriate for school. Hairstyles and colors should not be distracting and should be appropriate for school.

## TOPS



- ❖ Tops must be a solid color.

- ❖ Tops must have a collar and be a polo or button-down, plain, with no printing or graphics (small brand name logo, no larger than 1.5” square, is acceptable).
- ❖ Dresses are considered a top and need to follow those color guidelines.
- ❖ Tops must:
  - Be long enough to tuck.
  - Have sleeves that cover the shoulders and under the arm.
  - Not be sheer or otherwise revealing.
  - Not be torn or purposely frayed.
  - Not be denim.
  - Not have embellishments (i.e., lace), unless the same color as top.
  - Be clean.
- ❖ A shirt worn underneath the collared top must be a solid color consistent with dress code policy colors and plain with no visible printing or graphics (small brand name logo, no larger than 1.5” square, is acceptable).
- ❖ Any sweaters, vests, hoodies, or jackets worn inside the classroom must be a solid color consistent with dress code policy colors and requirements, plain, with no printing or graphics (small brand name logo, no larger than 1.5” square, is acceptable). Hoods may not be worn inside the building. Any size Promontory School logo is acceptable.

## BOTTOMS



- ❖ Bottoms must be a solid neutral color (**White** or of any shade **Blue, Brown, Gray, Green** and **black**).
- ❖ Bottoms are considered skirts, jumpers, overalls, skorts, shorts, capris, or pants and may be no shorter than 2 inches above the kneecap. Clothing must be worn under skirts to cover undergarments, i.e., tights, leggings, and shorts. Leggings and tights must be an opaque (not sheer) solid color consistent with dress code policy colors and are not allowed unless worn under a skirt/skort/dress which is still no shorter than 2 inches above the kneecap.
- ❖ Bottoms must:
  - Be no shorter than 2 inches above the kneecap.
  - Be worn around the waist.
  - Have no holes (patches matching color and hidden).
  - Be clean.
- ❖ No traditional wash blue jeans, sweats, knit or sweat-like fabric, workout clothing, basketball-style or athletic pants/shorts are allowed except for camping (see below).

## FLEXIBLE FRIDAYS

- ❖ Free choice of modest, clean and in good repair (no holes) clothing may be worn. No offensive graphics are allowed.

## DRESSES



- ❖ Dresses must be a solid color.
- ❖ Dresses may be worn that have a collar or collared shirt underneath and are no more than 2 inches above the kneecap.



- ❖ Leggings and tights must be an opaque (not sheer) solid color consistent with dress code policy colors and are not allowed unless worn under a knee length skirt/skort/dress which is still no shorter than 2 inches above the kneecap.
- ❖ Dresses must:
  - Have sleeves that cover the shoulders and under the arm.
  - Not be sheer or otherwise revealing.
  - Not be torn or purposely frayed.
  - Not be denim.
  - Not have embellishments (i.e., lace), unless the same color as dress.
  - Be clean.

## **ACCESSORIES**

- ❖ Any makeup, jewelry, or hair accessories worn should be appropriate for school and not distract from the learning environment.
- ❖ Body piercing will be limited to earrings that do not draw undue attention or present a danger to the person wearing them.
- ❖ No hats of any kind (including baseball caps) or sunglasses may be worn in the building.

- ❖ Belts and ties, if worn, should be conservative in style and not distracting.

## FOOTWEAR

- ❖ Footwear must be appropriate for P.E. and outdoor activities. Footwear may have open toes but must have a strap or some kind of back on the shoe so that it doesn't slip off the feet.
- ❖ Shoes and socks should be conservative in style and not distracting. No wheelies are permitted.
- ❖ Students will need a pair of sturdy hiking or walking shoes for outside excursions. It is possible that a specific type of shoe will be needed for a specific activity (i.e. rock climbing, back packing, water activities, etc.). If so, notification will be given in advance.

## OUTERWEAR

- ❖ Winter coats, jackets, gloves, hats, and other outerwear are not considered dress code items and should not be worn inside the classroom. Any items worn inside the classroom must be consistent with the school dress code
- ❖ policy colors and requirements.
- ❖ A rain jacket is not required for regular classroom use but is encouraged as it is likely to be used on outdoor fieldwork.

## FIELDWORK DRESS CODE



Unless notified differently, students should wear any shade **BLUE COLLARED SHIRT** and any dress code bottoms on fieldwork. This is not a “dress down” activity. When students leave the building for fieldwork, they represent Promontory School. This fieldwork dress code will also help chaperones more quickly identify Promontory students.

- ❖ Some fieldwork activities do call for a “dress down” dress code, and teachers will notify parents to specify in advance when activities call for dressing down. An official **PROMONTORY FIELDWORK T-SHIRT** or solid **BLUE T-SHIRT** and **BLUE**

**JEANS**, or bottoms appropriate for the activity, may be worn on teacher-specified “dress down” fieldwork. All other dress codes rules apply.

- ❖ An official Promontory fieldwork t-shirt is available to purchase through the school as an option.
- ❖ Spirit t-shirts, i.e., school fundraiser t-shirts, race shirts, etc. are not to be worn on fieldwork.

## CAMPING DRESS CODE

We recognize camping is a different learning environment. Students should be prepared to get dirty and remember the modesty standards from the dress code policy. The daily school dress code is appropriate on campouts, and additional dress code options are as follows:

### TOPS

- ❖ For camping, shirts may include any solid color t-shirt, with no printing or graphics (small brand name logo, no larger than 1.5” square, is acceptable).
- ❖ An **Official Promontory Fieldwork T-shirt** will be made available for purchase through the school as an option for such camping activities.
- ❖ Spirit t-shirts (school fundraiser t-shirts, race t-shirts, etc.) may be worn camping.

### BOTTOMS

- ❖ Jeans are allowed; however, they must meet standard dress code policies: no shorter than 2 inches above the kneecap, no holes, tears, or writing. They also need to be worn at the waist.

## STUDENT-LED CONFERENCE & CELEBRATION OF LEARNING

Students are expected to be in school dress code unless notified differently by their teacher.

## PASSAGE PRESENTATIONS DRESS CODE POLICY

Students are expected to wear school dress code or best dress, while adhering to modesty

standards, for their Passage

## **OTHER ATTIRE**

Students may choose other attire such as backpacks, purses, etc. that are not offensive and are appropriate to our learning environment.

Dress code items not specifically covered but considered inappropriate or contrary to the purpose of the Dress Code Policy are subject to review by the Administrators in charge of executing the Dress Code Policy.

## **EXEMPTION**

Dress code compliance is mandatory with no opt-out policy other than stated below.

Dress code policy exemption will be granted by the director based on:

- ❖ Religious beliefs
- ❖ Extenuating circumstances.

The administration will develop ways of assisting economically disadvantaged students who are unable to meet the dress code policy requirements because of economic circumstances.

## **General Policy Considerations**

This Policy is intended to create a framework to meet the purpose described above. As styles change and questions arise, the school administration, as the Board of Directors' designee, has the authority to determine if a student's attire or appearance conforms to the provisions contained in this Policy. If a student violates the dress code policy, the discipline procedures outlined by the Director should be followed.



## LIBRARY MATERIALS POLICY

### I. Library Policy

- A. Promontory School's libraries support and enhance student learning. Promontory School values libraries, media centers, and library staff who select, maintain, and preserve rich repositories of balanced, relevant, age appropriate, and varied educational sources for students.
- B. This policy specifies the process for identifying materials to be included or disqualified from use in libraries and schools based on Section 53G-10-103, *Sensitive Instructional Materials*, state and federal law, Board Rule R277-217, *Educator Standards and LEA Reporting*, or based on age appropriate content.
- C. All employees of Promontory School must adhere to this policy and are subject to the Promontory School employee conduct policies for any personal violation.

### II. Selection of Materials for Library Collection

- A. The library professional will initially select all library materials under the direction of the local board, including gifts and donations, consistent with this policy using the following criteria:
  - 1. seek recommendations and work collaboratively with parents, patrons, others in the school community during the selection process;
  - 2. create a collection that reflects diversity of ideas; and
  - 3. create a collection that adheres to the law.
- B. Electronic databases and other web-based searches and content will be filtered through Promontory School's state-required internet filter.
- C. Gifts and donations will be reviewed following selection criteria and will be accepted or rejected using the same criteria; and
- D. The responsibility for final material selection rests with trained library personnel under direction of the governing board of Promontory School using the following criteria:
  - 1. Overall purpose and educational significance;
  - 2. Legality;
  - 3. Age and developmental appropriateness;
  - 4. Timeliness and/or permanence;
  - 5. Readability and accessibility for intended audience;
  - 6. Artistic quality and literary style;
  - 7. Reputation and significance of author, producer, and/or publisher;
  - 8. Variety of format with efforts to incorporate emerging technologies; and
  - 9. Quality and value commensurate with cost and/or need.
- E. A record of reviewed materials will be maintained by Promontory School and include:
  - 1. the name of the school;
  - 2. the title and author of the material;

3. all available formats of the material (digital/hard copy/etc.);
4. the intended use of the material;
5. the date the material was reviewed; and
6. the employee's name and title that reviewed the material.

### **III. Library Collection Maintenance**

- A. Library materials will be maintained consistent with the criteria listed in II.D, state and federal laws, including Utah Code Ann. Section 53G-10-103, and represent varying viewpoints.
- B. The school librarian or designated specialist will inventory the school library collection and equipment annually.
  1. The inventory may be used to determine losses and remove damaged or worn materials to be considered for replacement.
  2. The inventory may also be used to deselect and remove materials that are inconsistent with the law, or that are no longer relevant to the curriculum or of interest to students.
  3. Identify gaps or deficits in the library's collection.

### **IV. Library Materials Review Process**

- A. Promontory School will ensure a least restrictive, transparent process for a library materials review request to be made in physical or electronic formats.
- B. A library materials review request of a material may only be made by:
  1. a parent of a student that attends the school;
  2. a student who attends the school; or
  3. an employee of the school.
- C. If challenges become unduly burdensome Promontory School may limit the number of challenges an individual may make in the course of a school year.
- D. A library materials review may be based upon the concern that the material is a sensitive material as defined in Section 53G-10-103, or upon concerns that with age-appropriateness of content.
- E. The identity of the requestor will be protected and kept confidential from all individuals outside of the review process outlined in this policy, to the extent possible.
- F. Promontory School will ensure each school provides access to a Library Materials Review Request Form (See Appendix A).
- G. The requestor must provide all information requested on the form including the requestor's complaint or objection to the library material.
- H. The material that is subject to a review request will have restricted access by maintaining the material behind the circulation desk or requiring an access code for digital materials until the processes described in this policy are completed. Access is limited to students with prior parent/guardian permission only. A list of restricted materials shall be made available to the public.
- I. The material's access level will be consistent at Promontory School until a final determination is made regarding the material.
- J. Upon receipt of a request for review, the school administrator or designee will acknowledge the receipt of the request, create a case number for the review, and convene a Review

Committee within a reasonable time according to the procedure outlined below:

1. A Review Committee will include a reasonable and an odd number of individuals.
  2. Members of the committee will include:
    - i. a facilitator chosen by Promontory School's administration;
    - ii. at least one administrator or designee;
    - iii. a licensed teacher at the school who is currently teaching English language arts or subject relevant to the challenged material;
    - iv. a licensed teacher-librarian or school librarian; and
    - v. parents of current students at the school that number at least one more than the LEA employees on the Committee including parents reflective of the school community as required in Subsection 53G-10-103(3).
- K. The Review Committee will determine the amount of time needed for an adequate review of a material to make a thorough and thoughtful decision and inform the requestor of the determined timeline with a preference for 30 school days where possible and no longer than 60 school days.
- L. The Review Committee may request that the Promontory School's governing board determine the maximum amount of time allowed for review and determination.
- M. Members of the Review Committee will receive materials to complete the review process, including the following:
1. access to the complete work that includes the material being challenged;
  2. a copy of the Materials Review Request form;
  3. a copy of this policy
  4. relevant information about the title compiled and shared by the library staff, including reason for initial approval of the material; and
  5. recorded public comment as described below in Subsection O.
- N. Prior to a decision of the Review Committee the school conducting the review will provide an opportunity for public comment regarding the material at a governing board meeting. O. The school conducting the review will provide notice to parents about the opportunity to provide public comment and include the name of the material that is the subject of the materials review at least 48 hours prior to the scheduled meeting for public comment. P. The school conducting the review will record all public comments, including written comments received, and make those comments available to the Review Committee within 48 hours of the public comment meeting.
- Q. The Review Committee will schedule meetings as determined by the Review Committee and maintain minutes of each meeting.
- R. The notes from each meeting will be retained by Promontory School along with all relevant documentation and the final determination.
- S. The Review Committee will determine whether the material constitutes sensitive material consistent with Section 53G-10-103, this policy, and the guidance letter provided by the Attorney General's Office dated June 1, 2022.
- T. In deciding whether the material constitutes sensitive material, the Committee must:
1. consider *all* elements of the definitions of pornographic or indecent materials as defined in Utah Code Sections 76-10-1235, 76-10-1201, 76-10-1203, and 76-10-1227; and
  2. whether the material is age appropriate due to vulgarity or violence.
- U. In deciding whether the material is age appropriate due to vulgarity, violence, or content,



the Committee must consider the material taken as a whole and consider whether it has serious literary, artistic, political, *or* scientific value for minors, which may include the following objective criteria:

1. reliable, expert reviews of the material or other objective sources;
2. committee members' experience and background; and
3. community standards.

V. In deciding whether the material taken as a whole has serious literary, artistic political, or scientific value as described in Subsection U., the Committee should consider that: 1.

serious value does not mean *any value*; and

2. greater protections should exist concerning content for a library in an elementary or middle school setting.

W. The Review Committee will make a final determination of a reviewed material as follows:

1. **Retained:** the determination to maintain access in a school setting to the challenged material for all students.

2. **Restricted:** the determination to restrict access in a school setting to the challenged material for certain students as determined by the Review Committee.

3. **Removed:** the determination to prohibit access in a school setting to the challenged material for all students.

X. The decision of the Review Committee will be determined by majority vote. Y. A material may not be reviewed again for three school years following the Review Committee's determination.

Z. The final determination of the Review Committee will be communicated to the requestor and appropriate employees within 5 school days of the decision being made.

AA. Promontory School will maintain a list of all materials that receive a "removed" determination and make the list available.

BB. Decisions of all challenged books will be communicated whether retained, restricted, or removed.

## V. Appeals Process

A. The original requestor or another individual who was not on the Review Committee may appeal the determination of the Review Committee in writing to the school principal within 15 business days of receipt of the Review Committee's final determination using an Appeal Request Form (See Appendix B).

B. If an appeal is filed with the school principal, the local governing authority will act as the Appeals Committee.

1. The local governing authority (Appeal Committee) may add parent or school administrator member(s) who did not participate in the initial Review Committee, only as necessary to have an odd number of members.

C. If there is not an appeal of the Review Committee's recommendation, the Review Committee's recommendation is the final determination for the challenged material. D. The Appeals Committee will determine the amount of time needed for an adequate review, not longer than 60 school days and a preference for 30 school days, of a material required to make a thorough and thoughtful decision and inform the requestor of the determined timeline.

E. Members of the Appeals Committee will receive materials to complete the review process, including the following:

1. a copy of the material;
  2. a copy of the Materials Review Request form;
  3. all meeting minutes;
  4. the Review Committee's final recommendation and rationale for the decision; 5. any other documents considered part of the administrative record related to the Review Committee's proceedings including all recorded public comments as described in Subsection V.O. above.
- F. The Appeals Committee will schedule meetings as needed, as determined by the Appeals Committee and maintain minutes of each meeting.
- G. The notes from each meeting will be retained by Promontory School along with all relevant documentation and the final determination by the Appeals Committee. H. The Appeals Committee may make a final determination of a reviewed material as follows:
1. **Retained:** the determination to maintain access in a school setting to the challenged material for all students;
  2. **Restricted:** the determination to restrict access in a school setting to the challenged material for certain students;
  3. **Removed:** the determination to prohibit access in a school setting to the challenged material for all students; or
  4. Another determination as decided by the Appeals Committee.
- I. The decision of the Appeals Committee will be determined by majority vote. J. A material may not be reviewed again for three school years if the Appeals Committee votes to uphold a Review Committee's determination.
- K. The final determination of the Appeals Committee will be communicated to the requestor and appropriate employees within 10 days of the determination.
- L. Promontory School will maintain a list of the determinations by Appeals Committee and make the list available to the public.

## **VII. Final Procedural Review (*Not Legally Binding until USBE amends R277-123*)** A.

The requestor in V.A., may petition the USBE for a procedural review of the Appeals Committee's decision.

1. The USBE will review the petition and determine if a procedural review is warranted, to determine whether the LEA correctly followed its library materials review policy referred to in Rule R277-628.
  2. That determination may include the USBE's decision to have the appeal considered initially by a USBE Committee or a panel of USBE members.
  3. If the USBE determines in USBE's procedural review that the LEA did not correctly follow its materials review policy, it will return the appeal to the LEA with direction to repeat its review process in compliance with its library materials review policy referred to in Rule R277-628.
- B. The USBE will make a final written appeal decision no more than 60 school days after the USBE's determination that the appeal satisfies the criteria for USBE review.
- C. This USBE review decision is final.

## VIII. Communication

- A. An easily accessible webpage on the public website for Promontory School will be updated and available prior to the beginning of each school year to inform teachers, staff, students, and parents of the following:
1. A Materials Review Request Form (See Appendix A);
  2. An Appeal Request Form (See Appendix B);
  3. Application to serve on a materials Review Committee;
  4. This Library Policy;
  5. A list of all materials that are restricted while under Review or have received a Review Committee or Appeals Committee determination.
- B. If made aware of material that may be considered sensitive material as defined in Section 53G-10-103, Promontory School will inform relevant parties regarding appropriate actions to take pursuant to this policy.

### Appendix A: Materials Review Form

Title:

Author:

School:

Review Request initiated by:

Telephone:

Address:

City:

Zip:

Email:

1) Does your child attend this school? Yes No

2) Was this material recommended, assigned, or made available through the students' school? If so, where?

3) What concerns you about this material? Please provide examples, page numbers, links, or any other information to help in locating or identifying content of concern. Please attach any images or other corroborating evidence.

4) What action are you requesting the committee to consider?

Signature:

Date

\*\*\*\*\*Below is for internal use

only\*\*\*\*\* LEA Appointed Committee Convener/Facilitator

(Determined by Promontory School) Administration

\_\_\_\_\_

Suggested Review Timeline: \_\_\_\_\_

**Appendix B: Appeal Request Form**

**Instructions:**

1. A requestor will submit the District Appeal Form along with a copy of the School Library Materials Reconsideration decision within 15 business days of receiving the decision of the School Library Material Reconsideration Committee.

**Requestor Information:**

- 1. Date \_\_\_\_\_
- 2. Legal Name of Guardian \_\_\_\_\_
- 3. Address \_\_\_\_\_
- 4. E-mail \_\_\_\_\_
- 5. Phone Number \_\_\_\_\_
- 6. School \_\_\_\_\_
- 7. School Challenge Decision Date \_\_\_\_\_

The submission of a District Appeal Form will receive a receipt of notice of submission within ten (10) school calendar days. The receipt of submission will include an estimated time-line for a determination of the District Appeal to be completed within a reasonable time period not to exceed \_\_\_\_\_ school days.

**Challenged Material Information:**

- 1. Title \_\_\_\_\_
- 2. Author \_\_\_\_\_
- 3. Publisher and date of publication \_\_\_\_\_
- 4. School where title can be accessed \_\_\_\_\_

Please provide a written statement setting forth your rationale to appeal the School Committee's decision regarding the title (attach additional pages as needed).



June 1, 2022

This memorandum provides analysis regarding  
HB 374, *Sensitive Materials in Schools*,

Official Memorandum-Laws Surrounding School  
Libraries

### **Introduction**

and its prohibition of obscenity in school libraries. This memorandum supersedes any prior memorandum or other information previously provided by the Office of the Utah Attorney General (AGO) on the question of removing pornographic books from school libraries, including a May 4, 2022 memorandum from AGO Education Division Counsel (May 4 Memo), titled "Laws surrounding school libraries." Any conflict or inconsistency between this document and any prior pronouncement from the AGO should be resolved in favor of the analysis herein. Any relevant part of the May 4 Memo not inconsistent with this document is incorporated by reference.

This memorandum has been personally written, reviewed, and approved by the Utah Attorney General and senior executive leadership of the AGO and constitutes the official position of the AGO (Official Memo). Our office was asked by the Utah State Board of Education (Board) and local education agencies (LEAs) to address issues limited to removal of inappropriate books in school libraries. Thus, the Official Memo does not address broader issues

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of appropriate classroom materials or other school curricula and focuses solely on school library books.<sup>1</sup> The focus and emphasis on these materials should not, therefore, be interpreted as the sum of AGO analysis on all issues relating to HB 374. The AGO is available to provide analysis

<sup>1</sup>The May 4 Memo similarly does not address these broader issues because the AGO was only asked about the limited question of books in school libraries.

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to the Board and LEAs on these broader issues if we are asked to do so as contemplated by state statute.

### **Background**

With access and addiction to pornography increasing among Utah children, the average age of first exposure and addiction to pornography among young people reaching pre-pubescent levels, and an increasing online threat of porn to the health, development, and welfare of youth, the Utah State Legislature has taken very positive and proactive measures to address the threat of pornography to

schoolchildren. Parenthetically, through the multiple programs of the AGO, including its Internet Crimes Against Children Taskforce (ICAC), Children's Justice Centers (CJCs), Secure Strikeforce, and online training resources, the AGO is at the front line every day of protecting vulnerable Utah children from exposure to and exploitation from pornography. In cases we investigate and prosecute, we witness the devastation to child victims and survivors of pornography exploitation and exposure.

Among other measures to combat pornography's detrimental impact on children, the Utah Legislature recently passed HB 374 which addresses "sensitive materials" that the Legislature intends to prohibit in the school setting and designates exceptions for certain instructional materials. The State of Utah has recognized that pornography in Utah is a public health crisis and that the school settings are places where "pornographic or indecent materials" will not be allowed. Because **HB 374** applies to both textbooks used to deliver curriculum and material used to support a student's learning in the school setting, it applies to library books in public schools.

### **Executive Summary**

Library books in Utah public schools are prohibited if they are pornographic or indecent as defined under one of three state statutes. The Board must create model policies consistent with such statutes, including HB 374, for LEAs. In turn, LEAs must follow such policies to comply with state statutes. As is the case with most laws that implicate the First Amendment of the United States Constitution, HB 374 will likely be subject to legal challenge. If the law is challenged, the AGO will vigorously defend the law.

As further detailed below, there are actions the Board and LEAs may take in complying with HB 374 to mitigate the risk of legal challenge. The first is to immediately remove books from school libraries that are categorically defined as pornography under state statute. This will help protect the LEAs from potential lawsuits brought by parents or groups alleging the school failed to comply with state laws.

The second mitigation action comes into play as LEAs remove pornographic materials from libraries. In such instances, any legal challenge to that removal will be analyzed under both

Utah statute (including HB 374) and federal law.<sup>2</sup> However, under federal law, there are some conflicts as to the appropriate standard and there is no definitive United States Supreme Court precedent governing removal of library books. Because under federal law, categorical exclusions alone may not be sufficient, the LEAs can further mitigate risk regarding their removal decision by engaging in analysis as to any overall value the materials may have that might forestall removal. Undertaking such an analysis in good faith significantly increases the likelihood of overcoming a legal challenge to the removal of the book.

Nothing in the legal analysis contained in the May 4 Memo or Official Memo should be read to undermine the legislative goals or the laws which aim to initiate and bring about the proactive removal of obscenity from school libraries. The AGO views the Board's responsibility as creating model policies for LEAs to strictly comply with HB 374.

While the AGO cannot determine on a book-by-book basis which materials should be removed, the office supports schools and the Board as they execute their duties in evaluating what materials can be removed under state and federal law. The AGO has, therefore, provided analysis on the standards found in statute and in case law, but declines to designate which books are likely to survive legal challenge if removed from public school library shelves.

### **Analysis**

This Official Memo is provided to clarify certain points of law discussed in the May 4 Memo and to assure appropriate context on certain matters.

#### **1. The purpose of the May 4 Memo and this Official Memo is to provide analysis of HB 374 with respect to library books only.**

Generally, the May 4 Memo was written in response to the requirement in HB 374 that the Board, in consultation with the AGO, "provide guidance and training to support public schools in identifying instructional materials that meet the definition of sensitive materials under" Section 530-10-103. More specifically, the May 4 Memo was for LEAs relating only to library books. (The first sentence of the Memo states that it "outlines the law as it pertains to school library books in Utah.") In fact, LEAs throughout Utah had requested information relating specifically to the handling of school library books pursuant to HB 374. Like the May 4 Memo, this Official Memo does not address course material. This Official Memo does not contain the AGO's discussions and analysis to the Board on other issues relating to HB 374. It is limited to the questions posed relating to the removal of certain books from library shelves due to reports of pervasively vulgar material, identified as sensitive materials under HB 374. The AGO will

<sup>2</sup>The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." It applies to the States by virtue of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The Supremacy Clause of the U.S. Constitution directs state courts that they "must not give effect to state laws that conflict with federal law[]." *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320,324 (2015).

Accordingly, federal court decisions inform the analysis here.

continue to consult with the Board relating to both school library books and other school course materials.



## 2. Utah Law prohibits "sensitive material" in the school setting.

HB 374 (Section 53G-10-103) references three applicable definitions of "pornographic or indecent material." HB 374 creates a new legislative approach to identify "sensitive materials" in a school setting under Utah statute. Under HB 374, pornographic or indecent material means any material defined as harmful to minors in Section 76-10-1201, described as pornographic in Section 76-10-1203, or described in Section 76-10-1227. Under HB 374, if a school library book meets the definition of *any* of these three standards then the book should be removed from a school library.<sup>3</sup> We reiterate our view that these definitions and standards are legally defensible. The relevant definitions are:

a. **Utah Code Ann. § 76-10-1201:** "Harmful to minors" means that quality of any description or representation, in whatsoever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it:

- (i) taken as a whole, appeals to the prurient interest in sex of minors;
- (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (iii) taken as a whole, does not have serious value for minors.

As described in the May 4 Memo, if a school library book in Utah were identified and removed from a library shelf as vulgar or obscene based on this standard, it is **likely to pass constitutional review** in a subsequent legal challenge.

b. **Utah Code Ann. § 76-10-1203:** Any material or performance is pornographic if: (a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex;

- (b) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and
- (c) Taken as a whole it does not have serious literary, artistic, political or scientific value.

As described in the May 4 Memo, if a school library book in Utah were identified and removed from a library shelf as vulgar or obscene based on this standard, it is **likely to pass constitutional review** in a subsequent legal challenge.

<sup>3</sup> HB 374, as codified at Section 53G-10-103, defines "sensitive material" as an instructional material that is pornographic or indecent material as that term is defined in Section 76-10-1235, *Accessing pornographic or indecent material on school property*. When citing to the language of Section 1235 in the May 4 Memo, there was a citation error (i.e., it stated 1217 instead of 1227). To be clear, Section 76-10-1235 states that in a school setting or on school property in Utah, "Pornographic or indecent material" means any material: "(i) defined as harmful to

minors in Section 76-10-1201; (ii) described as pornographic in Section 76-10-1203; or (iii) described in Section 76-10-1227."



c. **Utah Code Ann. § 76-10-1227:** "Description or depiction of illicit sex or sexual immorality" means:

- (i) human genitals in a state of sexual stimulation or arousal;
- (ii) acts of human masturbation, sexual intercourse, or sodomy;
- (iii) fondling or other erotic touching of human genitals or pubic region; or (iv) fondling or other erotic touching of the human buttock or female breast.

Section 1227(2)(a) states that subject to Section 1227(2)(c), "this section and Section 76-10-1228 do not apply to any material which, when taken as a whole, has serious value for minors." Section 1227(2)(c) states conclusively that subsections (i), (ii) and (iii) of 1227(1)(a) "ha[ve] no serious value for minors."

Section 1227(2)(c) can be read as a legislative directive that no description of illicit sex in subsections (i-iii) could have serious literary, artistic, political, or scientific value. Under that interpretation, if a book contains any of the material listed in subsections (i), (ii), or (iii), HB 374 requires the book to be removed from a school library. Such an interpretation creates categorical exclusions or a "bright line" rule. A decisionmaker that removes library books based on these defined categories directly complies with state statute. Other materials under category (iv), as per the plain language of the statute, can be assessed under a "taken as a whole analysis" to further comply with state statute.

Direct compliance with HB 374 and removal of books under state statutes 76-10-1201, 1203, and 1227 will likely insulate LEAs from lawsuits for violations of state statute.

### **3. Federal Law may require more than application of a bright line rule.**

Even when removal of library books meets strict compliance with HB 374 and related state statutes, a legal challenge will invite application of federal First Amendment jurisprudence, a body of cases which have not favored bright line rules in obscenity cases. *See, e.g., Home Box Off, Inc. v. Wilkinson*, 531 F. Supp. 987, 996 (D. Utah 1982) ("It is elementary that merely calling something obscene doesn't make it so").<sup>4</sup>

<sup>4</sup>The U.S. Supreme Court has long held that "the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). Simply put, while HB 374 provides very specific categories of materials to be removed, in federal jurisprudence, there is no bright line rule regarding the removal of books from library shelves in public schools under the U.S. Constitution.

A federal court might plausibly read Section 1227(2)(c) not as a bright line rule, but as a rebuttable presumption. That is, descriptions or depictions of things set forth in 1227(1)(a)(i), (ii), and (iii) presumably have no serious value for minors, *unless* the school proactively determines that such materials have serious literary, artistic, political, or scientific value. This is akin to the "taken as a whole" analysis that removal under subsection (iv) requires under Section 1227(2)(a) and (b). Failure to consider library materials "as a whole" may present risk of conflict with federal law. *State v. Watts*, 498 P.3d 365, 374-75 (Utah 2021) (citing *Miller v. California*, 413 U.S. 15, 18 (1973)).<sup>5</sup>

For example, removing a school library book because it contains a sole description or depiction of an act of "sexual intercourse" or "fondling" (or other forbidden depiction specified under Section 1227) may be subject to increased risk of legal challenge if the book would not otherwise be removed under Sections 1201 or 1203, or 1227 (iv), when taken as a whole.

A cardinal rule of statutory interpretation is that when a statute is susceptible to two plausible interpretations, it should be interpreted to avoid the constitutional conflict. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 381-82 (2005); *see also Hernandez v. Carrreera-Carlson*, 547 F.3d 1237, 1251 (10th Cir. 2008) ("[E]ven after a court has construed a statute to avoid constitutional doubts, an agency remains free to interpret the same statute in a different manner so long as its subsequent interpretation is reasonable and avoids serious constitutional questions").

Accordingly, to further protect the bright line removal decisions made under state statute from any legal challenge, LEAs analyzing material under subsections (i), (ii), and (iii) of 1227(1)(a) may consider further analyzing the material under the "serious value" definition found in 1227(2)(b). Under 1227(2)(b) a book that otherwise violates 1227(1)(a) should remain on the shelves if it has "serious literary, artistic, political, or scientific value for minors, taking into consideration the ages of all minors who could be exposed to the material." This is not intended as a formula to avoid implementation of HB 374 but to bolster the removal decisions and assure there has been a thoughtful process to determine whether there is any redemptive value in the offending material.

In other words, even if the material is specifically listed in subsections (i), (ii), and (iii), the decisionmaker may consider independently analyzing whether such material has serious value for minors under 1227(2)(b). And, to further validate the removal decision under federal law, decisionmakers may consider assessing the materials "as a whole" when analyzing materials under Section 1227.

<sup>5</sup>The possible ambiguity between bright line and rebuttable presumption of Section 1227(2)(c) is amplified by the fact that Section 1227 is generally meant to apply to indecent *public* displays. The First Amendment's obscenity analysis for public displays may differ from its obscenity analysis for library materials but is not addressed herein.

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Any decision or attempt to resist removal of offending material under Section 1227 based on "serious value" or "as a whole," is fraught with its own risks and potential legal challenge by parents who believe the decision is too permissive and contrary to state statute. *Cf. United States v. Stevens*, 559 U.S. 460,478 (2010) ("But the text says 'serious' value, and 'serious' should be taken seriously."). *Serious* value does not mean *any* value. Of crucial note, this risk of lawsuits by parents only increases for libraries in elementary or middle schools versus high schools. *See* Utah Code § 76-10-1227(2)(b) ("serious value' ... taking into consideration the ages of all minors who could be exposed to the material").

#### **4. Circuit courts disagree on the precedential impact of the *Pico* case.**

In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982) ("*Pico*"), the U.S. Supreme Court was faced with a challenge to the removal of books from library shelves by the defendant board of education. "[T]he only books at issue in [*Pico*] are *library* books, books that by their nature are optional rather than required reading." *Id.* at 862 (emphasis in original). The relevant question in *Pico* was whether the "First Amendment impose[s] any limitations upon the discretion of petitioners [the School Board] to remove library books from the Island Trees High School and Junior High School?" *Id.*

While *Pico* is the only case in which the Supreme Court has addressed the removal of books from library shelves, it is a plurality opinion-no part of the opinion garnered five votes. Justice Brennan's view, joined by Justices Marshall and Stevens, was that if there was a finding that the removals were based on viewpoint, then the removals violated the First Amendment. *Id.* at 871-72. Justice Blackmun concurred, finding that schools cannot remove books if "motivated simply by the officials' disapproval of the ideas involved." *Id.* at 879-80 (Blackmun, J., concurring). Justice White also concurred solely as to remanding the matter for a trial on whether the school board removed the books based on viewpoint or vulgarity. *Id.* at 883 (White, J., concurring). The dissenting justices (Chief Justice Burger joined by Justices Powell, Rehnquist, and O'Connor) questioned the plurality's recognition of the "right" of access to particular books: "It does not follow, however, that a school board must affirmatively aid the speaker in his communication with the recipient. In short the plurality suggests today that if a writer has something to say, the government through its schools must be the courier." *Id.* at 887 (Burger, C.J., dissenting).

The *Pico* case is the closest the U.S. Supreme Court has come to providing guidance on the issue of removal of books from school library shelves and supports the notion that "pervasively vulgar" books can be removed. *Id.* at 871. The Court later acknowledged this holding: "all members of the [*Pico*] Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675,684 (1986).

Opinions from the circuit courts of appeals on the precedential nature of *Pico* are as divided as the justices were. At least two federal circuit courts have issued opinions suggesting

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that Justice Brennan's *Pico* plurality opinion is the opinion of the High Court. *See, Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 & n.5 (9th Cir. 1998); *see also Turkish Coal. Of Am., Inc. v. Bruininks*, 678 F.3d 617, 623 (8th Cir. 2012). Neither of these cases directly addressed the issue of removal of books from library shelves and both distinguished *Pico* on those grounds. *Monteiro*, 158 F.3d at 1027; *Turkish Coal*, 678 F.3d at 623.

Other circuits have held otherwise. The Fifth Circuit concluded that "*Pico* is of no precedential value as to the application of the First Amendment to these issues." *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1045 (5th Cir. 1982). Similarly, the Eleventh Circuit held that "[w]ith five different opinions and no part of any of them gathering five votes from among the nine justices [] *Pico* is a non-decision so far as precedent is concerned. It establishes no standard." *Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1200 (11th Cir. 2009).

The Tenth Circuit-the case law that Utah is bound by-held that in "*Pico*, a plurality of the Supreme Court recognized a free speech 'right to receive' information and held unconstitutional a school board's censorship of several books from a school library." *Roberts v. Madigan*, 921 F.2d 1047, 1056 (10th Cir. 1990); *but see Cummins v. Campbell*, 44 F.3d 847, 853 n.4 (10th Cir. 1994) (noting that *Pico* did not produce a "majority opinion on the merits"). *Roberts* involved a students' challenge of the opportunity to read the Bible. 921 F.2d at 1056. The Tenth Circuit recognized the similarity between the removal of the Christian books and the claims in *Pico*, but the court expressed no opinion as to the students' "right to receive ideas" because the *Roberts* plaintiffs lacked standing. *Id.*

Even if the Tenth Circuit were to treat Justice Brennan's plurality opinion in *Pico* as controlling, that opinion recognized that courts must apply the First Amendment "in light of the special characteristics of the school environment." 457 U.S. at 868 (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969)). In *Pico*, Justice Brennan emphasized that the constitutionality of removal decisions "depends upon the motivation behind" the library book removals. *Id.* "[U]nconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar," nor if "the removal decision was based solely upon the 'educational suitability' of the books in question." *Id.* Following this reasoning, decisionmakers motivated to remove a book under an HB 374 challenge in order to protect youth from the public health crisis of pornography likely satisfy *Pico's* constitutional motivation analysis.

### **Conclusion**

HB 374 prohibits pornographic or indecent material as defined as harmful to minors in Section 76-10-1201, described as pornographic in Section 76-10-1203, or described in Section 76-10-1227. School library books that meet any of these statutory definitions are prohibited from school libraries. Analysis under these statutory definitions, or strict application of the categorical exclusions in 1227(1)(a)(i), (ii), and (iii), is the way to directly comply with HB 374. To mitigate the risk of legal challenge relating to decisions under Section 1227, LEAs may also analyze the materials as a whole and determine whether the materials have any serious literary, artistic, political, or scientific value. While these are important considerations, nothing should prevent the Board and LEAs from proactively complying with state law in removing pornographic books from library shelves. Any decision to retain books in libraries that meet the definition of pornography is contrary to state statute and significantly increases the likelihood of a lawsuit against the LEA for non-compliance. The AGO will continue to consult with the Board and LEAs regarding analysis and compliance with other facets of HB 374.

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#### MEMORANDUM TO LEAs

TO: LEAs

FROM: Ashley Biehl, Assistant Attorney General

RE: Laws surrounding library policies

DATE: 05/03/2022



The document outlines the law as it pertains to school library books in Utah. The intent is to provide LEAs with legal guidance. The Utah State Board of Education (USBE) will be releasing a model library policy before the 2022-2023 school year that LEAs may utilize in addition to these principles.

### **1. Do students have legal rights regarding access to school library materials?**

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Yes. The United States Supreme Court (“SCOTUS”) has an extremely long history of recognizing that students have their own First Amendment rights in school. The removal of books from a school library can constitute an official suppression of ideas, in violation of the First Amendment. In *Tinker v. Des Moines*, SCOTUS held that “School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect.”<sup>1</sup> “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”<sup>2</sup>

In *Island Trees v. Pico*, SCOTUS noted that “[l]ocal school boards have broad discretion in the management of school affairs, but such discretion must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. . . . [T]he special characteristics of the school *library* make that environment especially appropriate for the recognition of such rights.”<sup>3</sup>

Finally, SCOTUS has stated that “students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.”<sup>4</sup> “The school library is the principal locus of such freedom.”<sup>5</sup>

### **2. What is the legal standard for assessing what is harmful to minors?**

Utah Code Annotated (UCA) 76-10-1201<sup>6</sup> defines harmful to minors. It is important to note that to be defined as harmful to minors, a book must meet all three factors outlined below.

(5)(a) “Harmful to minors” means that quality of any description or representation, in whatsoever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it:

- (i) taken as a whole, appeals to the prurient interest in sex of minors;
  - (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
  - (iii) taken as a whole, does not have serious value for minors.
- (b) Serious value includes only serious literary, artistic, political or scientific value for minors.

<sup>1</sup>*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511, 89 S. Ct. 733, 739, 21 L. Ed. 2d 731 (1969)

<sup>2</sup> Shelton v. Tucker, (364 U.S. 479), at 487 (81 S.Ct. 247, 5 L.Ed.2d 231) (1960)

<sup>3</sup> Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 853, 102 S. Ct. 2799, 2801, 73 L. Ed. 2d 435 (1982)

<sup>4</sup> Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, quoting Keyishian v. Bd. of Regents of Univ. of State of N. Y., 385 U.S. 589, 603, 87 S. Ct. 675, 683, 17 L. Ed. 2d 629 (1967)

<sup>5</sup> Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 868–69, 102 S. Ct. 2799, 2809, 73 L. Ed. 2d 435 (1982)

<sup>6</sup> Utah Code Ann. § 76-10-1201

This means that a work that contains nudity, sexual conduct, sexual excitement, or sadomasochistic abuse is not harmful to minors on its face. If a work contains one of those things (as defined below), it **MUST** then be considered under this three-factor test. In order to be harmful to minors, the work must contain nudity, sexual conduct, sexual excitement or sadomasochistic abuse AND appeal to the prurient interest in sex of minors, be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors, AND lack serious literary, artistic, political, or scientific value.

EXAMPLE: A book on anatomy contains depiction of nudity. This book is not harmful to minors because it does not appeal to the prurient interest in sex of minors, and has serious scientific value for minors.

EXAMPLE: Bram Stoker’s *Dracula* contains a scene of sexual conduct. This book is not harmful to minors because it does not appeal to the prurient interest of minors, is not patently offensive to prevailing standards in the adult community when taken as a whole with respect to what is suitable for minors, and it has serious literary value.

EXAMPLE: *Penthouse Magazine* is likely to be considered harmful to minors as it appeals to the prurient interests in sex, would likely be deemed to be patently offensive to prevailing standards in the adult community with respect to what is suitable for minors, and arguably lacks serious literary, artistic, political and scientific value.

i. *How is nudity defined?*

UCA 76-10-1201

(10) “Nudity” means:

- (a) the showing of the human male or female genitals, pubic area, or buttocks, with less than an opaque covering;
- (b) the showing of a female breast with less than an opaque covering, or any portion of the female breast below the top of the areola; or
- (c) the depiction of covered male genitals in a discernibly turgid state.

ii. *How is sexual conduct defined?*

UCA 76-10-1201

(14) “Sexual conduct” means acts of masturbation, sexual intercourse, or any touching of a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a female, breast, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent or actual sexual stimulation or gratification.

iii. *How is sexual excitement defined?*

UCA 76-10-1201

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(15) “Sexual excitement” means a condition of human male or female genitals when in a state of sexual stimulation or arousal, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

iv. *How is sadomasochistic abuse defined?*

UCA 76-10-1201

(13) “Sadomasochistic abuse” means:

- (a) flagellation or torture by or upon a person who is nude or clad in undergarments, a mask, or in a revealing or bizarre costume; or
- (b) the condition of being fettered, bound, or otherwise physically restrained on the part of a person clothed as described in Subsection (13)(a).

v. *What does “prurient interest” mean?*

SCOTUS has defined prurient interest as: “Material appeals to the prurient interest, for instance, only if it is in some sense erotic.”<sup>7</sup>

The Utah Supreme Court has also clarified that “Material does not evoke a prurient interest unless it has the capacity to provoke ‘sexual responses over and beyond those that would be characterized as normal.’”<sup>8</sup> “An expression or depiction must at least be erotic in some significant way to the average person”.<sup>9</sup>

vi. *What standards must be used to determine if an item has scientific, literary, political or artistic value?*

To determine whether a book has scientific, literary, political or artistic value, the determining factor is whether a reasonable person would find value in the material when taken as a whole. This factor utilizes a national floor for what constitutes value. Thus, the work must be considered as a whole, and must be looked at through the lens of whether a reasonable person in America would think it has redeeming value.

In *Ashcroft v. ACLU*, SCOTUS laid out this standard as follows: “[T]he value of [a] work [does not] vary from community to community based on the degree of local acceptance it has won.”<sup>10</sup> Rather, the relevant question is “whether a reasonable person would find ... value in the material,

taken as a whole.”<sup>11</sup> Thus, the serious value requirement “allows appellate courts to

<sup>7</sup> Ashcroft v. Am. C.L. Union, 535 U.S. 564, 579, 122 S. Ct. 1700, 1710, 152 L. Ed. 2d 771 (2002).

<sup>8</sup> City of St. George v. Turner, 860 P.2d 929, 934 (Utah 1993), citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498, 105 S.Ct. 2794, 2799, 86 L.Ed.2d 394 (1985).

<sup>9</sup> City of St. George v. Turner, 860 P.2d 929, 934 (Utah 1993), citing Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)

<sup>10</sup> Ashcroft v. Am. C.L. Union, citing Pope v. Illinois, 481 U.S. 497, 500, 107 S. Ct. 1918, 1921, 95 L. Ed. 2d 439 (1987)

<sup>11</sup> *Id.*, at 501, 107 S.Ct. 1918.

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impose some limitations and regularity on the definition by setting, *as a matter of law*, a national floor for socially redeeming value.”

UCA 76-10-1227 (c) provides that “(c) A description or depiction of illicit sex or sexual immorality as defined in Subsection (1)(a)(i), (ii), or (iii) has no serious value for minors.” Subsection (1)(a)(i-iii) reads: “) "Description or depiction of illicit sex or sexual immorality" means: (i) human genitals in a state of sexual stimulation or arousal; (ii) acts of human masturbation, sexual intercourse, or sodomy; (iii) fondling or other erotic touching of human genitals or pubic region”. However, it is important to remember that 76-10-1201 requires all three prongs of the test to be met. Therefore, even if a book does not have literary, scientific, political or artistic value for the above reasons, it must also patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and appeal to the prurient interests in sex of minors, in order to be harmful to minors.

vii. *Does this require a book to be considered as a whole when assessing suitability?*

Yes. The third prong of “harmful to minors” requires a book to lack serious artistic, scientific, political, or literary value. SCOTUS has defined this criteria as “whether a reasonable person would find ... value in the material, taken as a whole.”<sup>12</sup> Therefore, the book must be considered in its entirety when determining whether it has scientific, literary, artistic, or political value.

Additionally, UCA 76-10-1227(2)(a) provides that: “Subject to Subsection (2)(c), this section and Section 76-10-1228 do not apply to any material which, when taken as a whole, has serious value for minors.”

Finally, the Utah Supreme Court has held that “under Supreme Court caselaw, an obscenity analysis must focus on the work ‘taken as a whole’”.<sup>13</sup>

viii. *Can books be banned if, taken as a whole, they are vulgar or educationally unsuitable?*

Yes. SCOTUS has held that “an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books

were pervasively vulgar. ...[I]f it were demonstrated that the removal decision was based solely upon the “educational suitability” of the books in question, then their removal would be “perfectly permissible.”<sup>14</sup>

<sup>12</sup> *Id.*

<sup>13</sup> *State v. Watts*, 498 P.3d 365, 374-75 (Utah 2021), citing *Miller v. California*, 413 U.S. 15, 18 (1973)

<sup>14</sup> *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871, 102 S. Ct. 2799, 2810, 73 L. Ed. 2d 435 (1982)

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### **3. Are library books and books assigned as apart of classroom curricula subject to the same standard?**

No. Library Books are given significantly wider protection under the First Amendment than books that are assigned as a part of school curriculum.

“Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.”<sup>15</sup>

### **4. What factors may NOT go into a book removal?**

Books may not be removed because they contain ideas that local school boards disagree with based upon: politics, nationalism, religion, or other matters of opinion.

“In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” Such purposes stand inescapably condemned by our precedents.”<sup>16</sup>

“Petitioners rightly possess discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner.”<sup>17</sup>

### **5. Does HB 374 change the standard for school library books?**

No. HB 374 prohibits sensitive materials in the school setting. HB 374 defines sensitive material as “an instructional material that is pornographic or indecent material as that term is defined in Section 76-10-1235.” Section 76-10-1235 defines pornographic or indecent material as: “i) defined as harmful to minors in Section 76-10-1201; ii) described as pornographic in Section 76-10-1203; or (iii) described in Section 76-10-1217.”

This section references back to 76-10-1201, which, as noted above in question 2, requires the

three prong test under 76-10-1201(5)(a) to be utilized in determining whether a material is harmful to minors. Therefore, this three-prong test under 76-10-1201(5)(a) must always be utilized when assessing whether a library book is 'sensitive material'. It also references UCA 76-10-1203, which provides the same test as 76-10-1201(5), with the difference that the first two

<sup>15</sup> Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 869, 102 S. Ct. 2799, 2809, 73 L. Ed. 2d 435 (1982)

<sup>16</sup> Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 872, 102 S. Ct. 2799, 2810, 73 L. Ed. 2d 435 (1982) citing West Virginia Board of Education v. Barnette, 319 U.S., at 642, 63 S.Ct., at 1187.

<sup>17</sup> Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870, 102 S. Ct. 2799, 2810, 73 L. Ed. 2d 435 (1982)

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prongs assess what appeals to the prurient interests in sex or is patently offensive to adults, rather than minors. UCA 76-10-1203 essentially repeats the same three-prong test, but focuses on adults, rather than minors.

## **6. Are library books included in HB 374?**

Yes, though HB 374 does not change the standard that is used to assess school library books, which is noted above in question 2, and can be found under UCA 76-10-1201.

HB 374 defines instructional materials as:

(1)(a) (i) "Instructional material" means a material, regardless of format, used:

(A) as or in place of textbooks to deliver curriculum within the state curriculum 122 framework for courses of study by students; or

(B) to support a student's learning in the school setting.

(ii) "Instructional material" includes reading materials, handouts, videos, digital 125 materials, websites, online applications, and live presentations.

...

(f) (i) "School setting" means, for a public school:

(A) in a classroom;

(B) in a school library; or

(C) on school property

(g) (i) "Sensitive material" means an instructional material that is pornographic or indecent material as that term is defined in Section 76-10-1235.

(ii) "Sensitive material" does not include an instructional material:

(A) that an LEA selects under Section 53G-10-402;

- (B) for medical courses;
- (C) for family and consumer science courses; or
- (D) for another course the state board exempts in state board rule.

As noted in question 5, HB 374 defines sensitive material as “an instructional material that is pornographic or indecent material as that term is defined in Section 76-10-1235.” Section 76-10-1235 defines pornographic or indecent material as: “i) defined as harmful to minors in Section 76-10-1201; ii) described as pornographic in Section 76-10-1203; or (iii) described in Section 76-10-1217.”

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Section 76-10-1201, requires the three prong test under 76-10-1201(5)(a) to be utilized in determining whether a material is harmful to children, and section 76-10-1203 essentially provides the same test. Therefore, this three-prong test under 76-10-1201(5)(a) must be utilized when assessing whether a library book is ‘sensitive material’.

### **7. What should be done with a book while it is pending review?**

While there is no specific law stating that books must be left in the library when facing a challenge, leaving books on the shelves while pending review helps to ensure that schools are not engaging in prior restraint. As noted in question 1, students have extensive first amendment rights in school, and the removal of a book from a school library can constitute a suppression of ideas. Prior restraint is a legal doctrine in the first amendment is violated when the government prevents speech before it occurs. In this case, removing books before a determination is made as to whether they meet the definition of “harmful to children” runs the risk of violating student’s first amendment right’s to study and inquire, via prior restraint.

SCOTUS has a long history of disfavoring prior restraints. “Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights,” wrote then-Chief Justice Warren Burger. SCOTUS has held that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”<sup>18</sup> They further noted that “[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.”<sup>19</sup>

<sup>18</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963) <sup>19</sup> Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 390, 93 S. Ct. 2553, 2561, 37 L. Ed. 2d 669 (1973)