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Book Ban Battles Move From School Boards To Courts

By **Jack Karp**

Law360 (October 25, 2022, 10:23 AM EDT) -- Parents and students on both sides of the fight over which books should be available in schools and libraries are taking their battles out of school board meetings and into court.

Some parents are asking judges to order the removal of books they claim are inappropriate for children. Students and other parents, meanwhile, are suing to stop the removal of books they say are being targeted because they're by diverse authors or deal with race and gender.

With the issue governed by scant case law and unclear precedent, more suits are likely coming, especially if some succeed, say experts. And one may wind up before the U.S. Supreme Court.

"I don't want to predict that the Supreme Court will hear it imminently," Joshua Dunn, chair of the political science department at the University of Colorado, Colorado Springs, told Law360 Pulse. "But I think it's gonna get there."

Protecting Kids From 'Obscene' Books

A Virginia father asked a state judge in April to declare that two books — "Gender Queer," a graphic novel-style memoir about being nonbinary, and fantasy-adventure novel "A Court of Mist and Fury" — are obscene for children and shouldn't be distributed in the state, after school officials declined to act.

The books contain sexually explicit material and exposing kids to them "potentially sets the stage for sexual and pornographic addictions in brains that are not fully formed," the dad's attorney, Timothy Anderson, told a Virginia Beach court.

A Virginia law allows citizens to petition a court to find probable cause that a book is obscene. If a judge finds such probable cause, they can bar the sale or distribution of the challenged book throughout the state, Anderson explained.

"A 12-year-old can't walk into AMC and watch an R-rated movie, and they shouldn't be able to go into Barnes & Noble and buy books that have sexually graphic material in them," Anderson told Law360 Pulse.

Parents in other states are also asking courts to order the removal of books they find objectionable when schools won't take action.

A Pennsylvania mom sued school officials in the Great Valley School District in August after they refused to remove books she claimed contain "obscene graphic sexual material" from her son's school library. A Florida man sued the Sarasota School Board for failing to restrict what he deemed "explicitly sexual materials."

And a group of Georgia mothers accused the Forsyth County Board of Education in federal court of violating their First Amendment rights when it stopped them from reading aloud at board meetings from books they want barred.

"It illustrates a tension, an irony in fact, in that the board is saying these books are perfectly fine to

have in the Forsyth County school library, but you're not allowed to read from them at a school board meeting," said Endel Rohe Kolde of the Institute for Free Speech, who is representing the moms.

The Great Valley School District and attorneys for the Forsyth County Board of Education did not respond to requests for comment.

Most of these lawsuits, though, are unlikely to succeed, say experts.

"Taking the affirmative step to dictate to a school board that, yes, you do have to remove this, I think that judges are going to be leery of that," said Dunn. "They worry about really becoming a substitute school board."

School districts have wide latitude to choose the books in their libraries, said University of Dayton School of Law professor Erica Goldberg. Parents trying to force books' removal would have to make a claim that overrides a school district's power.

"I can't even imagine what that would be," Goldberg said.

In fact, a Florida judge dismissed the case against the Sarasota School Board, finding that Florida law allows parents and residents to challenge instructional materials only before a school board and not in court, according to Patrick J. Duggan of Shumaker Loop & Kendrick LLP, who represented the school board.

A Virginia judge also dismissed Anderson's petitions trying to ban "Gender Queer" and "A Court of Mist and Fury" in August, finding that the law used to challenge the books doesn't give courts the authority to declare books obscene just for minors, and that it's unconstitutional.

"The decision in Virginia Beach hopefully will serve as a lesson to others that cases like this are misguided and will not succeed," said Robert Corn-Revere of Davis Wright Tremaine LLP, who represented bookstore Barnes & Noble in that case.

Targeting Nonwhite and LGBTQ Authors

Those fighting what they call a coordinated effort to ban books by diverse authors are turning to the courts as well.

In February, students and parents sued Missouri's Wentzville R-IV School District for removing several books from the school library, including Toni Morrison's "The Bluest Eye" and Alison Bechdel's "Fun Home."

The books were targeted because school board members disagree with their ideas and viewpoints, violating students' First Amendment rights, according to the complaint in Missouri federal court.

"As we started looking at these removals, we realized that the books were predominantly by authors who are not white, books with content that surrounded race and sexuality and gender, and the authors and protagonists were not straight white men," said Molly E. Carney of the Missouri ACLU, who is representing the students.

Lawsuits like the one in Wentzville are more likely to succeed than those seeking to force the removal of books, according to Goldberg.

The Supreme Court ruled in [Island Trees Board of Education v. Pico](#) that schools can't remove books simply because they disagree with the books' content. And the ACLU's Wentzville complaint "pretty well mirrors" what happened in Pico, Goldberg explained.

"The ACLU's complaint does appear to allege something pretty damning, which is the school board is basically removing only materials from non-white authors and/or LGBTQ+ authors, which would show at the very least some sort of viewpoint discrimination," Goldberg said.

Llano County, Texas, residents similarly asked a federal judge in May to stop county officials' "systematic campaign to eradicate books containing ideas or messages that they disagree with from

the county's library collection."

And the ACLU of Pennsylvania filed its own complaint with the civil rights divisions of the federal departments of Justice and Education accusing the Central Bucks School District of discriminating against LGBTQ students by removing books with LGBTQ-related content.

Attorneys for the Wentzville School District and Llano County did not respond to requests for comment.

But in a statement, Central Bucks Board of School Directors President Dana Hunter said, "The district is resolute and united in its zero tolerance for discrimination, harassment or bullying of any kind."

The district asked the ACLU to identify specific allegations of discrimination, but the ACLU hasn't done so, Hunter insisted, adding, "instead of being focused on the protection of students, the ACLU is more interested in making political points in the press. The school district's focus is — and always will be — the children and families of our community."

Carney, at least, is "sure" there will be more lawsuits like these coming.

"When you invalidate a certain book, you're invalidating the experiences of the author, of the protagonist, of the characters," Carney said. Banning these books means "we're opening the door to more censorship and to more mistreatment of people who are already mistreated in our society."

New Laws and Unclear Precedent

Disputes over banning books do appear to be on the rise, say experts, but they are far from new.

In the 1970s, a New York school board removed several books, including Kurt Vonnegut's "Slaughterhouse-Five" and "Black Boy" by Richard Wright, after parents claimed the books were "anti-American, anti-Christian, anti-Semitic and just plain filthy."

Students sued the board in what became the Pico case, and the Supreme Court ruled in their favor that public schools can't remove books because they disagree with those books' ideas.

But the Pico decision dates back to 1982, and the court hasn't addressed the issue since, according to experts.

The Pico court was also "badly fractured" and issued only a plurality decision, Dunn pointed out. The ruling garnered multiple concurrences and dissents, with no opinion winning over a majority of the justices.

"Which means we don't even have a majority precedential opinion coming out from the Supreme Court about what the law is," Goldberg said.

Legislators are stepping into that void.

A Missouri law that went into effect in August makes it a misdemeanor for any school employee to provide students with "explicit sexual material." Lawmakers in Iowa introduced legislation in February that would allow parents to sue schools that offer kids access to books they think are obscene.

Anderson, who filed the Virginia book challenges and who is also a state legislator, said he's working on legislation to potentially create a different obscenity standard for minors than for adults.

"We really need to see what can we do to make sure that we're protecting children in schools the same way we protect them at movie theaters and at Target when they're trying to buy violent video games," Anderson said.

If and when Anderson does introduce that bill, it's likely to face lawsuits, too, according to experts.

"Any law that tries to do what this law was trying to do would run into serious constitutional problems," said Matthew Callahan of the ACLU of Virginia, who represented the American Library

Association and other organizations as amici in the Virginia litigation, about the law at issue in that case.

At least one law leading to the removal of books is already being challenged.

Teachers and students sued Oklahoma State Board of Education officials last October over a state law restricting discussions on race and gender in Oklahoma's schools they say has caused educators to "blacklist" books by diverse authors.

"District administrators have struck texts by Black and women authors from their reading lists, including *To Kill a Mockingbird*, *Their Eyes Were Watching God*, *I Know Why the Caged Bird Sings*, *Narrative of the Life of Frederick Douglass*, and *A Raisin in the Sun*, while leaving in place texts by white and male authors," the lawsuit said.

Courts will likely see more litigation from those on both sides of the issue until the Supreme Court addresses it again, say experts.

Though with such a complex issue that balances so many competing interests, Goldberg wants lower courts to develop a stronger factual record first, she cautioned.

"I'd like to see a few more of these lawsuits percolate and then maybe have the Supreme Court take it," Goldberg said. "I hope they do."

--Editing by Alyssa Miller.

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