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## **Assessing Educational Suitability of Library Materials Under HB 900<sup>1</sup>**

In 2023, the Texas Legislature enacted House Bill 900 (HB 900), the Restricting Explicit and Adult-Designated Educational Resources or "READER" Act. The bill amended Texas Education Code §33.021 to direct the Texas State Libraries and Archives Commission (TSLAC), with State Board of Education (SBOE) approval, to adopt mandatory school library collection development standards. The new standards, codified at [13 Tex. Admin. Code §4.2](#), took effect January 3, 2024.

This memo is prepared to analyze common questions regarding HB 900 requirements and related Texas laws that school boards should consider when assessing the educational suitability of library materials and making removal decisions which prohibits school libraries from acquiring or maintaining materials that are "pervasively vulgar" or "educationally unsuitable" as referenced in the Supreme Court case of *Board of Education v. Pico*, 457 U.S. 853 (1982) and subsequent federal caselaw that has incorporated *Pico* guidance.

### **I. HB 900 and TSLAC School Library Standards**

HB 900 and the TSLAC regulations impose several key requirements on Texas school libraries:

- School boards must adopt collection development policies describing the criteria and process used to select, maintain, and withdraw materials. [13 Tex. Admin. Code §4.2\(a\)](#).
- Libraries are prohibited from possessing, acquiring or purchasing: (1) "harmful material" as defined by Texas Penal Code §43.24; or (2) material that is "pervasively vulgar or educationally unsuitable." [13 Tex. Admin. Code §4.2\(c\)\(7\)\(B\)](#).
- The collection development standards apply to all library materials, including those in school libraries, classroom libraries, and online catalogs. [13 Tex. Admin. Code §4.2\(c\)\(3\)](#).
- In selecting materials, school boards must recognize that parents are the primary decision-makers regarding students' access to library materials. [13 Tex. Admin. Code §4.2\(c\)\(4\)](#).
- Materials may not be removed based solely on the ideas they contain or the personal background of the author or characters. [13 Tex. Admin. Code §4.2\(c\)\(7\)\(C\)](#).

The TSLAC standards use several key terms that are defined elsewhere in Texas law. Understanding these definitions is critical for school boards evaluating potential removals.

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<sup>1</sup> **DISCLAIMER:** The information provided in this document is for the benefit of the general public and does not, and is not intended to, constitute legal advice, or serve as a substitute for legal counsel. Instead, the material herein is for general informational purposes only and should not be relied upon for any matter or situation. Independent legal counsel should be consulted on this matter.

## II. Impact of Recent Fifth Circuit Ruling on HB 900

It's important to note that the United States Court of Appeals for the Fifth Circuit recently affirmed a preliminary injunction prohibiting the enforcement of certain provisions of the Texas Education Code added by HB 900. Specifically, the injunction applies to the statutes requiring library material vendors to rate materials as "sexually explicit" or "sexually relevant." [Tex. Educ. Code §§35.001-35.002](#).

Because vendors are not currently required to issue such ratings, these two provisions are effectively inoperative. However, districts remain free to adopt additional procedures that do not conflict with the TSLAC standards. [13 Tex. Admin. Code §4.2\(i\)](#).

Importantly, the Fifth Circuit ruling does not impact other provisions in §4.2 that prohibit acquiring "harmful material" under [Penal Code §43.24](#) or "pervasively vulgar or educationally unsuitable" material under the *Pico* standard as discussed below. These provisions remain in full force and effect.

## III. Harmful Material Under Texas Penal Code §43.24

The prohibition on "harmful material" cross-references the definition in [Texas Penal Code §43.24](#). Under that statute, material is considered "harmful" to minors if it meets a three-prong test:

(1) The dominant theme appeals to the "prurient interest" in sex, nudity or excretion. The prurient interest is a "shameful or morbid interest in sex, nudity or excretion which goes substantially beyond customary limits of candor in description or representation of such matters." *Brockett v. Spokane Arcades*, 472 U.S. 491 (1985).

(2) It is "patently offensive" to prevailing adult community standards of suitability for minors. Courts look to the standards of the local community about what sexual material is appropriate for minors. *Ginsberg v. New York*, 390 U.S. 629 (1968). This prong is based on the "standard of care" a reasonable parent would exercise.

(3) It is "utterly without redeeming social value" for minors. Even if material appeals to the prurient interest and is patently offensive, it is not considered "harmful" if it has serious literary, artistic, political or scientific value for a legitimate portion of reasonable, older adolescents.

All three prongs must be independently satisfied for material to be considered "harmful" under §43.24. Material that has serious value for older students should not be withheld from them solely because it may be inappropriate for younger children, but that material should be appropriately segregated to ensure that accessibility is limited.

## IV. Pervasive Vulgarity and Educational Suitability Under Pico

The TSLAC standards prohibit material that is "pervasively vulgar or educationally unsuitable" under the Supreme Court's *Pico* decision. 457 U.S. 853 (1982). In *Pico*, a plurality of the Court held that school boards have discretion to remove "pervasively vulgar" books or those that are not "educationally suitable."

However, with this framework, *Pico* prohibits the removal of books based on mere disagreement with the ideas they contain. School boards may not prescribe an orthodoxy by removing books that express disfavored political, religious or social views. In other words, **the motivation behind the removal is key**. As appropriate, Texas school boards should document their rationale for removal decisions to demonstrate they are based on educational suitability rather than viewpoint discrimination. By doing so, boards can confidently exercise their authority to curate library collections appropriate for their students while minimizing legal risks.

How can Texas school boards determine if a book is "pervasively vulgar"? Texas law does not define this standard. But the *Pico* plurality suggested that even a single poem, chapter or page containing concentrated, offensive vulgarity could be removed. School boards could also reasonably conclude that a book's "random" vulgarity is inappropriate for teenage readers or that retaining such books gives them an implicit endorsement.

To assess "educational suitability," school boards should look to the state curriculum standards, known as the [Texas Essential Knowledge and Skills \(TEKS\)](#). The TEKS are adopted by the SBOE, with input from educators and parents, and specify what students should know and be able to do in each subject and grade level. 19 Tex. Admin. Code §110-130. Library materials that are not aligned with or suitable for the instructional levels and age groups served by that campus may be considered educationally unsuitable.

#### V. Deference to School Board Decisions

Regarding "educational suitability," courts have consistently shown deference to the decisions of school boards regarding library materials, as long as those decisions are based on legitimate pedagogical concerns rather than an intent to suppress ideas. The United States Court of Appeals for the Fifth Circuit, which includes the State of Texas, has reaffirmed that school boards have a "substantial legitimate role...in the determination of school library content" See *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 184 (5th Cir. 1995). The court held that genuine issues of fact existed regarding whether the board's motivation in removing a book on voodoo was based on its inaccuracies rather than suppression of ideas. This suggests courts will defer to school boards if there is evidence removal decisions are based on factual errors or educational unsuitability rather than viewpoint discrimination.

Additionally, in *ACLU v. Miami-Dade County School Board*, the United States Court of Appeals for the Eleventh Circuit stated that "federal courts should not arrogate to themselves power over educational suitability questions" and that such decisions are "within the exclusive province of local school boards." 557 F.3d 1177, 1225 (11th Cir. 2009).

#### IV. Other Factors Texas School Boards Should Consider for Assessing Educational Suitability or Pervasive Vulgarity

- Age Appropriateness - [Texas Family Code §264.001](#) defines an "age-appropriate normalcy activity" as one generally accepted as suitable for a child's age/maturity level. Factors include the child's overall health/safety, maturity level, best interest based on caregiver knowledge, and importance of encouraging social, emotional and developmental growth. Could age-inappropriate content that normalizes drug/alcohol abuse, glorification of self-harm, sadomasochism, violence, or sexually deviant/explicit conduct violate this standard?

- Local prevailing standards - Is the sexual content in the book considered appropriate for minors based on local community standards and the reasonable parent test? The Eleventh Circuit has emphasized that school boards may consider local community standards in assessing the suitability of materials. See *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, at 1177. The court stated that boards can remove books that contain factual inaccuracies or are educationally unsuitable for the students in their district. This supports the authority of Texas school boards to apply local standards in determining what content is appropriate.
- Serious value - Even if a book contains harmful content, does it have serious literary, artistic, political or scientific value for a legitimate portion of reasonable, older adolescents that justifies retaining it? Are reasonable alternatives without harmful content available?
- Extent of vulgarity - Is the vulgarity pervasive or limited to a particular section? Is the vulgarity concentrated or implies endorsement of harmful activity to meet *Pico*? What if the material refers minors to sexually explicit websites or commercial sites for adult toys?
- Parental consent– Does the material promote a gender fluidity ideology or enable the social transition of children that adversely affects or endangers their mental health? Does providing access to harmful, pervasively vulgar or educationally unsuitable material without parental consent violate the fundamental due process rights of parents?
- Texas Educator Code of Ethics– Could the material violate the Code of Ethics and Standard Practices pursuant to [Title 19, Part 7, Chapter 247](#) of the Texas Administrative Code?

## VI. Conclusion

Texas school boards have significant discretion to determine which library materials are educationally suitable for the students they serve. Under *Pico*, HB 900 and the TSLAC standards, books that are pervasively vulgar, harmful to minors, or inappropriate for the instructional level may be removed.

However, boards may not remove books based merely on dislike of the ideas expressed. Removals must be based on objective criteria like age appropriateness, alignment with curriculum standards, and serious educational value, and not the viewpoint or personal background of the author.

To minimize the risk of legal challenges to removal decisions, boards should carefully document their rationale, avoid making ideological statements, and ensure decisions are grounded in the specific needs and maturity levels of their student population. By complying with these constitutional guardrails, Texas school boards can exercise their statutory authority to curate library collections that are educationally suitable for the children they serve while also safeguarding parental rights.

For more information on this topic and other issues that are of importance to the general public, please visit <https://www.citizensdefendingfreedom.com>

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