



## MEMORANDUM

**TO:** The Pennsylvania Senate Education Committee

**FROM:** Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

**DATE:** June 20, 2022

**RE: OPPOSITION TO SB 1277 P.N. 1738 (AUMENT)**

**Bill summary:** [SB 1277](#) (PN 1738) would amend the [Public School Code of 1949](#) to add a new section, Section 1529, entitled “Parental Notification Relating to Instructional Materials and Books Containing Sexually Explicit Content.” This section would require school boards to develop a policy to:

1. Identify specific instructional materials and books within school libraries containing “sexually explicit subjects” and “sexually explicit content” that are used by or made available to students;
2. Provide parental notification of specific sexually explicit content prior to “student exposure”;
3. Permit parents to review instructional materials and/or library books with “sexually explicit content”; and
4. Provide alternative instructional materials at the request of the parent or guardian and/or prevent the student from viewing a library book.

Prior to adopting its policy, the school must hold a public hearing to solicit feedback to confirm that the policy conforms with the requirements of this new section. Policies must be adopted by August 30, 2022.

SB 1277 also includes legislative intent, clarifying that the bill’s provisions do not: “(1) Prohibit a school entity from implementing additional transparency measures for sexually explicit content. (2) Prevent a school entity from determining that sexually explicit content is not appropriate for minors or certain ages of students within the school entity, **even when the content would not violate other laws.** (3) Permit the giving of sexually explicit materials to minors that are prohibited by any other applicable law.”

**On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 1277.**

**SB 1277 is an unworkable proposal that rests entirely on a vague definition of “sexually explicit content.”**

SB 1277 refers to the definition of “sexual conduct” under [§ 5903\(e\)\(3\)](#) in the PA Crimes Code for the purposes of the bill, defined as “*acts of masturbation, homosexuality, sexual intercourse, sexual bestiality or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.*”<sup>1</sup> The bill then uses this criminal definition of “sexual conduct” to inform its definition of “sexually explicit content,” which “shall include the following”:

1. Materials that contain visual or visually implied depictions of sexual conduct or simulations of sexual conduct.
2. Materials that contain explicit written descriptions of sexual conduct.
3. Materials that contain visual depictions of nudity accessible to minors in kindergarten through grade eight.

### Concerns about this definition include:

- **Applicability:** The bill language requires that sexually explicit content “*shall include the following,*” which seems to indicate that all three elements must be present. But there is no “and” (or “or”) in the list of elements. As a result, it is unclear whether, for example, the K-8 requirement under (3) applies to (1) and

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<sup>1</sup> [18 Pa.C.S. § 5903\(e\)\(3\)](#) (relating to obscene and other sexual materials and performances).

(2). Or do (1) and (2) apply, by default, to K-12 because they don't mention age or grades? Or do (1) and (2) ever apply to 9-12?

- **Nudity:** "Nudity" is not defined in the bill, but "nudity" is defined under [§ 5903\(e\)\(2\)](#) to mean the "showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state."
  - If SB 1277 adopts this definition, how would it ever be possible for students to learn about human anatomy or reproduction in a biology class? What about information on menstruation, childbirth, or breastfeeding? Presumably any and all health class materials would automatically be included on the list without regard to whether the materials are intended for kindergarteners or eighth graders.
- **Scope:** There are endless additional questions that the scope of this definition begs.
  - Many works of literature and art, historical records and photographs would fall under SB 1277's definition of "sexually explicit content."<sup>2</sup> Does SB 1277 expect schools to examine, label, and essentially remove every book in their collection for this kind of content?
  - Including "acts of ... homosexuality" in the definition of "sexual conduct" is also problematically vague. What is an "act of homosexuality"? Are two people of the same sex kissing an "act of homosexuality"? What about two people of the same sex getting married? Holding hands? Food shopping? Sleeping next to one another?

**As it pertains to instructional materials, SB 1277 would unnecessarily expand current law, which already gives parents the right to access and review instructional materials and to request children be excused from objectionable instruction.**

Under Title 22 of the PA Code, schools are already required to adopt policies that provide parents access to curricular materials and a process to review those materials. If parents object to instructional materials that conflict with their religious beliefs, they also have the right to **excuse** their children from that instruction:

*School entities shall adopt policies to assure that parents or guardians have the following:*

- (1) *Access to information about the curriculum, including academic standards to be achieved, instructional materials and assessment techniques.*
- (2) *A process for the review of instructional materials.*
- (3) *The right to have their children excused from specific instruction that conflicts with their religious beliefs, upon receipt by the school entity of a written request from the parent or guardians.*<sup>3</sup>

However, SB 1277 goes further than what current law provides. It requires that schools create an inventory of materials containing vaguely defined "sexually explicit subjects" and then notify parents (with no details or clarity about the content of such notifications or how frequently they must be provided). SB 1277 would also permit parents to reject instructional materials for any, or no, reason and require that schools provide "alternative, non-explicit instructional materials and related academic activities to the student" upon request.

The logistical complexities involved in requiring schools to (1) decipher what every individual parent could deem "sexually explicit content" or subject matter; (2) generate a list of instructional materials that meet that vague definition; (3) proactively notify parents without clear instruction as to what, how, or how frequently such a notification is provided; and then (4) provide alternative materials or activities based on any possible objection is untenable. Even if schools are able to work out a process for complying with the first three requirements, what happens when numerous students in one class have parents that request alternative

<sup>2</sup> However, [§ 5903\(i\)](#) **exempts schools and libraries** from its definition of "sexual conduct": "Nothing in this section shall apply to any recognized historical society or museum accorded charitable status by the Federal Government, any county, city, borough, township or town library, any public library, any library of any school, college or university or any archive or library under the supervision and control of the Commonwealth or a political subdivision."

<sup>3</sup> [22 Pa. Code § 4.4 \(d\)\(1\)-\(3\)](#).

materials or activities? What happens if they all object to different materials or different combinations of materials? This law would require schools and teachers to develop micro-curricula to accommodate multiple requests for alternative lessons. **It is tantamount to requiring public schools to function as homeschools.**

**As it pertains to policing library books for “sexually explicit content,” SB 1277 effectively invites schools to go beyond its provisions in order to censor material it considers inappropriate.**

Similar to instructional materials, SB 1277 would require that schools identify and inventory library books with “sexually explicit content,” provide parental notification of specific sexually explicit content prior to “student exposure,” permit parents to review suspect library books, and if the parent finds a book objectionable, the school is required to “prevent the student from viewing the book.” This would effectively close school libraries to students, as this process would need to be completed before the 2022-2023 school year commences.

This provision similarly suffers from vaguely defined terms and actions: who determines the meaning of “sexually explicit content,” how is that arbitrary meaning used to identify library books meeting that definition, and how are schools to handle the lack of specificity regarding notification? For example, is a kiss sexually explicit content? How about books depicting medical conditions? Would the staircase scene from *Gone With the Wind* count? The statute provides no guidance whatsoever about how to apply the standard.

When applied to library books, these definitions suffer from additional deficiencies. For example, what does it mean to notify parents about suspect library books prior to “student exposure”? Is “exposure” walking past a library book on a shelf? Is it the possibility that a student may come across it while browsing or researching? There is no definition of what “student exposure” means and when it would occur. Also, what actions would schools be required to take in order to prevent a student from **viewing** a book? Presumably schools could give parents the ability to ban their own children from entering the school library or schools could wall-off access to libraries and grant access on a case-by-case basis. Perhaps schools could establish some sort of system to deny students the ability to check a book out from the library without specific permission from a parent. Aside from that, who exactly is responsible for preventing certain students from **viewing** specific books? Teachers? Librarians? School police officers?

Although SB 1277 does not go so far as to require objectionable books be removed from school libraries, it certainly invites it. In clarifying its legislative intent, SB 1277 includes an alarming caveat, noting that nothing in the bill should be construed to “prevent a school entity from determining that sexually explicit content is not appropriate for minors or certain ages of students within the school entity, **even when the content would not violate other laws.**” This would open the door, if not encourage, individual school administrators to censor materials they deem “not appropriate,” including school library books.

Such vague and overbroad standards fail to provide the censor with adequate guidance about what is and is not allowed. This would invite cascading censorship problems; for example, librarians, teachers, and anyone with the power to decide which materials are available to students is likely to err on the side of caution—to avoid getting in trouble—and censor books if they aren't sure on which side of the line the material falls.

The U.S. Supreme Court held in [\*Board of Education, Island Trees Union Free School District No. 26 et al v. Pico\*](#) that “the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library” and “the Constitution protects the right to receive information and ideas.”<sup>4</sup> Materials available in a school library—intended as a “place to test or expand upon ideas presented to [a student], in or out of the classroom”—are distinct from curricular materials over which a school board has greater discretion.<sup>5</sup> School boards may not remove books “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

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<sup>4</sup> [\*Board of Education, Island Trees Union Free School District No. 26 et al v. Pico\*](#), 457 U.S. 853, 866 (1982).

<sup>5</sup> *Pico*, 457 U.S. at 868-69.

other matters of opinion.”<sup>6</sup> The Court underscored the unique role of school libraries, and ruled that school boards “may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge”<sup>7</sup> by prescribing a narrow view of “community values” that limit the books available in a school library where the “opportunity at self-education and individual enrichment ...is wholly optional.”<sup>8</sup>

The lynchpin of SB 1277 is an overly broad and vague definition of “sexually explicit content” that will cast a wide net across all manner of instructional materials and library resources. It would impose unreasonable burdens on schools and may result in extreme self-censorship, as schools may alter their instructional materials or library collections in order to avoid issues with this proposed law. And while it doesn’t outright ban or censor educational or reference materials, it certainly includes an invitation for schools to consider such measures.

**For these reasons, we urge you to oppose Senate Bill 1277.**

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<sup>6</sup> *Pico*, 457 U.S. at 872.

<sup>7</sup> *Pico*, 457 U.S. at 866.

<sup>8</sup> *Pico*, 457 U.S. at 869.