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Testimony to the Senate Education Committee
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Thank you for the opportunity to testify today. I am Sharon Ward, Senior Policy Advisor for the Education Law Center, a nonprofit legal services organization whose mission is to ensure access to a quality public education for students who are underserved by our education system, including Black and Latino students, students with disabilities, those in the foster care or juvenile justice system, children experiencing homelessness, LGBTQ students, and students who are at the intersection of these identities.

One of the Education Law Center's primary activities is to support and empower parents to secure educational services based on a parent's determination of what is best for their child. Over the course of a year, we represent hundreds of families whose children have failed to receive critical educational services they need and to which they are legally entitled. ELC is generally successful at securing redress that parents seek for their children. Our primary focus is on students and the parents who fight for them. We are not strangers to parents' rights but rather protectors of those rights.

I am here today to register our opposition to Senate Bill 7 for a variety of reasons, including our assessment that the legislation infringes on and undermines parent's rights instead of upholding them as supporters of the bill have urged.

Briefly, the bill requires school districts to establish policies to permit parental review of curriculum and library books, requires districts to identify materials that have sexually explicit content or subjects (both terms are used), and requires districts to use a standard opt-in form to secure parental consent to access these materials. The bill also explicitly permits school entities to remove books and materials preemptively.

The Education Law Center agrees that reading materials should be reviewed by qualified adults for age-relevance and appropriateness, a process that school districts already follow with the oversight of trained educators and school librarians. We also agree that parents are important partners in education along with school personnel and students themselves.

Over the last two years, we have worked with parents who fiercely oppose school board policies that force the removal of books based on content, policies that are frequently promoted most fervently by individuals with no children and few ties to the school district. This censorship may occur through a formal process by a school board to modify a school district's longstanding book purchase and removal policies, but it also takes the form of soft, or informal, censorship in which school officials remove book titles in circumvention of established board policies and applicable law. ELC has worked with parents on formal policy changes in 15 districts, and in just the past two weeks we have received reports of at least six school districts that appear to have practiced this form of soft censorship.

These efforts are the opposite of parental control, and they undermine the longstanding educational partnership that exists between parents and schools, a partnership that allows access to a wide range of books while enabling parents to make individual decisions for their child. Senate Bill 7 steps into this highly contentious debate, forcing school districts to adopt a policy that many parents oppose.

Senate Bill 7 is a book ban, plain and simple. It will permit school entities to purge book collections based on the most limited view of what is appropriate and will allow a single parent or small group of parents to determine which books are available to all children. This process will not protect parents' rights but infringe on them. The current opt-out provisions established in Pennsylvania code and school district policy are a better approach, responding to individual parents' needs while protecting other parents' choices about what is acceptable for their own children.

We oppose the legislation for several reasons.

1. **The legislation establishes a book ban that violates students' constitutional rights.**

In addressing school district book bans, the General Assembly must address two legal issues: (1) the legal authority to review and remove books and (2) whether that authority is being exercised in a lawful way.

Several school boards have adopted policies to ban books in the past two years. In our experience, this authority has been used to target works that center on the experiences of people of color and those who identify as LGBTQ. These policies purport to limit sexualized content, but are applied primarily to books featuring marginalized populations, while exempting, in practice, "the classics." Such targeted book bans violate the First Amendment. They are also harmful to children, contributing to a hostile learning environment that is an impediment to student learning, the opposite of what school districts are trying to achieve and what parents want.

It's also worth noting that many of the districts banning books are predominantly white districts with few teachers of color banning books by authors of color.

SB 7 does not distinguish between curriculum and library books, which runs counter to both district policy and case law.

School boards' authority to remove books is limited by federal and state law, including the First Amendment. Students have a First Amendment right to read and receive information and school boards cannot target certain viewpoints to be prohibited. As the U.S. Supreme Court has explained, "the special characteristics of the school library" create additional First Amendment protections for students.[1] The Court ruled that books in libraries are different from mandatory school curricula, as libraries are intended as a "place to test or expand upon ideas presented to [a

[1] *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 868 (1982) *("the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students").*

student], in or out of the classroom" and are distinct from materials included in the school's curriculum, over which the board has greater discretion.[2] The court agreed that while school boards have discretion to transmit community values, that discretion is not unfettered, and libraries have a unique role different and separate from mandatory school curriculum.[3] A school board "may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge"[4] by imposing a narrow view of "community values" that limits the books available in a school library where the "opportunity at self-education and individual enrichment … is wholly optional."[5]

Moreover, the First Amendment requires school districts to have "established, regular, and facially unbiased procedures" governing the removal of noncurricular books.[6] Book removals by school districts that rely on irregular procedures without standards or a review process are more likely to violate the First Amendment. For example, courts have found that the removal of noncurricular books by school districts violated the First Amendment when those schools failed to provide a standard or review process regarding book removal,[7] where districts failed to follow their own policy and procedures regarding book removal,[8] or where that policy merely amounted to a disapproval of the ideas contained in certain books.[9]

This higher standard offers additional protections for students. The Supreme Court has held that school boards may not remove books from a school library "simply because they dislike the ideas contained in those books" or in an effort "to prescribe what must be orthodox in politics, nationalism, religion, or other matters of opinion."[10] In practice, this means that school boards may not remove a library book because it does not agree with what is discussed, such as "controversial racial issues." School boards also may not remove a book simply because it depicts gay or lesbian relationships.[11] Further, school boards may not remove or restrict a library book based on an unfounded "concern that the books might promote disobedience and disrespect for authority" or because a book deals with "witchcraft"—a common complaint against the *Harry Potter* series.[12]

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[2] *Id.*, 457 U.S. at 868-69 (citing *Right to Read Defense Committee v. School Committee*, 454 F.Supp. 703, 715 (Mass. 1978)).
[3] *Id.*, 457 U.S. at 869.
[4] *Id.*, 457 U.S. at 866 citing *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).
[5] *Id.*, 457 U.S. at 869.
[6] *Pico*, 457 U.S. at 874.
[7] *See Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 552-53 (N.D. Texas, 2000).
[8] *See Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 876 (D. Kan. 1995) (ordering case to proceed to trial where the school officials' motivations for removing books with LGBTQ themes from school libraries was a genuine issue of fact); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (law is unconstitutional under the Equal Protection Clause if race, sex or gender is a motivating factor in its enactment).
[9] *Case,* 908 F. Supp.at 875-76.
[10] *Pico*, 457 U.S. at 872 citing *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).
[11] *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864 (D. Kan. 1995).
[12] *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 1002 (W.D. Ark. 2003).

Additionally, board policies, including book policies, are unlawful if they are deemed impermissibly vague or arbitrary and capricious.[13] Vague language and overbroad prohibitions may be challenged as having a chilling effect on book choices and speech protected by the First Amendment.

Importantly, the reliance on vague, subjective criteria and failure to require consideration of a book in its entirety, including whether it has received critical acclaim, may be evidence that the policy is not tailored to be objective and to identify "educational suitability" but instead serves to impermissibly enforce a particular viewpoint.[14]

Courts also consider the context of proposed policies and the motivation of policymakers to determine if animus toward a particular population is a motivating factor.[15] And in a recent investigation by the U.S. Department of Education's Office for Civil Rights (OCR), the agency found that Forsyth County (Ga.) Schools' book removal policy created a hostile environment for LGBTQ students and students of color, with an underlying motivation of targeting books due to gender identity, sexual orientation, or race. [16]

Senate Bill 7 requires districts to take actions that courts have already found violate the First Amendment. It encourages removal of books without consideration of the whole book, regardless of merit, and potentially for a word or phrase that meets the definition of sexually explicit. The definition is vague and overbroad and leaves room for interpretation that violates the constitution. Is one word sufficient or phrase sufficient to condemn a book to the garbage pail? Should every district remove Romeo and Juliet and the Bible from its shelves? Will they? Unlikely. It is more likely, as we have seen in school districts in which we have worked, that the standards will be used to purge books that depict LGBTQ characters and related themes or feature people of color and related themes.

Pennsylvania school boards do have broader discretion over curricular decisions under state law, with responsibility to adopt a "course of study" that is adapted to the "age, development, and needs of the pupils" in schools. Together, school boards and superintendents have the authority to select the textbooks and other curricular materials used by teachers and students in public

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[13] *See e.g.*, *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp.2d 698, 704 (W.D. Pa. 2003) (holding a policy that prohibited "abuse, offense, and harassment" was overly vague because the terms were not defined in any way); *Bender v. Exeter Twp. Sch. Dist.,* 63 Pa. D. & C.4th 414, 425 (Berks Cty. Ct. C.P. July 18, 2003), *aff'd mem.,* 839 A.2d 486 (Pa. Commw. Ct. 2003) (holding that a transfer to an alternative school for minor misbehavior was arbitrary and capricious).

[14] *Pico*, 457 U.S. at 874-75.

[15] *See e.g.*, *Case v. Unified Sch. Dist. No. 233*, 895 F.Supp.1463, 1470 (D. Kan. 1995) (ordering case to proceed to trial where the school officials' motivations for removing books with LGBTQ themes from school libraries was a genuine issue of fact); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (law is unconstitutional under the Equal Protection Clause if race, sex or gender is a motivating factor in its enactment).

[16] Off. of Civil Rts., U.S Dep. Of Ed., Letter to Forsyth County Schools Re: OCR Complaint No. 04-22-1281 (2023), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04221281-a.pdf. (OCR investigated Forsyth County Schools in Georgia for the school district's policy removing select books that depicted sexually explicit content. Through comments made at school board meetings, OCR found that the policy had an underlying motivation of targeting books due to gender identity, sexual orientation, or racial orientation, and therefore created a hostile environment for students of certain racial and gender identities.)

schools. Federal courts have largely affirmed the discretion of school boards under the First Amendment to make these choices.[17]

Under state law in Pennsylvania, any school district's decision to adopt a new textbook or course of study requires an affirmative vote by a majority of all members of the school board. This vote must be recorded, showing how each member voted.[18] Pennsylvania law also requires a recommendation from the superintendent before a change in textbooks is made. A change in textbooks cannot be made without the superintendent's approval unless two-thirds or more of the school board votes for it.[19]

2. Parents' rights to make decisions regarding their children's education are already protected in federal and state law.

Senate Bill 7 is unnecessary as parents have significant rights to make decisions for their children. US Supreme Court cases have applied the Due Process Clause of the 14th Amendment to protect parents' rights to bring up their children, including the right to select a private or parochial school or to homeschool their children.

The Family Educational Rights and Privacy Act (FERPA), enacted in 1974, ensures parents' rights to inspect their child's education records at school.[20] FERPA broadly defines education records to include records maintained by an educational institution directly related to a student, in any format, that allows the student to be identified from the information contained in it. Guidance issued by the Family Policy Compliance Office of the U.S. Department of Education concludes that library circulation records and similar records maintained by a school or university library are "educational records" under FERPA.

Pennsylvania law (22 PA Code 4.4) provides additional protections. It requires boards of school directors to provide parents and guardians with information about curriculum, instructional materials, and assessment techniques, to have a process for parents to review instructional materials, and to have their children excused from specific instruction that conflicts with their religious beliefs, upon written request. School districts have opt-out forms for parents to use for this purpose. Parents also have the right to opt their children out of courses about sexual health and STI prevention.

The opt-out process is an approach that supports parents' rights while limiting the impact of individual parent preferences on other students and families. There is little evidence that this

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[17] *Virgil v. Sch. Bd. of Columbia Cnty.*, 862 F.2d 1517 (11th Cir. 1989) (finding school board's actions of removing certain materials from high school curriculum while allowing the same books to remain in school library was reasonably related to Boards legitimate concern regarding the appropriateness of materials for the age of students). *See also Pratt v. Independent School District,* 670 F.2d 771 (8th Cir. 1982) (ordering reinstatement to high school curriculum of films which had been removed by school board because of alleged violence and effect on students' religious and family values).

[17] *Pico*, 457 U.S. 853, 871 (1982) ("pervasively vulgar" and "educational unsuitability"); *ACLU v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, (11th Cir. 2009) ("factual inaccuracies").

[18] 24 P.S § 5-508.

[19] 24 P.S § 8-803.

[20] 20 U.S.C. § 1232g,

process is not effective and less evidence that parents are availing themselves of this statutory protection. What we have seen in recent school board debates is that vocal parents are instead seeking to impose their viewpoints on other families and children rather than using existing processes to make choices about their own children.

The parent opt-out may not be the most convenient for parents, but convenience is not a valid reason to trample the rights of other parents or infringe on students' First Amendment Rights.

3. **Book banning is anathema to a free society.**

Students have First Amendment rights for a reason – throughout recent history groups have tried to limit students' access to information and ideas to voluntary materials – library books – and those efforts have largely been rebuffed by the courts. Young people seek out books to learn about things that interest them and to help them interpret and understand the people, ideas, history, and relationships that they encounter. As adults, we have to give them access to the tools they need to grow into responsible adults. Library books are among those tools.

We are not arguing that adults should not make judgments about which books are age-relevant for students; they already do. We are arguing that those decisions should be made by trained professionals, based on constitutional standards, in partnership with parents and the community. That is not this bill.

Over the past two years, we have seen school districts rush through book bans, curriculum changes, and other policy revisions outside of the normal process, using the boards' emergency powers to accelerate votes and limit debate. The notion that book restrictions serve to protect parents' interests belies the evidence we have seen in districts from Pennridge to Penncrest, where parents have fought vigorously and largely unsuccessfully to protect their children's freedom to read. Their perspectives are valid and their freedom to decide what is best for their own children should not be abridged.

The Education Law Center has witnessed first-hand the devastating consequences of restrictive book bans that are motivated by political agendas, anti-LGBTQ discrimination, and anti-Black racism. These actions harm the ability of schoolchildren to learn, create hostile learning environments, and undermine our school communities. This bill will do far more harm than good.