

# 2023 MASA/MOSPRA Spring Conference

## Litigating the Culture Wars

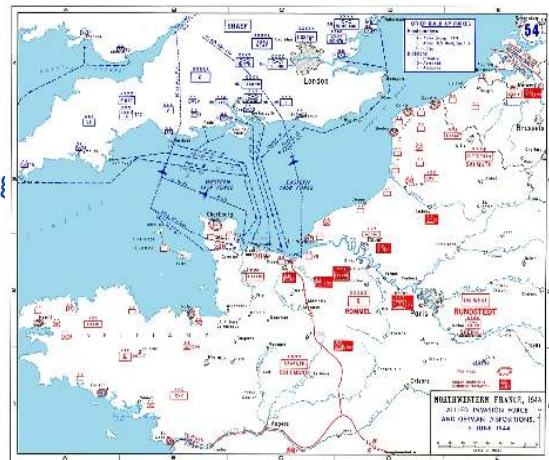
Drew Marriott



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## Battle Map

- **Conducting Board Meetings**
  - Litigation
  - Legislation and going forward
- **Challenged Books and Curriculum**
  - Litigation on challenged books and challenge materials.
  - Legislation and going forward
- **Transgender Student issues**
  - Student accommodation litigation
  - Staff free speech litigation
  - Legislation and going forward



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## Litigating Board Meetings



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### View-point Discrimination: Risk

- Recent litigation and a District Court decision in Missouri.
  - Litigation filed by patrons of the District.
  - Represented by a nationwide Free Speech organization
- With any created forum comes some level of risk--a real risk is viewpoint discrimination.
- Restricting speech of speakers must be done in a uniform manner.



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## Your Policies

- A function of your Board Policies.
- Policy can place limitations on length of time, number of speakers, limiting content to agenda items, and disallowing off-topic or inappropriate speech or actions.
- Changing public comment policy is largely a political risk.
- SB 681 requirements for a community engagement policy as of July 1, 2023.



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## Policy Language

- In considering the language of your Public Participation policies, there are benefits to procedural requirements:
  - Limitations on the amount of time a speaker can speak
  - Overall limitation on the length of public comment
  - Provisions for submitting requests for public comment in advance
  - Possible limitations to agenda items



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## Challenged Materials and Books



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## First Amendment and Book Challenges

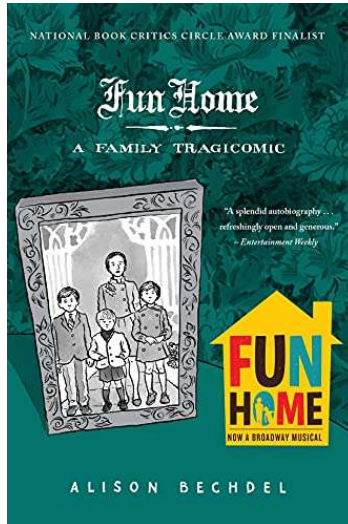
- Students have some first amendment rights to access materials, but it is not unfettered.
- Some cases have found that the First Amendment can limit the power of local school boards to remove library books, but give some deference to school boards.
- Recent Missouri Cases:
  - C.K.-W v. Wentzville R-IV School District—Plaintiff’s Preliminary Injunction denied and appeal and case dismissed
  - L.H. et al., v. Independence School District—Plaintiff’s Preliminary Injunction denied.
  - Missouri Association of School Librarians and Missouri Library Association v. Jean Peters Baker



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## C.K.-W v. Wentzville R-IV School District



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## C.K.-W v. Wentzville R-IV School District

- Several books were challenged by parents in the District.
- The challenged materials policy requires automatic removal of the book pending review by a review committee and then a decision by the Board.
- After several reviews, one book, Fun Home, was removed from circulation in the school libraries.
- The ACLU, on behalf of the NAACP and parents, filed suit and filed for a preliminary injunction.
- Basis for arguments are from the US Supreme Court Plurality Decision in Board of Education v. Pico



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## C.K.-W v. Wentzville R-IV School District

- The lawsuit sought:
  - Sought class action for all students in Wentzville schools
  - Language focused on the “banning” of books
  - Allege removal of “banned” books part of a campaign to suppress certain viewpoints
  - Counts alleged:
    - Violation of First Amendment (preventing access to information)
    - Requested injunctive relief (preliminary and permanent injunction)
    - Attorneys’ fees
    - Declaratory Judgment



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## C.K.-W v. Wentzville R-IV School District

- Trial Court Denied the ACLU’s Motion for a Preliminary Injunction:

“The District’s policy does not ban the District’s students from reading the books at issue here. Nor does it ban students from acquiring the books or lending the books to others. Students may borrow the books from the public library or from a friend or neighbor. They likewise are free to purchase the books. The policy does not even ban students from bringing the books at issue to the District’s schools. Nor does it ban students from discussing the books at school during their free time or encouraging others to read them.”

“A school district does not “ban” a book when, “through its authorized school board,” it “decides not to continue possessing [a] book on its own library shelves.”



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## C.K.-W v. Wentzville R-IV School District

“A policy that requires the temporary removal of any material anytime the District receives a complaint (which people of any race, religion, gender, sexual orientation, and political or world view may file) necessarily would not impute a motive on the District. When the District temporarily removes all complained-of books, and does so evenhandedly, it necessarily cannot be removing them with the intent to deny students access to ideas with which the District disagrees.”



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## C.K.-W v. Wentzville R-IV School District

“Plainly, that is not what is happening here. This is the case of the government (in the form of a school district) temporarily removing access to particular materials to determine whether they are appropriate for children. In doing this, it is not banning protected speech. And no one argues it removed these books because it feared they would provoke a violent response. This is not a case of a heckler’s veto.”



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## C.K.-W v. Wentzville R-IV School District

“As previously discussed, no one disputes that the District can remove books from its libraries for numerous reasons. And, therefore, policies providing for when and why books will be removed are necessarily allowable. The specifics of such a policy—especially where, like here, the policy is facially neutral—should not easily be second-guessed by a federal court.”



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## L.H. et al., v. Independence School District

- After denial of their motion for a preliminary injunction in the Wentzville case, the ACLU appealed that ruling to the 8th Circuit Court of Appeals.
- They subsequently filed suit against the Independence School District on behalf of students that “intend to use the library to access its materials and fears that the materials they wish to have access to will be automatically removed upon any challenge, without notice or an opportunity to appeal.”
- Though Independence had one book challenged and that book was restricted to allowing access only at middle schools and high schools, the ACLU did not challenge the restriction of that book.



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## L.H. et al., v. Independence School District

- The ACLU only challenged the review policy that allows for automatic removal pending committee review.
- They seek:
  - Preliminary Injunction and Permanent Injunction
  - First Amendment right to access information
  - Due Process (Section 1983)
  - Declaratory Judgment
  - Attorneys' Fees



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## L.H. et al., v. Independence School District

- The District opposed the motion for a preliminary injunction, filed a motion to dismiss, and sought to stay the case pending the 8th Circuit's ruling in the Wentzville case.
- On January 13th, the Trial Court entered an order staying the case pending the 8th Circuit appeal on the other case.
- That same night, the ACLU moved to dismiss their appeal on the Wentzville case.
- Once remanded to the trial court, the ACLU dismissed the Wentzville case.



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## L.H. et al., v. Independence School District

- The trial court denied the ACLU's request for a preliminary injunction, and relied on much of the rationale from the Wentzville trial court.



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## L.H. et al., v. Independence School District

Before the Court is Plaintiffs' motion for preliminary injunction. (Doc. 4.) The motion is fully briefed. (Docs. 8, 16, 20.) As explained more fully below, because Plaintiffs fail to show a fair chance of prevailing on the merits of their claims and fail to show a threat of irreparable harm, Plaintiffs' motion for preliminary injunction is **DENIED**.



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## ***Missouri Association of School Librarians and Missouri Library Association v. Jean Peters Baker***

- Associations are represented by the ACLU.
- Lawsuit is filed against Jean Peters Baker, the Jackson County Prosecutor.
- Seeks injunctive and declaratory relief, arguing that Section 573.550 (SB 775) imposes criminal penalties on librarians and others if they provided certain “explicit sexual” materials.
- Seeks to invalidate the statute.



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## **Criteria for Restriction**

- Check your procedures for addressing challenges.
- In both of these cases, the policies required automatic removal pending review by a committee and then a decision by the Board.
- The automatic removal language applied to any materials that were challenged. Both were upheld by the trial courts.
- Board decision is final.
- Procedures related to procurement and curating practices are helpful.
- If challenged, follow your procedures for the review, decision, and appeal process.



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## Legislation and future issues

### Capitol Perspectives: Performance audits

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DECEMBER 19, 2022 5:50 AM

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📍 Scott Fitzpatrick was elected Missouri State Auditor in November 2022 (Rudi Kellier/Missouri Independent).

The election of Republican Scott Fitzpatrick as Missouri State Auditor on a campaign to investigate public school curricula reminded me of prior state auditors who expanded the role.

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## Going forward

- Fitzpatrick said that auditing federal COVID-19 relief funds and how local school districts spend money will be his top priorities during the coming four years.
- Wants to dig into whether districts were using “critical race theory” as the basis of curriculum about racial history and current race relations. He said any audits of the curriculum would be guided by legislation expected this year.



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## Legislation

- Legislation regarding:
  - Critical Race Theory
  - Parents Bill of Rights
  - Transgender students and discussions of gender



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## Transgender Students and Gender Identity

- Working through gender identification matters on a student-by-student basis in partnership with parents/legal guardians.
  - Law is not settled, but we have some insight, but that keeps changing:
    - RMA v. Blue Springs
    - Gavin Grimm case
    - But, See Adams v. St. Johns County School Board
- The issue in many of these cases focused on policies that did not communicate with parents.
- What we know: In Missouri, a student can bring a MHRA claim for failure to accommodate their gender identity.
- Questions arise:
  - Pronouns
  - Name Changes/Nicknames



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### Teacher gets \$95,000 to settle lawsuit over refusal to use student's preferred name

By Rebekah Riess and Alaa Elassar, CNN  
Published 4:45 PM EDT, Thu September 1, 2022



Mark Reinsteiv/Shutterstock

The teacher received a three-day suspension with pay for violations of 11 district policies.

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## Staff Free Speech Issues

### Teacher Who Wouldn't Use Transgender Students' Preferred Names Loses Claims

By Christine M. Burke  
November 2, 2021

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# Legislation

## Missouri Democrats say House dress code debate a distraction

"It was a lot of lack of decorum in this room in my two years here and not once has that lack of decorum stemmed from someone's blouse or lack thereof," said one Democrat.



Members of the Missouri House of Representatives recite the Pledge of Allegiance as they begin their annual legislative session, Jan. 5, 2022, in Jefferson City, Mo. (David A. Lopez/AP Photo)

By ASSOCIATED PRESS  
01/15/2022 04:53 PM EST



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