

## **Parents' Access to Children's Library Records**

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May 1, 2002

Do parents have a legal right to review their children's library records? In my opinion, children should be entitled to a measure of independence, exploring ideas, forming opinions, and keeping their research confidential, even from their parents. But parents have a right to direct the upbringing of their children. Reviewing the current legal landscape, I believe that if children's interests came into conflict with their parents' the outcome would depend on the age of the children.

### **New Jersey Library Confidentiality Act**

The New Jersey Confidentiality of Library Records Law provides that:

Library records which contain the names or other personally identifying details regarding the users of libraries are confidential and shall not be disclosed except in the following circumstances:

- a. The records are necessary for the proper operation of the library,
- b. Disclosure is requested by the user, or
- c. Disclosure is required pursuant to a subpoena issued by a court or court order.

N.J.S.A. 18A:73-43.1.

On its face, the statute provides for the confidentiality of children's records. It makes no distinction between children and adults in terms of confidentiality. It makes no exceptions for requests from parents. One could argue that the statute prohibits the release of library records to a parent without the consent of the child, unless the parent gets a court order.

There is another New Jersey statute, however, that conflicts with the library confidentiality law. N.J.S.A. 9:2-4.2 provides:

This memorandum sets forth my personal views and is not a legal opinion letter. Accordingly, this memorandum necessarily cannot serve as the basis for any public library's legal judgments. The law, particularly as it relates to Internet use, is changing rapidly, as new legislation is adopted and new court challenges are filed. Libraries seeking legal advice should retain counsel for analyses of their own particular situations and current law.

### **Parental access to unemancipated child's records**

- a. Every parent, to the extent permitted by federal and State laws concerning privacy, except as prohibited by federal and State law, shall have access to records and information pertaining to his or her unemancipated child, including, but not limited to, medical, dental, insurance, child care and educational records, whether or not the child resides with the parent, unless that access is found by the court to be not in the best interest of the child or the access is found by the court to be sought for the purpose of causing detriment to the other parent.
- b. The place of residence of either parent shall not appear on any records or information released pursuant to the provisions of this article.

Does this trump the confidentiality statute? It suggests that libraries should disclose children's library records to their parents, making sure only that the parents' home addresses are deleted from the record. But it also specifically says "except as prohibited by federal and State law." Accordingly, one could argue that the library confidentiality statute should prevail. Nevertheless, the New Jersey disclosure statute reflects the state's general policy that parents are entitled to information about their children.

### **American Library Association Policy**

The ALA's "Library Bill of Rights" states that "a person's right to use a library should not be denied or abridged because of origin, age, background or views." This suggests that the promise of confidentiality that attaches to adult records should attach to children's records as well. This policy reflects the principle that children have a First Amendment right to obtain information at a public library. "Minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well defined circumstances may government bar public dissemination of protected materials to them." Erznoznik v. City of Jacksonville, 422 U.S. 211, 212-213 (1975).

However, the ALA's interpretation of its bill of rights also states that "parents and legal guardians have the right and responsibility to restrict their children's - and only their own children's - access to any electronic resource." This suggests that parents may have a right to review records of their own children's computer use. (Libraries may elect not to retain records of the websites their patrons visit.)

Similarly, the NJLA acknowledges that "some library users may wish to shield themselves and their own children from unintentional exposure to text and images that they deem offensive," and that "regulation of access by minors is the responsibility of their parents." Again, this suggests that parents are entitled to a measure of control over their children's activities in the library.

### **Arguments in Favor of Parental Access**

Generally the courts are very solicitous of parents' rights to direct the upbringing of their children. See, e.g., Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parents' right to direct the upbringing and education of children); Meyer v. Nebraska, 262 U.S. 390 (1923) (parents' right to procure education for children as a protected liberty interest under the 14th amendment).

There is a strong government interest in supporting parents, especially when it comes to the question of exposure to disturbing materials on the Internet, radio or other media. The First Amendment would permit restrictions on offensive language and materials that are psychologically or intellectually inappropriate for children. FCC v. Pacifica, 438 U.S. 726, 749 (1978); Ginsberg, 390 U.S. at 639. "There is a compelling interest in protecting the physical and psychological well being of minors. This interest extends to shielding minors from the influence

of literature that is not obscene by adult standards.” Sable v. FCC, 492 U.S. at 26. “It is evident beyond the need for elaboration that a state’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’” Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

Only in rare cases are children permitted to withhold information from their parents, but there are examples. If an unemancipated minor seeks medical care for alcohol or drug abuse, the health care provider may not disclose that information to the parents without the minor patient’s consent. See N.J.S.A. 9:17A-4 and 42 C.F.R. §2.14. A minor who is pregnant or married is deemed to have the legal capacity of an adult, and does not need her parent’s consent in order to authorize medical care. See N.J.S.A. 9:17A-1. Many legal privileges, such as lawyer-client communications (but not doctor-patient), attach at any age.

I conclude that if a dispute between a parent and a library were to escalate into litigation, the parent could win access to the child’s records, depending on the age of the child and the nature of the records.

### **Different Children, Different Library Records**

Seven-year-olds are not the same as seventeen-year-olds. The pictures in a library book are not the same as pictures on the Internet. If a parent’s right to direct a child’s upbringing came into conflict with the child’s First Amendment rights to obtain information at the library, see Kreimer v. Morristown, 958 F.2d 1242, 1251 (3d Cir. 1992), the outcome would depend primarily on the age of the child.

The right to acquire information is clearly connected to the fundamental rights of political speech and free association in democratic society. Brown v. Bd. of Education, 347 U.S. 483, 493

(1954). As such, it is essential for teenagers. “In our system, students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate.... Just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.” Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 868 (1982).<sup>1</sup>

The right to receive information must therefore extend to the Internet as well as to books, television, and all the other media available in the library. Indeed, the nature of the Internet makes it, every bit as much as other media, a “necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press and political freedom.” Id. at 867.<sup>2</sup> “That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 637 (1943) (flag salute).

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<sup>1</sup> In Pico, the United States Supreme Court considered the problems that arose when a local school board removed several books from a high school library. The Court split sharply on the issue of keeping the books in the school library, but agreed unanimously that the students had a right to read the offensive books at the local public library. For the plurality, Justice Brennan said “the student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom.” Id. at 869. In dissent, Justice Rehnquist stated that local officials had authority to remove the books, but emphasized that the students were free to read books at the public library even if those books had been disapproved by the school board and removed from the school library. “The removed books are readily available to students and nonstudents alike at the corner bookstore or the *public library*.” Id. at 913 (Rehnquist, J. dissenting) (emphasis added). Though he never went so far as to acknowledge a right to receive information, Justice Rehnquist treated the public library as a much broader forum for children to exercise their First Amendment rights. “Indeed, following the removal from the school library of the books at issue in this case, the local *public library* put all nine books on display for public inspection. Their contents were fully accessible to any inquisitive student.” Id. at 913 (Rehnquist, J. dissenting) (emphasis added).

Unlike schools, libraries provide the entire community with a broad array of information. It is well established that high school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506 (1969). Their rights appear to be even stronger at the public library.

Other states have recognized that older minors have a First Amendment right to access information that has serious content, even if that information would be inappropriate for younger children. The Virginia Supreme Court, for example, held that if a work is “found to have a serious literary, artistic, political or scientific value for a legitimate minority of older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole.”

Commonwealth v. American Booksellers Ass’n, 372 S.E.2d 618, 624 (Va. 1988), cert. denied 494 U.S. 1056 (1990). See also American Booksellers Ass’n v. Virginia, 882 F.2d 125, 127 (4th Cir. 1989).

The federal court in Georgia went even farther, holding that a “harmful to minors” restriction could not constitutionally be applied to material in which “any reasonable minor, including a 17-year-old, would find serious value.” American Booksellers v. Webb, 919 F.2d 1493, 1504-05 & n.20 (11th Cir. 1990), cert. denied 500 U.S. 942 (1991). The federal court in New Mexico similarly found that older minors have First Amendment rights and struck a state law that would have restricted their access to the Internet. ACLU v. Johnson, 4 F.Supp.2d 1029, 1031 (D.N.M. 1998), aff’d by the 10th Circuit, No. 98-2199, November 2, 1999.

In New Jersey, as in these other states, what is obscene for a minor may not necessarily be obscene by adult standards, N.J.S.A. 2C:34-3. But it is clear that, as a governmental entity, the public library must be mindful of children’s First Amendment rights, and must guard against restrictions that sweep too broadly. For example, the Supreme Court has held that the state cannot simply ban minors from exposure to a whole category of expression, such as nudity, when only a subset of that speech can plausibly be deemed “obscene” for them. Erznoznik at 212-214. See also Interstate Circuit v. Dallas, 390 U.S. 676 (1968) (striking ordinance as vague which

prohibited showing of films “not suitable for young persons”).

When push comes to shove, parents are entitled to information about their children. But parents have no right to ask their public libraries to act as surrogate parents, and libraries have no obligation to assume parental responsibilities for supervising children’s reading habits.

### **Parents Cannot Ask Libraries to Police Their Children**

Libraries are not obliged to monitor the reading habits of children, and should resist pressure from parents to police them. The library does have an obligation to weigh the competing considerations, including the risks that some parents might fail to supervise their children, and that some children might abuse the trust placed in them by their parents. Library policies will be upheld so long as they are rationally related to the library’s legitimate government interests. Martinez v. California, 444 U.S. 277, 282-283 (1980); County of Sacramento v. Lewis, 523 U.S. 833 (1998). These interests must be tied to the library’s mission and purpose.

The right to rear one’s children does not give parents a right to dictate Internet policy at the library, Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 2 Fed. Supp.2d 783, 24 Fed. Supp.2d 552 (E.D. Va. 1998). In Kathleen R. v. City of Livermore, 87 Cal. App. 4th 684, 104 Cal. Rptr. 2d 772 (2001), for example, a parent sued the local library after her son downloaded some sexually explicit pictures from the Internet using the library’s computers. The Livermore library had adopted a policy that it would not supervise or monitor the Internet use of any of its patrons, even minors; parents would have to be responsible for their children’s Internet use. The lawsuit claimed that the library’s decision to provide unfiltered access to the Internet violated the United States Constitution. It also sought an injunction that would prohibit

the library from maintaining any computer system that would (a) allow minors to access sexual material or (b) permit anyone else to look at obscene material. The court held that the library was immune from suit under federal law, 47 U.S.C. §230(c)(1), and threw out the case.

The library has no constitutional obligation to protect children from whatever harm might befall them as a consequence of using the Internet, DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195 (1989), and probably enjoys immunity from every other kind of civil or criminal action a parent may assert. 47 U.S.C. §230(c)(1).

But there is no guarantee against lawsuits. “Libraries are not in the business of purveying or exhibiting pornographic materials. They are, however, frequent targets of private citizens concerned, sometimes in an ignorant and narrow-minded way, with the exposure of their children to immoral influences. Mindless censorship, flavored with hysteria, of textbooks and of reading lists, of school libraries and of public libraries, is an old story ... but one with plenty of contemporary vitality.” Kucharek v. Hanaway, 902 F.2d 513, 520 (7th Cir. 1990), cert. denied, 498 U.S. 1041 (1991).

## **Conclusion**

If a library wishes to honor the confidentiality of its minor patrons, it should adopt a formal policy that children’s library records are confidential, and ask parents to sign a statement when their children get library cards indicating that the parents understand the policy.