

RE: Complying with HB374

A few weeks ago, as parents in Alpine School District, we identified 35 materials that were all available within the Alpine School District. Some at junior high schools and all contained extremely graphic content that clearly violates HB374. I would appreciate your help in drafting a policy that bolsters efforts to, as the AG letter stipulates, “immediately” remove pornography from our schools. We can work together through a committee process to fully document the violations after we protect our children first.

In our meeting today, it was portrayed that the AG was walking back their hardline stance regarding the bright line rule. The [AG letter dated June 1](#), makes clear that the LEA’s must “immediately remove books from school libraries that are categorically defined as pornography under state statute. This will help protect the LEA’s from potential lawsuits brought by parents or groups alleging the school failed to comply with state laws.” After removing material that clearly violates state law, the AG states “the second mitigation action comes into play……any legal challenge to that removal will be analyzed under both Utah Statute (including HB374) and federal law.” LEA’s can mitigate risk by engaging in an analysis in good faith to further increase the likelihood of over coming a challenge. The AG letter goes on to state, “nothing in the legal analysis contained in the May 4 Memo or the Official Memo should be read to undermine the legislative goals or the laws which aim to initiate and bring about the proactive removal of obscenity from school libraries.” A model policy should be created that strictly complies with HB374.

HB374 relies on various parts of Utah code, but section 1227 is the section that clearly defines the “bright line rule”: items that can be clearly identified as pornography.

Utah Code Ann. 76-10-1227 (important parts included, does not include the entire section of code)

For purposes of this section and Section 76-10-1228:

"Description or depiction of illicit sex or sexual immorality" means:

human genitals in a state of sexual stimulation or arousal;
acts of human masturbation, sexual intercourse, or sodomy;
fondling or other erotic touching of human genitals or pubic region; or
fondling or other erotic touching of the human buttock or female breast.

(2)

(a) Subject to Subsection (2)(c) this section and Section 76-10-1228 do not apply to any material which, when taken as a whole, has serious value for minors.

(b) As used in Subsection (2)(a), “serious value” means having serious literary, artistic, political, or scientific value for minors, taking into consideration the ages of all minors who could be exposed to the material.

(c) A description or depiction of illicit sex or sexual immorality as defined in Subsection (1)(a)(i),(ii), or (iii) has not serious value for minors.

The AG letter continues, “Section 1227(2)(c) can be read as a legislative directive that no description of illicit sex in subsections (i-iii) could have serious literary, artistic, political, or scientific value. Under that interpretation, if a book contains any of the material listed in subsections, (i), (ii), (iii), HB374 requires the book to be removed from a school library.....a decisionmaker that removes library books based on these defined directly complies with state statute. Other materials under category (iv), as per the plain language of the statute, can be assessed under a “taken as a whole analysis” to further comply with state statute.” Clearly there is a difference between material that should be removed immediately and material that can be “taken as a whole”. Policy 6161 of Alpine School District has misinterpreted this assessment by the AG to mean that every material must be reviewed as a whole, when in fact only one category in Section 1227 has been addressed as such.

The AG letter states, “Any decision or attempt to resist removal of offending material under Section 1227 based on “serious value” or “taken as a whole” is fraught with its own risks and potential legal challenge by parents who believe the decision is too permissive and contrary to state statute..... the text says ‘serious’ value, and ‘serious’ should be taken seriously. Serious does not mean any value.” While the 35 materials that have been identified may have some value, they do not, according to 1227(2)(c) have any serious value for minors because they all have clear violations of 1227(1)(a)(i-iii). HB374 requires that any material that have any content listed in 1227(1)(a)(i-iii) be removed.

“Of critical note, this risk of lawsuits by parents only increases for libraries in elementary or middle schools vs high schools, see Utah Code 76-10-1227(2)(b)...taking into consideration the ages of all minors who could be exposed to the material.” 1227(2)(b) only comes into play if the materials do not contain content detailed in 1227(1)(a)(i-iii). Even so, if the school is distributing sensitive materials, per 1227(2)(b) ALL MINORS that COULD be exposed need to be taken into consideration. This includes other minors at the school and even includes other minors that may be at the home of the student, since those minors could be exposed as well.

In his conclusion, the AG states “school library books that meet any of the statutory definitions are prohibited from school libraries.....strict application of the categorical exclusions in 1227(1)(i),(ii), and (iii), is the way to directly comply with HB 374. LEA’s may also analyze the materials as a whole.....while these are important considerations, nothing should prevent the Board or LEA’s from proactively complying with state law in removing pornographic books from library shelves. Any decision to retain books in libraries that meet the definition of pornography is contrary to state statute and significantly increases the likelihood of a lawsuit against LEA’s for non-compliance.”

In reading through the current policy, here are some examples where the policy does not match with the current Utah code as explained above (this is not an exhaustive list, rather this list points to some shortcomings in the current policy).

Policy 6161 Issues

Section 6.3

Requests for review of instructional materials are limited as follows:

6.3.1 a student currently enrolled in and attending a District school

6.3.2 a parent or guardian of a student currently enrolled in and attending a District school; or

6.3.3 a district employee

Being made aware of clear violations of 1227(1)(a)(i-iii) helps the district and the schools to be compliant with HB374, regardless of who notified the school. While I support this policy for other book challenges that don't clearly violate the bright line rule, to reject a notification of pornography at a school library because the notification didn't come from an approved source is problematic.

Section 6.4.1 - review committee is limited to one request at a time to review instructional or library materials

In essence, the current policy states that schools can and should, knowingly, keep pornography that has been brought to their attention because they can only review one material at a time. This is fraught with legal implications as the AG directive has been to remove pornography immediately. We have parents bringing this information to the district's attention and after they are made aware of the material, they are busy creating committees or referring these parents to each individual school to mount a challenge at every school for every book. This is clearly not the intent of the law or the AG letter.

Section 6.5.1 - Any adult who wishes to file a request for review must first read or review the instructional material as a whole before filing the request.

This is in direct violation of HB374. Meeting ANY of the statutory definitions in 1227(1)(a)(i-iii) is grounds for immediate removal. The work, as a whole, does not need to be taken into account. While a review of the material, as a whole, may help with potential future lawsuits, the AG has directed the material be removed first, then the committees can do their review and create their reports.

Section 7.4.2 An item under review may not be removed from the library while the review process is pending, but shall be designated as having restricted access requiring a written parent or guardian permission request to the school librarian.

This section clearly states that even if notified of pornographic material, the pornography may not be removed from the library and is not removed as the AG directs, but rather is kept at the school. Keeping materials in the library that are clearly defined as pornographic is against HB374. The first action that should be taken is removal, per the AG letter. Keeping the material in the schools doesn't limit the material from other students at the school. Per 1227(1)(b), all the minors who could be exposed need to be taken into account. Knowingly distributing pornographic material to a minor, even with parental permission, is distribution of pornography. Also, even with parental permission, the school cannot be certain the materials will be limited to the student to which they were given. The school in that instance is taking responsibility for the

distribution of pornography to every person that that student may expose to the material. Also, the school district would need to be aware of the ages of all the minors that could potentially be exposed. This includes children that aren't even in attendance at the school.

Section 7.5.1

In conducting a requested review, the sole purpose of the school library materials review committee shall be to determine whether the item contains pornographic or indecent material as defined in Policy 6161.

Pornographic material is clearly defined in 1227(1)(a)(i-iii). After the school or District is made aware of the pornographic material, every effort should be made to immediately remove that material from the library. Then, an analysis can be done by the committee. Per the AG letter, that is the direction given to be compliant with HB374. If we had a pornographic magazine in the school, we wouldn't need to form a committee to determine if the magazine was pornographic. The same policy applies here. The first priority is to protect the children and the second priority is to protect the school. It seems the priorities have been flip flopped and the policy is directed more at protecting the school from a potential lawsuit (which the AG's office would defend if it was in strict compliance with HB374), rather than protecting the children.

Section 7.6.3 (various locations)

In conducting a requested review, the sole purpose of the District library materials review committee shall be to determine whether the item contains pornographic or indecent material. However, where the item being reviewed is located in a school serving younger students (an elementary school, or a middle school, or junior high school), and the concern relates to nudity, the District library review committee may consider whether the item constitutes pornographic or indecent material for older children.

The definition of pornographic or indecent materials is clear in 1227(1)(a)(i-iii). The school District caters to minors: 100% of all students in the Alpine School District are minors. The policy should be clear in the immediate removal of pornography because the law is clear with regards to what is and what isn't pornography. If a pornographic magazine was found in the school library, the district policy wouldn't require that the individual notifying the school be a member of the district in order to notify them. It wouldn't require that the material be kept at the school and allowed to be checked out with parent permission. It wouldn't require a committee be formed, require the material be reviewed in its entirety by the parent and by everyone on the committee. It wouldn't require 45 days of review and committee hearings with a vote on whether the material was pornographic or not. Yet this is exactly how policy 6161 works.

Not being in compliance with HB374 also puts educators at risk in additional ways. The educator standards are clear.

Per, R277-217-2 Prohibited Conduct by an Educator

An educator may not:

(16) knowingly possess, while at school or any school-related activity, any pornographic or indecent material in any form;

- (17) use school equipment to intentionally view, create, distribute, or store pornographic or indecent material in any form;
- (18) knowingly use, view, create, distribute, or store pornographic or indecent material involving children;
- (19) expose students to material the educator knows or should have known to be inappropriate given the age and maturity of the students.

Also per R277-217-3 Required Conduct for an Educator

An educator shall:

- (1) comply with all federal, state, and local laws
- (4) take prompt and appropriate action to protect a student from any known condition detrimental to the student's physical health, mental health, safety, or learning;

Because the district policy is not in strict compliance with HB374, the current district policy has put all educators within the Alpine School District at risk of losing their licenses. Because of the current district policy, the list of materials submitted weeks ago is still stuck in a bureaucratic process. No immediate action has been taken to remove the materials from the school libraries, and instead the parents have been told to make book challenges at all the schools. The Utah Professional Practices Advisory Commission (UPPAC), will need to be notified of the violations of professional conduct and ethics within the Alpine School District.

I am including some small snippets of some material the district refuses to acknowledge as pornographic. These are not the most egregious examples, but they are similar in nature to other examples that have been provided previously for all 35 books. The following passage is from a book called *What Girls Are Made Of*, by Elana K. Arnold page 68. This book was found at multiple junior high schools and high schools in Alpine School District.

"Instead I flick the vibrator's switch back on, I grip the black handle tightly, and I press the nose of it against the center of me. The next orgasm hits almost at once, more of a tsunami than a wave, and I'm overcome and lost in it. When the crest of it passes, I don't turn off the vibrator, I don't take it away. I shove it more firmly against me, and I squirm beneath its relentless hum. I force myself to come again and again, until the pleasure morphs into punishment, until I ache, until I lose count of how many times I've come and how many ways I've lost Seth. The orgasms are a seething ocean, each cresting atop the one before, and they drag me back and away, like an undertow."

Is this not clearly pornographic? Is this different than a magazine photo?

The following passage is from a book called *Tilt* by Ellen Hopkins. This book was found at 3 high schools in Alpine School District.

"He moves to kiss my nipples, and though I want to say no, I can't. It feels good. Great. Amazing. Beneath my skirt, I feel him grow hard against the thin barrier of my panties. I like how that feels, too. But I'm still not ready. "Stop." His mouth is around my nipple and he mumbles, Why? All

innocent. Now his lips move an inch or so higher and he starts to suck, softly at first, then harder. It is crazy good and it makes me moan but when he tries to slide down my panties I know I can't. Not yet. "I . . . I have my period." It's a lie, but he can't know that, and it's better than saying I'm too young. He stiffens. Stops. Then he says, We can do something else then. He lifts me up, undoes his zipper and this is no movie when he frees his erection and shows me exactly how to use my mouth to get him off. I wish I could say I don't like it. But somehow I do. Getting off is easy. You don't even need two to make it happen. The proper grip with a slippery fist, whoopee, there it goes. But man does not live by ejaculation alone. There's the whole pursue-and-conquer thing to consider, which is why loose girls aren't all that much fun. Okay, maybe I'm a bit warped that way, but hard-to-get turns me on. Besides, I kind of like playing teacher, which is why I'm so patient with this little girl, who will so be worth the wait. Oh yes, I plan on winning a major jackpot, taking her all the way for the very first time. If that means patience, okay by me. It's only part of the game."

I have attached the full report to this email that includes summaries of 35 books found in the Alpine School District, as further evidence of the materials we are trying to get removed. They are clear violations of HB374. No committee should be necessary, we can form a committee after the materials are removed if you feel it necessary. None of these books should be reviewed "as a whole" as they are graphic depictions of sex as defined in 1227 (1)(a)(i-iii) and have no serious value for minors per 1227(2)(c). Not immediately removing these materials is in also in violation of the Educator Standards R277-217. Failure to comply risks the educational licenses of all educators within the district.

Again, I appreciate your time today. We should be able to stand strong together, uphold the law as it is clearly written, and enforce the AG letter without concern of a "potential" threat. There is a by far greater threat that we are already staring in the face. By clearly holding to the definitions that have been set forth in HB374 and further defined in 1227 (1)(a)(i-iii) we will be protected both by parents and by the AG's office.

A Concerned Parent