

Iowa State Board of Education

Executive Summary

August 4, 2022



- Agenda Item:** Appeal # 5158 (West Des Moines Community School District)
- State Board Priority:** Creating a Safe, Healthy, and Welcoming Learning Environment
- State Board Role/Authority:** The State Board formerly had jurisdiction over this appeal under Iowa Code sections 256.7(6) and 290.1.
- Presenter(s):** Thomas A. Mayes, Presiding Administrative Law Judge Counsel for the Parties
- Attachment(s):** One
- Recommendation:** It is recommended that the State Board AFFIRM the decision of the West Des Moines Community School District’s Board of Directors.
- Background:** This is an appeal of a denial of a challenge to the book Gender Queer remaining on the shelves of the Valley Southwoods Freshman High School. The Administrative Law Judge recommends finding that the Appellant lacks standing. Alternatively, the Administrative Law Judge recommends affirming the School Board’s decision. Reasonable minds could differ on whether the challenged book should remain on the shelves of the Southwoods library and, since reasonable minds can differ, the School Board’s decision must be affirmed under the applicable standard of review.

IOWA DEPARTMENT OF EDUCATION
(cite as ____ D.o.E. App. Dec. ____)

In Challenged Library Book,)
)
T.P.,)
) Admin. Docket No.: 5158
Appellant,)
)
vs.) PROPOSED DECISION
)
West Des Moines)
Community School District,)
)
Appellee.)

This is an appeal of a decision by the West Des Moines Community School District (“District”) School Board (“Board”) not to remove the autobiographical graphic novel *Gender Queer: A Memoir*, by Maia Kobabe, from the library at District’s Valley Southwoods Freshman High School (“Southwoods”). The Board made its decision on March 28, 2022 (Exhibit 3), and the appellant T.P. timely filed an affidavit of appeal to the State Board on April 25, 2022.

The parties appeared for an evidentiary hearing on June 8, 2022. Appellant was present with counsel, attorney Alan Ostergren. The appellee was present through superintendent Lisa Remy, Board President Lonnie Dafney, and Chief Officer of Human Resources Josie Lewis, all of whom offered sworn testimony. The appellee was represented by attorney Kristi Latta. Appellee’s exhibits 1 through 9 were received without objection.¹

¹The Appellee filed a motion for summary judgment, which the undersigned denied. The reasonableness of the Appellee’s actions were at issue, and Appellant was entitled to inquire about the reasonability of Appellee’s decisions. Given that the record must be viewed in a light most favorable to a non-moving party, *Van Fossen v. MidAm. Energy Co.*, 777 N.W.2d 689, 692 (Iowa 2009), and given that summary disposition is

After hearing the evidence and reviewing the arguments of counsel, the decision of the District's Board is AFFIRMED for two independent reasons.

Standing

As a preliminary matter, the undersigned concludes that T.P. is not "the parent or guardian of an affected pupil who is a minor, who is aggrieved by a decision or order" of the Board. Iowa Code § 290.1 (2022). While T.P. has a child in the District, the child no longer attends Southwoods. Any relief this Board would grant to T.P. would not affect her child. In *Ackley-Geneva Community School District*, 16 D.o.E. App. Dec. 196 (1998), the Board's administrative law judge dismissed an appeal of a high school's good conduct policy, where the student at issue was in elementary school at the time. While the facts are different, the outcome is the same: if the Board's decision were reversed and *Gender Queer* was removed from the Southwoods library, T.P.'s child would not be affected at all. This prior decision is entitled to great weight in the present matter. *See, e.g.*, Iowa Code § 17A.19(10)(h) ("Action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency.").

T.P., through counsel, argues that standing under section 290.1 is broad enough to include her appeal, citing *Sanderson v. Board of School Directors*, 211 Iowa 768, 234 N.W. 216 (1931). That case, however, was decided prior to the statute's amendment in 2002, which limited jurisdiction under section 290.1 to parents of affected pupils and affected infrequently granted when the question is one of reasonableness of a party's actions, *Hoyt v. Gutterz Bowl & Lounge, L.L.C.*, 829 N.W.2d 772, 775 (Iowa 2013) (negligence), the matter proceeded to an evidentiary hearing.

pupils. See 2002 Iowa Acts, House File 2515, § 29. Section 290.1 no longer permits appeals, in the Appellant's words, "of anyone connected to the school district."

T.P.'s child, no longer attending the school at issue, would not be "affected" by this decision. T.P. has no standing in this matter.

Merits

In the interest of thoroughness in addressing all matters presented to it, the State Board will proceed to address the merits.

The parties dispute the scope of this Board's review. The District asserts that the State Board's review is deferential. See, e.g., *Sioux City Cmty. Sch. Dist. v. Iowa Dep't of Educ.*, 659 N.W.2d 563 (Iowa 2003). T.P. argues that the State Board has the right to substitute its judgment for that of the Board. See *id.* (citing *Board of Educ. for Franklin County v. Board of Educ. v. Hardin County*, 250 Iowa 672, 95 N.W.2d 709 (1959)). We believe the District has the stronger argument regarding this Board's scope of review.

The *Sioux City* case sets the scope of review under Iowa Code chapter 285 (school transportation), and appeals under chapter 285 are to the Director, not to the State Board. Iowa Code § 285.12. We believe the rationale is transferable to appeals to the State Board under section 290.1. In *Gabrilson v. Flynn*, the supreme court recognized "the broad deference" given "to discretionary decisions of school boards." 554 N.W.2d 267, 275 (citing *Board of Directors v. Green*, 259 Iowa 1260, 1265, 147 N.W.2d 854, 857 (1967)). In *Green*, our supreme court stated: "It is also understood that where a school board has acted pursuant to law, the action taken must be regarded at least as *prima facie correct.*" *Id.* at 1266, 147 N.W.2d at 857 (emphasis added).

The State Board has summarized its deferential review in prior decisions:

The State Board in reviewing appeals under Iowa Code section 290.1 has been given broad authority to make decisions that are “just and equitable.” Iowa Code § 290.3 (2013). The standard of review in these cases requires that the State Board affirm the decision of the local board unless the local board decision is “unreasonable and contrary to the best interest of education.” *In re Jesse Bachman*, 13 D.o.E. App. Dec. 363 (1996). Thus, the test is *reasonableness*.

In re Expulsion of Student A., 27 D.o.E. App. Dec. 726 (2016) (emphasis in original). The State Board does not sit as a “‘super school board’ substituting its judgment for that of the elected board officials.” *Sioux City Cmty. Sch. Dist.*, 7 D.o.E. App. Dec. 137, 141 (1987). The State Board will affirm a local board decision absent a “total absence of reason.” *Id.* at 142. The Board’s decisions are not beyond review or insulated from review; rather, the State Board reviews local decisions in a narrow and deferential manner.²

T.P. has the burden of proving the unreasonableness of the Board’s action. *See, e.g., In re GEER II Mental Health Schools Grant*, 30 D.o.E. App. Dec. 159, 160 (2021). The standard of proof is whether the Board’s decision is supported by a preponderance of the evidence. *In re Jesse Bachman*, 13 D.o.E. App. Dec. at 363.

With this scope of review and burden of proof, it is clear that the Board acted permissibly and reasonably.

² The statutes cited by T.P.’s counsel in support of a less deferential scope of review deal with the authority of the State Board and the Director to make rules and set standards on distance learning, core content standards, and “examples of age-appropriate and research-based materials and lists of resources” for parents to use to teach children about unwanted sexual advances, sexual harassment, and sexual abuse. Iowa Code §§ 256.7(7), (26), (28), 256.9(46). These statutes do not address selection of reading materials in a school’s library, and the undersigned takes note of the fact that the State Board does not have rule-making authority to require school districts to adopt specific curricula or instructional materials. *Id.* § 256.7(26)(c).

Gender Queer is an autobiographical graphic novel. It contains discussions and depictions of sexuality, gender identity, intimacy, and sexual activity. The language and illustrations are often crude, explicit, and confrontational (See, e.g., Affidavit of Appeal). T.P. provided selected excerpts from the work in her Affidavit of Appeal. The book is available in the Southwoods library; however, it is not required reading in any class (Exhibit 6). It is available to any student; however, Southwoods would honor any parental request that the parent's child not be allowed to check out the book (Remy Testimony). Many readers would find the book objectionable; however, the book has won two literary awards, including the ALA Alex Award, which is awarded to "books written for adults that have special appeal to young adults, ages 12 through 18" (Exhibit 6).

T.P. invoked the District's policy to challenge controversial materials (Exhibit 4), and the District and Board followed this policy to the letter (Exhibits 1-9; Lewis Testimony; Dafney Testimony; Remy Testimony).³ Policy 605.04, "Guidelines for Potentially Controversial Material," provides as follows:

Materials provided in each school will be appropriate for the age range of students attending the school. The materials will encompass a broad range of topics including topics that may be viewed as controversial. The materials will represent diverse religious, political and ideological views without any attempt to sway readers' opinions. The schools will provide a variety of materials addressing issues such as race, ethnicity, gender, age, sexual orientation, and religion. The material will reflect sensitivity to the needs, rights and aspirations of men and women without preference or bias. Factual medical and scientific information will be provided. Material of a sensitive nature will be subjected to a test of literary merit by the individuals selecting

³The Appellee cited the Supreme Court's decision in *Island Trees School District v. Pico*, 457 U.S. 853 (1982), in its brief in support of its motion for summary judgment. The undersigned does not consider this case controlling on any point of law because no opinion in it constituted a holding of the Court.

the materials. Recommendations from experts in the field of child and adolescent literature may be used in selecting materials.

(Exhibit 4).

As part of T.P.'s challenge to this book, the District reviewed the book's literary merit, relying on awards from the American Library Association (Exhibit 6). The District made the following additional finding in its review:

This book covers the same type of material as many other text-based books. Menstruation, body image, masturbation, oral and vaginal sex are all topics covered in both biographies and young adult (YA) books commonly found in high school libraries. After reading the book, the committee found the primary purpose of the book to be autobiographical, and not to be pornographic or obscene.

(Exhibit 6). On this particular point, no evidence was offered to the contrary.

While a different school board might permissibly have made a different decision,⁴ *see, e.g., In re Removal of Book from Curriculum*, 23 D.o.E. App. Dec. 188 (2005), the evidence of record shows the District and the Board acted reasonably.

As to the literary award, T.P. focused in her affidavit of appeal that the book was written for adults, so it should, in effect, be restricted to adults. The text of the award, however, clearly stated that it would have special interest to high school students.

T.P. places great weight on the decisions made by others, including the decision by the West Des Moines public library to shelve the book in its "Adult Graphic Novel" section (Exhibit 7) and Amazon and Google to categorize *Gender Queer* as of interest to adults or restrict its viewing (Affidavit of Appeal). While these facts are relevant, they are not dispositive. The District is ultimately responsible for the collections in its libraries, and need not defer its judgment to non-educators.

⁴One school board member dissented from the decision to keep the book in the Southwoods library (Exhibit 3).

T.P. also forcefully argues that *Gender Queer* meets the definition of obscenity in Iowa Code chapter 728⁵ and that the District and Board were, in effect, required to consult with law enforcement officials. She asserted that the District did not have the authority to determine whether a book is obscene. While school districts cannot make decisions on what matter to prosecute and investigate, school districts have “exclusive jurisdiction in all school matters,” Iowa Code § 274.1, including their library programs, *see* Iowa Admin. Code 281-12.3(12), and need not defer to law enforcement personnel where reasonable minds could differ on questions of education policy or pedagogy. *See generally Hills & Dales Child Dev. Ctr. v. Iowa Dep’t of Educ.*, 968 N.W.2d 238 (Iowa 2021).

At the hearing, T.P.’s counsel noted that appeals under the District’s policy have been rare (Remy Testimony); however, that does not make this infrequent decision unreasonable. T.P.’s counsel also posed hypothetical situations to Superintendent Remy, including whether the District would remove a book containing a photographic depiction of adults having intercourse. Superintendent Remy’s answer, boiled down to its essence, was that the District would follow its policies regarding the selection and challenge of any such book (Remy testimony). That hypothetical book was not before the District or its Board, and is not presently before the State Board. *Gender Queer* is, and reasonable minds could differ on whether it should be included in a school’s library. As reasonable minds could differ, the Board’s March 28, 2022, decision must be

AFFIRMED.

⁵ “‘Obscene material’ is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sadomasochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.” Iowa Code § 728.1(5).

Proposed Order

The undersigned has considered all evidence and issues presented, whether or not discussed in this decision.

It is recommended that the March 28, 2022, decision of the Board of Directors of the West Des Moines Community School District in this matter be AFFIRMED.

No costs.

This proposed decision will be presented to the State Board of Education at its regularly scheduled meeting on August 4, 2022. The State Board will review this proposed decision based on the record made and the post-hearing briefs. The parties are able to present arguments during the public comment period on the Board's agenda. The Board's presiding officer may also allow oral argument during its deliberations. If oral argument is allowed, the parties are allotted seven minutes, thirty seconds each.

If either party desires additional proceedings pursuant to the Department's chapter 6, the party or counsel may notify the undersigned and this matter will be rescheduled for later State Board consideration.

The undersigned was impressed by the skill with which counsel presented their client's respective positions.

Done on July 20, 2022.

/s/ Original Signed
Thomas A. Mayes
Administrative Law Judge

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T.P.,)
) Admin. Docket No.: 5158
Appellant,)
)
vs.) DECISION
)
West Des Moines)
Community School District,)
)
Appellee.)

After due consideration by the State Board of Education, the proposed decision in this matter is

_____AFFIRMED.

_____ OTHER:

This is final agency action in a contested case proceeding.

Any party that disagrees with the Department’s decision may file a petition for judicial review under section 17A.19 of the Iowa Administrative Procedure Act. That provision gives a party who is “aggrieved or adversely affected by agency action” the right to seek judicial review by filing a petition for judicial review in the Iowa District Court for Polk County (home of state government) or in the district court in which the party lives or has its primary office. Any petition for judicial review must be filed within thirty days of this action, or within thirty days of any petition for rehearing being denied or deemed denied.

Dated: _____

Iowa State Board of Education, by:

John Robbins, President