STATE OF NEW YORK
STATE EDUCATION DEPARTMENT

In the Matter of the Appeal of
Moms for Liberty of Wayne County
and Reverend Jacob Marchitell

from the action of

the Board of Education of the Clyde-Savannah Central School District regarding the retention of books in the school library.

AMICUS CURIAE APPLICATION AND PROPOSED MEMORANDUM OF LAW

The Law Office of Stephanie Adams, PLLC, Stephanie A. Adams, Esq, counsel for the NEW YORK LIBRARY ASSOCIATION, a party interested in the instant Appeal, requests permission to submit the below memorandum of law as amicus curiae, per Section 275.17.

TABLE OF CONTENTS

IDENTITY OF APPLICANT 1
CONTRIBUTION AND INTEREST OF NYLA AS AMICUS 1
ASSURANCE 2
THE FACTS 2
PRELIMINARY STATEMENT 3
ARGUMENT 5
I. The policy was properly applied by the Respondent, who was operating within its authority supported by law and precedent. 5
II. Petitioners' Appeal is based on misapplications and conflation of law, case law, and legal terms, and appears to be coordinated with a broader effort to intimidate Respondent and others. 6
III. The governing ethics and standards of school libraries are aligned with the protections of the relevant case law, and it is important to emphasize this alignment. 12
CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Appeal of Adrianne Rickson,
62 Ed Dept Decision No. 18,211 11

Appeal of Clifford T. Bradshaw,
62 Ed Dept Decision No. 18,197 ..... 5, 6

Appeal of Paul Parsons,
32 Ed Dept Decision No. 12,954 11

Bethel School District v. Fraser,
478 U.S. 675 (1986) 8

Board of Education v. Pico ex rel. Pico,
457 U.S. 853, 102 S. Ct. 2799 (1982) 6

City Sch. Dist. of New York v. McGraham,
17 N.Y.3d 917 (2011) 9

Fayetteville Pub. Library v. Crawford Cnty.,
5:23-CV-05086 (W.D. Ark. Jul. 29, 2023) 14, 15

Guiles ex Rel. Guiles v. Marineau,
461 F.3d 320 (2d Cir. 2006) 11

People v. Illardo,
97 Misc. 2d 294, 411 N.Y.2d 142 (N.Y. Cnty. Ct. 1978) 8

People v. Keyes,
141 A.D.2d 227, 535 N.Y.S.2d 162 (N.Y. App. Div. 1988) 4, 10

R.O. ex Rel. Ochshorn v. Ithaca City School Dist,
645 F.3d 533 (2d Cir. 2011) 10

Santer v. Bd. of Educ. of E. Meadow Union Free Sch. Dist.,
23 N.Y.3d 251 (2014) 9

Swedenborg Found., Inc. v Lewisohn,
40 N.Y.2d 87 (1976) 8

Statutes

N.Y. Educ. Law § 771 9

N.Y. Penal Law § 235 ..... 4, 8

N.Y. Penal Law § 235.21 7

N.Y. Penal Law § 263 10

N.Y. Penal Law § 263.15 ..... 4, 10

Regulations

8 NYCRR 80 11

8 NYCRR 90 9

8 NYCRR 90.18 12

Other Authorities

Alissa Tudor, Jennifer Moore, & Sephra Byrne, *Silence in the Stacks: An Exploration of Self-Censorship in High School Libraries*, 28(1) SCH. LIBR. WORLDW. 1−17 (2023) 15

Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES (January 30, 2022, updated June 22, 2023), https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html 4

Elizabeth A. Harris & Alexandra Alter, *With Rising Book Bans, Librarians Have Come Under Attack*, N.Y. TIMES (July 6, 2022, updated June 22, 2023), https://www.nytimes.com/2022/07/06/books/book-ban-librarians.html 14

Kathy Ishizuka, *Nearly a Quarter of School Librarians Have Experienced Harassment Over Books*, SCHOOL LIBRARY JOURNAL (September 30, 2023), https://www.slj.com/story/Nearly-a-Quarter-of-School-Librarians-Have-Experienced-Harassment-Over-Books-SLJ-Censorship-Survey 12

Marisa Shearer, *Banning Books or Banning Bipoc?*, 177 NORTHWEST. UNIV. LAW REV. 24 (2022). 4

Nathalie Conklin, *From The Library Of Alexandria To The Local School Board: The Modern American Perpetuation Of The Legacy Of Banned Books*, 48 T. MARSHALL L. REV. 51 (2023) 12

NYLA Code of Ethics, NEW YORK LIBRARY ASSOCIATION (January 31, 2019), https://www.nyla.org/assets/MEMBERSHIP/Form-Center/Manuals-and-Guides/Leadership-Manual/Policies/NYLA%20Code%20of%20Ethics.pdf (last accessed March 26, 2024) 13

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Professional Ethics, AMERICAN LIBRARY ASSOCIATION (June 29, 2021), https://www.ala.org/tools/ethics (last accessed March 26, 2024)..... 13

School and Public Librarians Describe On-the-Job Harassment, SCHOOL LIBRARY JOURNAL (November 16, 2023), https://www.slj.com/story/School-and-Public-Librarians-describe-on-the-job-harassment-censorship 15

Section of School Librarians (SSL), NEW YORK LIBRARY ASSOCIATION, https://www.nyla.org/section-of-school-librarians (last accessed March 26, 2023). 1

IDENTITY OF APPLICANT

The New York Library Association ("NYLA") is a not-for-profit corporation formed to lead, educate, and advocate for the advancement of New York State's library community. NYLA has over 4,470 individual members and 350 institutional members across the State of New York.

As part of its work, NYLA operates the "Section of School Librarians" (the "School Librarian Section" or the "Section"), the purpose of which is "to lead school librarians in advancing the profession; to encourage, promote, and advocate the interests of school library programs, school librarians and school library systems; and to ensure that each student becomes an active reader, responsible information-seeker, and critical thinker."[1]

The issues presented in the instant Appeal have a direct impact on thousands of professionals represented by NYLA and those they serve.

CONTRIBUTION AND INTEREST OF NYLA AS AMICUS

NYLA has reviewed the "Verified Petition and Application for Stay," Respondent's submissions in opposition to Petitioners' request for stay, and the Verified Answer. The legal and policy issues posed by the instant action fall within the ambit of the purposes of both NYLA and the School Librarian Section. In its representative capacity, NYLA has also been alerted to additional recent instances, throughout the state, whose determinations will rest on the principles and law underlying the instant Appeal.

In monitoring and assessing this matter and listening to those whom it represents, NYLA has identified additional law and arguments that might not otherwise be considered, as they have

[1] *Section of School Librarians (SSL)*, NEW YORK LIBRARY ASSOCIATION, https://www.nyla.org/section-of-school-librarians (last accessed March 26, 2023).

not been raised by the Parties. These points of law are set forth in the below proposed Memorandum of Law.

ASSURANCE

Consistent with the standards applied by the Commissioner to evaluate applications to submit as amicus curiae, no other entity, other than NYLA and its counsel, has contributed to the funding or preparation of this submission.

THE FACTS

For the purposes of this Memorandum of Law, it is important to set out some relevant facts. This case involves the attempted removal of five books in the Jr./Sr. High School library of the Clyde-Savannah Central School District (the "Five Books"). As it happens, each of the Five Books is written by an author, or addresses subject matter, associated with an identity that is protected from discrimination by the New York State Human Rights Law.

Petitioners base their claims on the outcome of complaints about the Five Books brought by Petitioner Reverend Jacob Marchitell (the "Complaints"). In the Complaints, Petitioner Marchitell argued that the Clyde-Savannah Central School District should remove the Five Books because of their content, several excerpts of which he included in his Complaints. The school district responded by empaneling a review committee (the "Committee"), which produced a written evaluation of the Five Books pursuant to Board policies 8320 and 8330. (*See,* Affidavit In Opposition to Petitioner Application for Stay, ¶ 10 – 19).

Papers submitted by Respondent indicate that Petitioner Marchitell appealed the Committee's evaluation and only received a final answer to his appeal after three attempts by the Respondent Board of Education of the Clyde-Savannah Central School District (the "Board") to properly respond.

First, on July 12, 2023, the Board voted on a motion regarding Petitioner Marchitell's appeal of the Committee's decision. This motion failed because the majority vote of those Board members present "did not constitute a majority of the full Board." (Affidavit In Opposition to Petitioner Application for Stay, ¶ 25 – 28). Second, on August 9, 2023, the Board voted 5-to-3 to reject the decision of the Committee. (*Id.* at ¶ 30 – 32). Finally, on August 16, 2023, the Board voted to rescind its second vote and then to accept the Committee's decision, thereby returning the Five Books to the shelves. (*Id.* at ¶ 33 – 50).

School boards in New York State typically decide a library materials review with a single vote, and it can be imagined that Petitioners were, along with others, frustrated and distressed by the unusually protracted process. Petitioners, however, do not base their Appeal on any alleged procedural error but bring two causes of action challenging the Board's final vote on the basis of its outcome.

PRELIMINARY STATEMENT

Of less focus in this amicus brief—because the formula for evaluating school library materials is long-standing and because it has been thoroughly addressed in Respondent's reply[2]—is Petitioners' **second cause of action**: that the final vote was the result of the Board being led astray by "legal mischaracterizations." (Verified Petition, ¶ 33 – 43). Part I of this Memorandum of Law's "Argument" section briefly addresses why the Board's decision to follow its policies was not in error and thus why the Appeal's second cause of action should be denied.

[2] For the same reason of economy, this Memorandum of Law does not address Petitioners' standing, but NYLA agrees with the position set out in Respondent's Fourth Affirmative Defense.

From the perspective of NYLA as amicus, it is Petitioners' starkly phrased **first cause of action**, asserting that "[t]he Board abused its discretion by deciding to place obscene, pornographic materials backs [sic] on library shelves" that requires the more painstaking assessment and additional input of an amicus.

Amicus NYLA focuses on Petitioners' first cause of action because Petitioners' repeated use of the words "obscene" and "obscenity," their invocation of New York State Penal Law § 235 and reference to a case[3] applying Penal Law § 263.15, [4] and their related misapplications of precedent are not only erroneous but are emblematic of a dangerous nationwide trend of accusations used to intimidate and threaten schools and librarians into denying access to books on the basis of their content and the identities of their authors.[5] This trend is a threat to civil liberties, and causes needless waste, stress, and harm to librarians and those they serve. As such, it is of grave concern to Amicus.

In addition to normalizing unjustified threats against librarians and schools, participants in this trend misappropriate language from criminal law to force desired outcomes.[6] By using conclusory legal terms such as "obscene"—a classification determined by a court proceeding—and expressly linking their complaints to laws such as New York Penal Law §§ 235.15 and 263.15, Petitioners attempt to position their opinion, rather than the careful process set by Respondent Board, as the arbiter of school library content. As shown in the "Argument" section below, this tactic is devoid of legal merit and is used to intimidate and impugn certified professionals performing their duties as governed by law, regulations, and policy. It is also used

[3] People v. Keyes, 141 A.D.2d 227 (N.Y. 1988), as cited in the Verified Petition, ¶ 25.
[4] Promoting a sexual performance by a child; a class D felony.
[5] Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES (January 30, 2022, updated June 22, 2023), https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html.
[6] Marisa Shearer, *Banning Books or Banning Bipoc?*, 177 NORTHWEST. UNIV. LAW REV. 24 (2022).

in a plain attempt to destabilize the support of the administrators and elected leaders who are obligated to uphold those laws, regulations, and policies.

Amicus is keenly interested in ensuring that the constitutional rights of all parties under the First Amendment are honored. For that to happen, the law, language, and precedents mediating those rights must be respected, and the framing of Petitioners' arguments must be wholly and carefully rejected.

ARGUMENT

I. The policy was properly applied by the Respondent, who was operating within its authority supported by law and precedent.

As the Commissioner recently decided in *Appeal of Clifford T. Bradshaw*, Decision No. 18,197, boards of education may set policy for school library collection management subject to constraints under the First Amendment of the U.S. Constitution:

> [A] board of education has broad authority to prescribe the course of study in the schools of the district (Education Law § 1709 [3]; *Appeal of McLoughlin and Carusi*, 44 Ed Dept Rep 336, Decision No. 15,191; *Appeal of Murphy, et al.*, 39 *id.* 562, Decision No. 14,311; *Appeal of Smith, Jr.*, 34 *id.* 346, Decision No. 13,335). This includes the ability to manage its library collection. A school district's discretion to remove material from its collection, however, is not unfettered. "[L]ocal school boards may not remove books from school library shelves simply because they dislike the ideas contained [there]in …" (*Board of Ed., Island Trees Union Free School Dist. No. 26 v Pico*, 457 US 853, 872 [1982]).

Bradshaw, 62 Ed Dept Decision No. 18,197.

This formula is not new, and the relevant facts in the instant Appeal differ very little from *Bradshaw* and its predecessors. What may be new—and is certainly remarkable in its incautious audacity—is Petitioners' utter rejection of this well-established formula and their embrace of a different and defective legal framework using inapplicable and inappropriate terminology.

For the reasons set forth in *Bradshaw* and in the submissions of Respondent, the Appeal should be denied in full. Section II, below, addresses the concerns raised by Petitioners' novel and inapplicable legal arguments and tactics.

II. Petitioners' Appeal is based on misapplications and conflation of law, case law, and legal terms, and appears to be coordinated with a broader effort to intimidate Respondent and others.

Much is made of the First Amendment by Petitioners in the record of this matter, and rightly so. The First Amendment of the United States Constitution both empowers and limits the Respondent as it evaluates requests for reconsideration of school library materials. The primary limitation was first set out in a case so similar to the instant matter that it could be used to summarize it: *Board of Education v. Pico ex rel. Pico*, 457 U.S. 853, 102 S. Ct. 2799 (1982). In *Pico*, the U.S. Supreme Court described the case before it this way:

> [This case] does not involve textbooks, or indeed any books that… students would be required to read… On the contrary, the only books at issue in this case are library books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there. Furthermore, even as to library books, the action before us does not involve the acquisition of books. Respondents have not sought to compel their school Board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the removal from school libraries of books originally placed there by the school authorities, or without objection from them.

Pico, 457 U.S. at 862.

Pico gave the below simple test for whether or not a school board has improperly regulated the content of books in a school library:

> [W]hether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.

Id. at 854.

The court in *Pico* then affirmed the authority of school boards to set policy that governs books in the school library, with the following limits:

> In rejecting petitioners' claim of absolute discretion to remove books from their school libraries, we do not deny that local school boards have a substantial legitimate role to play in the determination of school library content. We thus must turn to the question of the extent to which the First Amendment places limitations upon the discretion of petitioners to remove books from their libraries. In this inquiry we enjoy the guidance of several precedents. *West Virginia Board of Education v. Barnette*[7] stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be **orthodox** in politics, nationalism, religion, or other matters of opinion… If there are any circumstances which permit an exception, they do not now occur to us." 319 U.S., at 642.

Id. at 870 (emphasis added).

This brings us to the heart of Petitioners' attempts to remove the Five Books; Petitioners want **Petitioners**—not the school district per its policies—to be the authority to determine what is "orthodox" for the purposes of a school library.

To push for this authority and adrenalize elected leaders into taking hasty action before taking time to reflect on the law and policies governing this matter, Petitioners cited § 235.21 of the Penal Law (*see,* Respondent's Exhibit "A") and, in their Appeal, cite criminal cases and apply terms of art from the Penal Law, as if a criminal conviction regarding the Five Books was *res judicata*.

This invocation of criminal law in the context of school library collection development—a careful exercise governed by the Education Law and protected by a particular line of First Amendment jurisprudence—functions not as a cogent legal argument but as an intimidation

[7] A case cited by Moms for Liberty in defense of a librarian in *Moms for Liberty - Yolo Cnty. v. Yolo Cnty.*, 2:23-cv-02802-CKD (E.D. Cal. Dec. 20, 2023).

tactic that targets governing boards, librarians, educators, administrators, and members of the community.

To bolster their baseless claim of "obscenity," Petitioners cherry-pick from legal cases in the same misleading way that they have cherry-picked content from the Five Books they seek to repress. The results are just as worthy of repudiation.

In Paragraph 20 of the Verified Petition, Petitioners cite *Bethel School District v. Fraser,* 478 U.S. 675 (1986) as precedent for the notion that school boards have an "interest in protecting minors from exposure to vulgar and offensive spoken language" and, in the ensuing paragraphs, argue that this notion warrants the Board departing from its policies regarding library collection management.

This is wrong. In *Bethel*, the Supreme Court addressed the authority of schools to impose student discipline over spoken language; the court did not address regulation of content in school libraries. In fact, Justice Brennan, in a concurring opinion in *Bethel*, emphasized: "Nor does the case involve any attempt by school officials to ban written materials they consider inappropriate for high school students or to limit what students should hear, read or learn about." *Id.* at 689.

In Paragraph 23 of the Verified Petition, Petitioners cite *People v. Illardo*, 97 Misc. 2d 294, 411 N.Y.2d 142 (N.Y. Cnty. Ct. 1978) and *Swedenborg Found., Inc. v Lewisohn*, 40 N.Y.2d 87 (1976). These cases are invoked in an apparent attempt to validate Petitioners' personal opinions that the Five Books constitute obscenity under Penal Law § 235.00, but this application of *Illardo* and *Swedenborg* does not survive scrutiny. *Illardo* confirms that an affirmative defense based on an "educational… justification" is **not** "unconstitutionally vague," not that such a defense is limited as suggested by Petitioners. *Swedenborg* construes the term "educational" in the context of Real Property Tax Law § 421, not the Education Law or even the Penal Law. It

strains credulity to hold that a case analyzing a claim of tax exemption under the Real Property Tax Law would be instructive in a case assessing the actions of a school board, especially since all educational activities related to maintaining a school library are expressly set forth and prescribed in Education Law § 771 and 8 NYCRR 90.

Petitioners cite *Santer v. Bd. of Educ. of E. Meadow Union Free Sch. Dist.*, 23 N.Y.3d 251 (2014) as precedent for the proposition that "the State, particularly the Board" has "a duty to ensure the safety of its students" in this appeal related to school library materials. (Verified Petition, ¶ 24). This citation of precedent is mistaken, as it involves an equivocation which is revealed by a close reading. In *Santer*, the "duty" referred to is a duty to ensure physical safety; the case involves applying the *Pickering* test to balance compelling state interests against the First Amendment rights of protesting employees who had allegedly parked their cars in a way that made morning drop-off of students potentially dangerous. This line of case law in no way informs a properly undertaken analysis under *Pico*; it is altogether a different realm of First Amendment law.

Paragraph 24 of the Verified Petition then cites *City Sch. Dist. of New York v. McGraham*, 17 N.Y.3d 917 (2011), but upon close reading, this case also does not serve Petitioners' aim of justifying the repression of books in a manner that violates law and school board policy. *McGraham*, 2011 N.Y. Slip Op. 8228 states that the "broad, well-settled principle" that "the State has a public policy in favor of protecting children" (*id.* at 2) is **not** a bar to applying the law as required in particular cases (in the case of *McGraham*, the law in question pertained to the arbitration of employee disciplinary matters).

Paragraph 25 of the Verified Petition contains perhaps the gravest of Petitioners' misapplications of precedent. Here, Petitioners cite *People v. Keyes*, 141 A.D.2d 227, 535

N.Y.S.2d 162 (N.Y. App. Div. 1988) in an apparent attempt to equate their efforts to repress the Five Books to the work of law enforcement interrupting and prosecuting the creation or promotion of child pornography under Penal Law § 263.15.

This citation to *Keyes* is inapposite for two reasons. First, try as Petitioners might to intimidate the educators involved in this matter, this Appeal does not involve content defined by Penal Law § 263, "Sexual Performance By a Child," and it is the position of Amicus that any suggestion to the contrary risks accusations of defamation and harassment. Further, it is the firm position of NYLA that any person tempted to use this or a similar tactic should pause and consider the implications of so characterizing school librarians—who are mandatory reporters of child abuse under New York State law—before resorting to such calumny.

Second, the "harm to the children involved" referred to in Petitioners' quotation of *Keyes* is the harm to those children exploited by the creation of material found to meet the statutory definition of a sexual performance by a child, not by the selection of novels and memoirs for a school library per state law and regulations. To the incautious reader, this prevarication buttresses the assertion in Paragraph 26 of the Verified Petition, where Petitioners assert that if the Five Books aren't removed, the Board is in violation of "its duty to protect its students from harm." This formulation—rooted in a series of legal errors and fertilized by Petitioners' desire for the authority to determine what is "orthodox" for a public school library's community—must be rejected in the evaluation of this Appeal.

The charade of Petitioners' position is furthered, but not strengthened, by Petitioners' citation of *R.O. ex Rel. Ochshorn v. Ithaca City School Dist*, 645 F.3d 533 (2d Cir. 2011) to argue that a school district has a "right to censor content" that it deems "lewd." (Verified Petition, ¶ 38). In citing *R.O.*, Petitioners once again mix their First Amendment apples and

oranges, since *R.O.* pertains to "assessing whether a school's censorship of **student speech** is constitutionally permissible." (*R.O.*, 645 F.3d at 540, emphasis added). This area of First Amendment jurisprudence does not apply to the authority of a school board to remove materials from a school library. This misapplication of *R.O.* is not helped by Paragraph 38's citation to *Guiles ex Rel. Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006), another student speech case that, if it is instructive at all in the instant matter, is instructive because it: a) shows the importance of not considering content in isolation (*see, id.* at 327, Section B); b) shows the importance of not simply relying on dictionary definitions when making legal arguments (*see, id.* at 328); and c) shows the importance of applying the proper precedent and standard of review (*see, id.* at 332).

The Commissioner's decision cited in Paragraph 39 of the Verified Petition suffers from a similar inapplicability; in *Matter of Parsons*, Decision No. 12,954, the Commissioner addressed student discipline as applied via a dress code. (*See, Appeal of Paul Parsons*, 32 Ed Dept Decision No. 12,954). Again, the regulation of student speech, while certainly a First Amendment matter, falls under a distinctly different line of case law.

Paragraph 40 of the Verified Petition departs from the trend of citing inapplicable legal cases and moves into pure fiction by asserting that the Commissioner's decision in *Appeal of Rickson,* Decision No. 18,211, is consistent with the notion that "New York does not recognize" a librarian's "right to academic freedom." (Verified Petition, ¶ 40). To the contrary, *Rickson* states: "Boards of education have the right to 'establish and apply' curricula" and that this right "must be balanced against teachers' **right to academic freedom**." (*Appeal of Adrianne Rickson*, 62 Ed Dept Decision No. 18,211). Librarians, as one of the many types of educators required to meet the certification criteria for teaching service set by 8 NYCRR 80, have a well-established right to academic freedom. This academic freedom, in turn, helps school librarians ensure that

each student can become an active reader, responsible information-seeker, and critical thinker; in short, a person ready to exercise their own academic freedom.[8] In New York, this freedom can benefit an entire community, as school libraries are set up to supplement public library access.[9] Protecting and promoting this array of very real freedoms is a part of the work that NYLA and the Section perform every day.

III. The governing ethics and standards of school libraries are aligned with the protections of the relevant case law, and it is important to emphasize this alignment.

The Commissioner is aware of the intricate web of law and regulation governing school libraries, school library systems, and school library media specialists in New York State. Suffice it to say that, in New York, school libraries are intentional academic resources available on equal terms to all students, that school library systems are required to ensure such academic resources are shared and optimized, and that school librarians are certified and credentialed professionals.

Of course, we live in a world where professionals with credentials, and the systems they are built into, are being challenged. A May 2023 survey of 729 school librarians across the U.S. found that 30% of high school librarians and 21% of junior high school librarians had experienced harassment related to books or displays in their libraries over the last year.[10]

Disrespecting the work of credentialed professionals—even when that work is done per law, regulation, and duly adopted school board policy—is a right held by Petitioners. However, that right does not nullify, negate, or make the obligations of library professionals any less valid.

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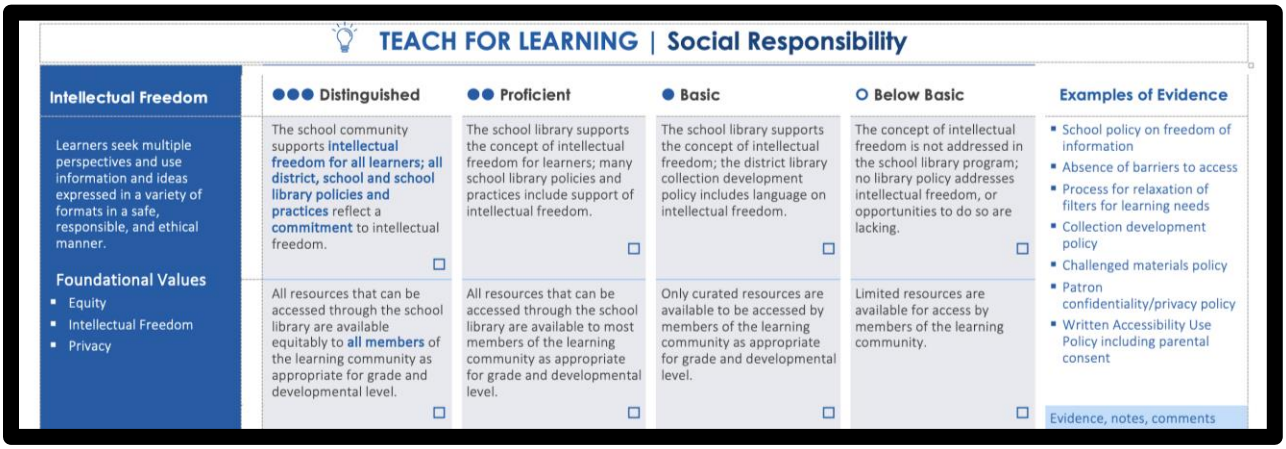
[8] For an exploration of how students benefit from access to a diverse array of library materials, see Nathalie Conklin, *From The Library Of Alexandria To The Local School Board: The Modern American Perpetuation Of The Legacy Of Banned Books*, 48 T. MARSHALL L. REV. 51, 90.

[9] As enabled by 8 NYCRR 90.18.

[10] Kathy Ishizuka, *Nearly a Quarter of School Librarians Have Experienced Harassment Over Books*, SCHOOL LIBRARY JOURNAL (September 30, 2023), https://www.slj.com/story/Nearly-a-Quarter-of-School-Librarians-Have-Experienced-Harassment-Over-Books-SLJ-Censorship-Survey.

The training, qualifications, and experience of professionally certified educators remains relevant to the act of evaluating school library materials, and the standards they are held to in that work are rigorous.

In New York State, school librarians working to uphold the standards of their profession are evaluated against a rubric[11] that includes these requirements for the school library and intellectual freedom:



TEACH FOR LEARNING | Social Responsibility

Intellectual Freedom	●●● Distinguished	●● Proficient	● Basic	○ Below Basic	Examples of Evidence
Learners seek multiple perspectives and use information and ideas expressed in a variety of formats in a safe, responsible, and ethical manner. **Foundational Values** ▪ Equity ▪ Intellectual Freedom ▪ Privacy	The school community supports **intellectual freedom for all learners; all district, school and school library policies and practices** reflect a **commitment** to intellectual freedom. ☐	The school library supports the concept of intellectual freedom for learners; many school library policies and practices include support of intellectual freedom. ☐	The school library supports the concept of intellectual freedom; the district library collection development policy includes language on intellectual freedom. ☐	The concept of intellectual freedom is not addressed in the school library program; no library policy addresses intellectual freedom, or opportunities to do so are lacking. ☐	▪ School policy on freedom of information ▪ Absence of barriers to access ▪ Process for relaxation of filters for learning needs ▪ Collection development policy ▪ Challenged materials policy ▪ Patron confidentiality/privacy policy ▪ Written Accessibility Use Policy including parental consent
	All resources that can be accessed through the school library are available equitably to **all members** of the learning community as appropriate for grade and developmental level. ☐	All resources that can be accessed through the school library are available to most members of the learning community as appropriate for grade and developmental level. ☐	Only curated resources are available to be accessed by members of the learning community as appropriate for grade and developmental level. ☐	Limited resources are available for access by members of the learning community. ☐	Evidence, notes, comments

The New York-specific requirements in the rubric are aligned and consistent with a bedrock of the library profession: the American Library Association ("ALA") Code of Ethics, which was most recently reaffirmed as the Code of Ethics of NYLA on January 31, 2019.[12] The second principle of the ALA and NYLA Code of Ethics provides: "We uphold the principles of intellectual freedom and resist all efforts to censor library resources."[13] The standards and ethics underlying the professionalism of school librarians, and librarians of all types in New York, are foundational to the unique protection afforded to libraries under the First Amendment.

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[11] *NYSED School Library Program Rubric*, NEW YORK STATE EDUCATION DEPARTMENT, https://www.nysed.gov/curriculum-instruction/nysed-school-library-program-rubric (last accessed March 26, 2024).
[12] *NYLA Code of Ethics*, NEW YORK LIBRARY ASSOCIATION (January 31, 2019), https://www.nyla.org/assets/MEMBERSHIP/Form-Center/Manuals-and-Guides/Leadership-Manual/Policies/NYLA%20Code%20of%20Ethics.pdf (last accessed March 26, 2024).
[13] *Id.*; *Professional Ethics*, AMERICAN LIBRARY ASSOCIATION (June 29, 2021), https://www.ala.org/tools/ethics (last accessed March 26, 2024).

While the Appeal before the Commissioner is a New York matter, to be evaluated per the standards that apply in New York, the issue of legal action targeting libraries and librarians is also a concern nationwide.[14] In *Fayetteville Pub. Library v. Crawford Cnty.*, 5:23-CV-05086 (W.D. Ark. Jul. 29, 2023), the court cited the standards and ethics of the librarian's profession as one of many reasons why libraries have their own line of case law governing the restriction of library materials. As written by the Honorable Timothy L. Brooks in an opinion and order issued July 29, 2023:

> Professional librarians hold advanced degrees from ALA-accredited institutions, and all librarians are taught to adhere to the ALA's Code of Ethics and Library Bill of Rights in their professional lives. According to their Code of Ethics, librarians promise:
>
> - [to] uphold the principles of intellectual freedom and resist all efforts to censor library resources;
> - not advance private interests at the expense of library users, colleagues, or our employing institutions; [and]
> - distinguish between [their] personal convictions and professional duties and… not allow [their] personal beliefs to interfere with fair representation of the aims of [their] institutions or the provision of access to their information resources.
>
> According to the Library Bill of Rights, librarians commit to the following basic principles:
>
> - Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation.
> - Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.
> - A person's right to use a library should not be denied or abridged because of origin, age, background, or views.
>
> …
>
> The vocation of a librarian requires a commitment to freedom of speech and the celebration of diverse viewpoints unlike that found in any other profession.

[14] Elizabeth A. Harris & Alexandra Alter, *With Rising Book Bans, Librarians Have Come Under Attack*, N.Y. TIMES (July 6, 2022, updated June 22, 2023), https://www.nytimes.com/2022/07/06/books/book-ban-librarians.html.

Fayetteville Pub. Library, 2023 US Dist LEXIS 131427, at *12 – 14.

The *Fayetteville* ruling connects the ethics and values of the library profession—and the library space—to the particular and precise protections accorded to libraries throughout the country and shows why that connection is a vital part of the First Amendment tapestry.

The approach put forward by Petitioners disregards the connection of library ethics to long-standing library protections. This approach must be expressly rejected. Without the assurance that the law, policy, and their leaders will uphold long-established protections, library professionals have cause to fear for their jobs, their reputations, and their well-being.[15] This fear risks casting a chilling effect whereby librarians and their institutions preemptively limit access to library materials,[16] even if such "self-censorship" is contrary to the law, regulations, and professional ethics.

Petitioners may believe that the Five Books in Respondent's school library are a threat to safety, but whatever Petitioners believe—or urge others to believe—cannot govern the content of school library materials. Rather, per long-established case law, such selection is made and evaluated through a process, set by school board policy, that neutrally applies established selection criteria; this process guards individual works against censorship on the basis of personal opinion about their content or the identities of their authors. This approach not only counters the risk of bias but also reduces the risk of books being removed from shelves due to fear and efforts to censor. Therefore, to the extent that the Commissioner is empowered to encourage Respondent and other districts to ensure their school library collection policies and the

[15] *School and Public Librarians Describe On-the-Job Harassment*, SCHOOL LIBRARY JOURNAL (November 16, 2023), https://www.slj.com/story/School-and-Public-Librarians-describe-on-the-job-harassment-censorship.
[16] Alissa Tudor, Jennifer Moore, & Sephra Byrne, *Silence in the Stacks: An Exploration of Self-Censorship in High School Libraries*, 28(1) SCH. LIBR. WORLDW. 1−17 (2023).

ethics underlying them are current,[17] known to leadership, and uniformly applied, Amicus urges the Commissioner to do so.

CONCLUSION

The causes of action set forth by Petitioners to argue their Appeal are based on misconceptions and equivocations, appear to be in furtherance of an intimidation and harassment campaign, and should be expressly rejected by the Commissioner in denying the Petitioners' Appeal in full. Attempts to use bullying and fear to deny access to school library materials should continue to be met with attention to law, policy, and due process. To those ends, NYLA trusts that the additional arguments and information supplied in this Memorandum of Law will be additive and useful.

Dated: April 12, 2024
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[17] NYLA acknowledges model policies such as those developed and maintained by ERIE1 BOCES as a resource for school districts seeking to ensure their school library collection and reconsideration policies are current.