LEGAL AND OPERATIONAL ISSUES FACING MONTANA LIBRARIES

MONTANA STATE LIBRARY SPRING 2025

These materials are designed to provide information regarding areas of the law and best practices concerning the identified topics. These materials are not intended to be a rendering of legal advice. The reader of these materials should request legal advice from an attorney on specific legal inquiries.

INTENDED OUTCOMES

This session provides library leaders foundational guidance about issues facing libraries. Emerging and ongoing issues are presented so participants complete the session with renewed confidence in handling legal and operational matters.

QUESTION: HOW DO LIBRARIES PLAY A ROLE IN MONTANANS' RIGHT TO LIFELONG LEARNING?

MONTANA CONSTITUTION

Article X

Section 1 Educational goals and duties.

- (1) It is the goal of the people to establish a system of education which will <u>develop the</u> <u>full educational potential of each person. Equality of educational opportunity is</u> <u>guaranteed to each person of the state.</u>
- (2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.
- (3) The legislature shall provide a basic system of free quality public elementary and secondary schools. <u>The legislature may provide such other educational</u> <u>institutions, public libraries, and educational programs as it deems desirable.</u> It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.

QUESTION: HOW DOES FREEDOM OF SPEECH APPLY IN MONTANA LIBRARIES?

CONSTITUTIONAL FOUNDATIONS

- The United States and Montana Constitutions guarantee rights to expression and access to information.
- United States Constitution, Amendment 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
- Montana Constitution, Article II, Section 7. Freedom of speech, expression, and press. No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty. In all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts.

RIGHT TO RECEIVE INFORMATION

- In Martin v. Struthers, 319 US 141, (1943), the Supreme Court ruled the First Amendment includes not just a right to speak or write but also to receive information. The Court protected the right of a person to pass pamphlets door to door ruling that city ordinance prohibiting such distribution was unconstitutional.
- This was confirmed decades later in Court's decision in *Griswold vs. Connecticut,* 381 US 479, (1965), where the majority held receipt of information or speech is a public right, "It would be a barren marketplace of ideas if there were only sellers and no buyers." The decision ruled that the state law prohibiting distribution of information about contraceptives was unconstitutional.
- These decisions serve as the basis for library operations in that the information collected, stored, and available at a library is accessible to patrons consistent with the patrons' free speech rights.

RIGHT TO RECEIVE INFORMATION IN PUBLIC LIBRARIES

- Courts have held that the right to receive information "[i]ncludes the right to some level of access to a public library, the quintessential locus of the receipt of information." *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992).
- Public libraries are quintessential public fora for access to information and consistent with library policy, areas for engaging in other types of expressive activities such as making speeches, distributing pamphlets, or holding meetings.

PUBLIC SCHOOL COLLECTION DEVELOPMENT AND RECONSIDERATION

- The purchase, placement, and reconsideration processes for materials in a school library must honor the United States Supreme Court's holding in *Board* of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853 (1982).
- In *Pico*, Supreme Court ruled students have a First Amendment right to access information in the school library because the library is a voluntarily accessed location in the school.
- The Court found a board of trustees would violate that First Amendment right if it removed books because the members on the board simply did not agree with the content of the books due to philosophical, ideological, religious, or other reasons unrelated to education, safety, or the broader policy.

PUBLIC LIBRARY COLLECTION DEVELOPMENT AND RECONSIDERATION

- A public library's collection in based on the right to receive information and that the library is a designated public forum. Materials are selected for the collection in a manner consistent with these rights, state law, and the adopted library collection plan.
- Montana obscenity law at Section 45-8-205, MCA, is based on the United States Supreme Court ruling *Miller v. California*, 413 U.S. 15 (1973) which established a threepart test about material, on the whole, 1) not appealing to prurient interest in sex based on community standards, 2) not having offensive conduct defined in applicable state law, and 3) having serious literary, artistic, political, or scientific value.
- Library staff generally comply with the statute in an educationally relevant manner by collecting library materials which "demonstrate serious literary, artistic, political, or scientific value" to a patron which the specific library may serve.
- The Supreme Court held that the literary, artistic, political, and scientific value of material does not vary from community to community. If a "reasonable person" would conclude that the work has "value" it will be protected expression under the First Amendment. *Pope v. Illinois*, 481 U.S. 497 (1987).
- Library staff may have a heightened standard under school district policy, city ordinance, or college handbook adopted in a manner permitted by law.

LIBRARY RESTRICTED ACCESS AREAS

- Courts have regularly held restricted areas of a library based on viewpoint of books to be an interference with the rights of a patron to access information.
- This was the holding in Counts v. Cedarville, 295 F Supp. 2d 996 (W.D. Ark. 2003), where school board trustees stated they didn't want the books in general, unrestricted circulation because they didn't like the content of Harry Potter books due to the discussion of witchcraft. There was no anticipated or documented substantial disruption due related to the books. The court ruled that under Pico and Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), limiting access to the books would be a violation of the students' rights to access information in the school library.
- The same concept has applied to public libraries in cases such as *Fayetteville Public Library v. Crawford County,* Case No. 23-5086, 2023 WL 4845636 (W.D. Ark. December 23, 2024. state law creating challenge procedure that would allow removal of books based on "appropriateness" to section "inaccessible to minors" unconstitutional.
- The policy for school and public libraries is important, however. The policy or its guidance documents must define certain sections of the library and how that definition is honored by library staff.

QUESTION: HOW DOES FREEDOM OF SPEECH APPLY TO LIBRARY FACILITIES?

LIBRARY AS PUBLIC FORUM

Traditional Public Forum

- Streets, parks, sidewalks traditionally held to be locations for the public to assemble and communicate.
- Limited Public Forum
 - Property the government has intentionally established or opened for expressive activity.

Nonpublic Forum

- Property of the government reserved for specific governmental function even if that function includes communication.
- Factors for Determination
 - Written policy, consistent application of policy, function of the forum, criteria within the policy

Restrictions on Speech in Forums

- Type of forum will determine standard of review
- Viewpoint restriction impermissible
- Content neutral restrictions with narrowly tailored compelling government interest generally permissible

LIBRARY AS PUBLIC FORUM

- A library or school (or part of a library or school) can be considered a designated or limited public forum.
- In determining whether a "designated public forum" exists courts will look to "policy and practice" to ascertain whether the entity "intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788 (1985).
- A designated public forum is "property that the State has opened for expressive activity by part or all of the public." *International Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).
- A designated public forum is created by "purposeful government action." Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666 (1998).
- Library and school district policy should outline the use of facilities.

CERTAIN TYPES OF USE

Faith-Based Use

Library facilities may be use by faith-based groups in the same manner as other entities or individuals consistent with the conduct expectations in the facilities use policy. Permitting use does not constitute and endorsement or entanglement with the faith under establishment clause. See *Liberty Counsel Cases*.

Political or Ideological Use

Partisanship or ideology are not a basis to deny access to a library facility. Such a denial would be restriction of access based on viewpoint. Use of the facility in a manner consistent with behavior requirements is permitted. Avoidance of controversy is not a basis to deny access. See *Cornelius*.

Library Staff Involvement

The library provides the forum but service to the group beyond general assistance should be carefully managed to avoid potential claims of library staff misusing public resources under Sections 2-1-104, 2-1-121, 2-1-122, MCA

CONDUCT AND BEHAVIOR EXPECTATIONS

- Numerous court decisions have found a public library has the authority to establish reasonable rules governing library use.
- Such regulation must always be related to the purpose of the library.
- The purpose of the library is to honor rights to access information under free speech laws, interference with other patrons' rights can be basis for regulation.
- A library's power to regulate patron behavior is not limited to cases of "actual disruption," but may be tied to safety, use of resources, and other reasonable concerns directed to fulfilling the library's mission.
- This includes the authority to regulate other expressive activities which are not consistent with the purpose of the forum with reasonable time, place, and manner restrictions.
- The library's facilities and conduct policies have to be developed in a legally compliant manner.

QUESTION: WHAT IS THE PROCESS FOR POLICY ADOPTION IN MONTANA LIBRARIES?

STATUTORY REQUIREMENTS

- Section 22-1-309, MCA, states a library board of trustees "shall have exclusive control of the expenditure of the public library fund, of construction or lease of library buildings, and of the operation and care of the library." To that end, The library board of trustees of every public library shall, "<u>adopt bylaws and rules for its own transaction of business</u> and for the government of the library, not inconsistent with law."
- Section 20-3-323, MCA, states, "The trustees of each district shall prescribe and enforce policies for the government of the district. In order to provide a comprehensive system of governing the district, the trustees shall:

(a) adopt the policies required by this title;

(b) adopt policies to implement or administer the requirements of the general law, this title, the policies of the board of public education, and the rules of the superintendent of public instruction"

Section 20-7-203, MCA, states "<u>The trustees shall adopt those policies necessary for</u> regulating the use and operation of school libraries. These policies may provide for the use of school libraries by the residents of the district, provided that such use does not interfere with the regular school use of the library."

LIBRARY POLICIES - PURPOSE

- An effective library policy is the first line of defense in litigation.
- An effective library policy should satisfy these objectives:
 - Maintain continuity and consistency and foster stability;
 - Clarify board/staff relations and provide guidance for the administrative staff;
 - Legitimize library actions;
 - Allow the board and staff to operate the library in a more efficient manner; and
 - Provide the basis for a legal record.

LIBRARY POLICIES - SOURCES

- Library policies originate from many sources and serve specific purposes.
 - Statute, regulation or judicial opinion;
 - Established library practice;
 - Recommendation from local government or insurance carrier;
 - Board and community philosophy; and
 - Financial management or auditing requirements.

LIBRARY POLICIES - ADOPTION

- Each public library or school district will have a "policy on policies."
- That policy will outline how policies are reviewed, adopted, revised, or terminated.
- A library's bylaws, memorandum of agreement, or other governance documents will provide detail about policy management.
- Policies must be reviewed, discussed, and voted upon in accordance with public participation and open meeting laws.
- Patrons and employees should be provided a chance for comment.
- Policies must be accurate and publicly accessible. The public and employees will rely on policies for guidance and to respond to inquiries.
- Policies cannot remain dormant. They are active, living documents.
- Employee handbooks should be a distillation of the policy manual accessible to staff and consistent with any collective bargaining agreement.

LIBRARY POLICIES - TOPICS

Frequent areas of litigation are areas to focus on when reviewing policy:

- Patron Conduct
- Collection Management
- Circulation
- Reconsideration
- Meeting Rooms
- Displays
- Computer Usage
- Gifts and Donations
- Grievances
- Personnel
- Volunteers

- Open Meetings and Public Participation
- Community Engagement
- Employee and Trustee Code of Ethics
- Patron Definition and Services
- Non-Discrimination Laws
 - Sexual Harassment
 - Disability Access
 - Other Protected Classes

QUESTION: WHO IS AVAILABLE FOR LEGAL ASSISTANCE IN MONTANA LIBRARIES?

MONTANA LIBRARY ASSISTANCE HELPLINE



THANK YOU

Contact Information:

