

STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU



Austin Knudsen
Attorney General

1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

MEMORANDUM

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TO: Katherine Orr
Montana State Library

FROM: Madison Mattioli
Agency Legal Counsel

RE: Minors' Freedom to Read

DATE: November 1, 2022

MEMORANDUM

Question Presented: Can a library can limit access of minors to “age appropriate materials” set aside by the library to follow parental direction?

Short Answer: Likely no, under the current state of Montana law. However, our legislature could attempt to pass content-based restrictions on minors' free speech rights and if such laws were narrowly-tailored to achieve a compelling state interest (protection of minors), they could reasonably be upheld.

Analysis:

As the American Library Association proscribes in its Library Bill of Rights, “[a] person’s right to use a library should not be denied or abridged because of origin, age, background, or views.” The United States Supreme Court has held that children and young adults unquestionably possess First Amendment rights, including the right to

receive information through the library in print, sound, images, data, social media, online applications, games, technologies, programming, and other formats. *Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729 (2011). In *Board of Education, Island Trees Union Free School District v. Pico* (1982), a plurality of Supreme Court justices affirmed that students have a First Amendment right to receive information and school boards cannot remove books from school libraries for political reasons. The Court did add that school boards could remove books that were “pervasively vulgar.” This provides support for the idea that a public library also cannot remove or restrict books for political reasons but may be able remove books that are pervasively vulgar. However, there is the obvious distinction that public libraries are not schools and similar First Amendment restrictions do not apply.

The Montana Constitution provides that, “[t]he rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.” Mont. Const., Art. II § 15. Because Montana law does not restrict a minor’s use of a library, minors currently have the right to use a library just as an adult would.

The legislative history of the adoption of Article II, section 15, indicates that legislators were concerned about affording minors “the same constitutional standards of fairness and due process” rights that adults possess, although none of the testimony specifically mentions the first amendment or access to libraries. The “except where specifically provided by law” statement was intended to cover only laws on the books that “protect and enhance” the individual minor, such as driving laws or alcohol consumption laws. The comments to the Bill of Rights Committee proposal indicate that exceptions can be made on “clear showing that protection is being enhanced.” One such law, SB 140, was introduced in Montana in 2001. It was a bill proposed by Jack Wells to amend the Library Records Confidentiality statute to allow parents’ access to a child’s library information, and it died in committee.

The ALA endorses the proposition that, “[c]onstitutionally protected speech cannot be suppressed solely to protect children or young adults from ideas or images a legislative body believes to be unsuitable for them.”¹ Cited in support of this statement, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) states that, “[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.” See also *Tinker v. Des Moines School Dist.*, 393 U.S.503 (1969); *West Virginia*

¹ Access to Library Resources and Services for Minors: An Interpretation of the Library Bill of Rights, <https://www.ala.org/advocacy/intfreedom/librarybill/interpretations/minors>.

Bd. of Ed. v. Barnette, 319 U.S. 624 (1943); *AAMA v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

The US Supreme Court has, however, upheld Congress' passing of the Children's Internet Protection Act (CIPA), which requires libraries to install filters on Internet computers to qualify for federal funding and discounts for computers and computer access. *United States v. American Library Association* (2003). At the end of 2007, 21 states had also enacted content-based restrictions in the form of Internet filtering laws that apply to public schools and libraries.

CONCLUSION

The current state of Montana law would not allow a library to act as a court and determine whether an item is obscene (not constitutionally protected speech) or *en loco parentis* (in the place of a parent) and determine that an item is harmful to a minor (content-based restriction on speech). The latter would be a task for the legislature.

Because Montana law does not have a statute that restricts any minor's use of the library to enhance their protection, the library cannot restrict their access to use the library in all ways adults would. This means that the library likely cannot legally restrict access to books determined by the parent to be "age inappropriate" without legislative authority to do so. This statement is bolstered by Montana's constitutional provision providing minors with the same rights adults have in all aspects, except where there is a law designed to enhance protection for them, and no such law exists here.