

Freedom to Read Foundation
REPORT TO COUNCIL
2014 Midwinter Meeting — Philadelphia, Pennsylvania

As President of the Freedom to Read Foundation, it is my privilege to report on the Foundation's activities since the 2013 Annual Conference:

LITIGATION ACTIVITIES - *ARCE V. HUPPENTHAL*

Two years ago at the Dallas, Texas Midwinter Meeting, the library community first learned about the State of Arizona's successful effort to shutter the Tucson Unified School District's acclaimed Mexican American Studies (MAS) program. Long a target of politicians and state officials who viewed the program's promotion of Mexican culture and identity as "un-American," the TUSD MAS program was closed after the State Superintendent of Instruction, John Huppenthal, issued a notice stating that the MAS program was in violation of Arizona Revised Statute §15-112, a law crafted to end ethnic studies in schools by prohibiting the use of certain class materials and books.

Adopted specifically to close the TUSD MAS program, §15-112 prohibits both public and charter schools from using class materials or books that "encourage the overthrow of the government," "promote resentment toward a race or class of people," are "designed primarily for pupils of a particular ethnic group," and "advocate ethnic solidarity instead of the treatment of pupils as individuals." If the State Superintendent determines that a program is violating §15-112, the school board must close the program or surrender 10% of the state funds allocated to the school district.

In January 2012, as a result of Huppenthal's findings, all MAS teaching activities were suspended and the MAS curriculum was prohibited. Students looked on as books used in the courses were removed from classrooms, placed in boxes marked "banned," and put in storage. Subsequently, students in the MAS program filed suit in federal district court, challenging the constitutionality of §15-112 on First Amendment grounds. The lawsuit, *Arce v. Huppenthal*, alleged that the Arizona statute was overbroad, void for vagueness, and violated their rights to free speech, free association, and equal protection.

The district court dismissed the free association claim but went on to address the students' remaining First Amendment claims. It held that the proper test for determining whether the statute violated the First Amendment rights of the students is the test set forth by the Supreme Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988): "limitations on curriculum should be upheld so long as they are reasonably related to legitimate pedagogical concerns."

Consequently, the court determined that only one provision, the ban on courses that are "designed primarily for pupils of a particular ethnic group" was unconstitutional because the provision's broad and ambiguous wording could deter school districts from teaching ethnic studies. It upheld the remaining provisions of the statute, rejecting arguments that those provisions were overbroad or unconstitutionally vague. It also dismissed the plaintiffs' equal protection claims. The students have appealed the court's decision to the Ninth Circuit Court of Appeals.

At our last meeting, Candace Morgan reported that the trustees of the Freedom to Read Foundation had voted to assist the students' effort to overturn the district court's decision and restore the MAS program to the Tucson schools. To that end, FTRF retained Jenner & Block on a pro bono basis to prepare an *amicus curiae* brief in support of the student plaintiffs' First Amendment arguments. The brief addresses the test to be applied in determining the students' First Amendment rights and also argues that §15-112 is unconstitutional due to its overbreadth.

Specifically, the brief contends that the *Hazelwood* holding does not apply and that the state does not have absolute discretion over curriculum decisions. It argues that the statute violates the students' First Amendment right to receive information, based on the Supreme Court's holding in *Board of Education v. Pico* (a school library case) that students have the right to receive information and the government cannot censor classroom materials based on political or partisan motivations—as appeared to be the case based on the public statements made by Superintendent Huppenthal and other proponents of the legislation. But FTRF also took the position that the state violated the First Amendment even if *Hazelwood* applies because curriculum decisions based on partisan or political motivations do not constitute a legitimate pedagogical interest.

FTRF also maintained that the statute is unconstitutionally overbroad and will chill school instructors from utilizing course materials in their classrooms that might be held to violate the statute, such as Martin Luther King's "Letter From a Birmingham Jail" on the grounds that it "advocates ethnic solidarity instead of the treatment of pupils as individuals."

We are pleased to have the American Library Association joining FTRF on the brief, along with REFORMA, the Asian Pacific American Librarians Association, and the Black Caucus of the American Library Association. Other organizations on the brief are the American Booksellers Foundation for Free Expression, the Comic Book Legal Defense Fund, the National Association for Ethnic Studies, the National Coalition Against Censorship, and the National Council of Teachers of English. You can find the brief along with much more information on the case, including other briefs, at www.ftrf.org/?Arce_v_Huppenthal.

This brief represents a major step forward in achieving the litigation goals of FTRF's strategic plan: to maintain FTRF's reputation as a center of excellence for litigation on behalf of intellectual freedom by developing a proactive legal strategy and taking the lead in appropriate litigation. We are particularly grateful to Julie Carpenter and Elizabeth Bullock of Jenner & Block and Theresa Chmara, FTRF's general counsel, for working in concert to develop a brief that challenges the status quo to make a principled argument for expanding students' First Amendment rights in the classroom.

The brief was filed on November 25, 2013. Because the State of Arizona cross-appealed the district court's holding that one part of the statute was unconstitutional, legal counsel for the students expects that briefing may not be completed until June. An oral argument date has not been set at this time.

DEVELOPING ISSUES

Helen Adams, a member of the Foundation's Developing Issues Committee, led a discussion about a growing movement to require K-12 teachers and librarians to "red flag" books for "problematic" content or to exclude books that express disfavored viewpoints on controversial issues. She described one school district's decision to install a "library review committee" to ensure that books in the library presented controversial issues "in the right way" and discussed a Virginia parent's campaign to have the

Virginia Board of Education adopt regulations that will require school faculty to identify books containing sensitive or controversial content and to publish a syllabus prior to the commencement of classes that notifies parents about any sensitive or sexually explicit materials that may be included in the course, the textbook, or any supplemental instructional materials. These initiatives substantially interfere with instructors' academic freedom and pose a real risk of chilling teachers' and librarians' acquisition and use of complex and challenging literature.

Theresa Chmara, FTRF's general counsel, provided a helpful overview of the recent federal appellate "Net Neutrality" decision striking down the FCC's Open Internet Order and the various lawsuits that are challenging the legal validity of the National Security Agency's surveillance on First Amendment grounds.

JUDITH F. KRUG MEMORIAL FUND

The Judith F. Krug Memorial Fund, which was created by donations made by Judith's family, friends, colleagues, and admirers, supports projects and programs that assure that her lifework will continue far into the future. At present, the fund supports two major initiatives: a grants program that underwrites Banned Books Week activities in libraries, schools, and community institutions, and a program to augment and improve intellectual freedom education in LIS programs.

For Banned Books Week 2013, FTRF made seven Banned Books Week event grants. The grantee organizations hosted a remarkable variety of events that ranged from an author living behind a wall of banned and challenged books in the window of the Kurt Vonnegut Memorial Library to a celebration of challenged and controversial black male authors hosted by the Atlanta School of Law and Social Justice. Judith's Reading Room teamed with Muhlenberg College to stage a dance performance inspired by Marjane Satrapi's frequently challenged graphic novel *Persepolis* while the public libraries in Gadsden, Ala., Yuma County, Ariz., and Lockport, La. sponsored events including read-outs, video and art projects, lectures on censorship, and a symbolic book-burning. Visit www.ftrf.org/?page=Krug_BBW for details.

The Krug Fund's education initiative seeks to provide top-notch intellectual freedom training for LIS students and professional librarians. At present, two projects are moving forward under the guidance of consultant Joyce Hagen-McIntosh, in cooperation with LIS programs. We anticipate announcing details about both projects in advance of the Annual Conference.

STRATEGIC PLAN INITIATIVE AND FTRF MEMBERSHIP

In order to advance those portions of FTRF's strategic plan addressing organizational capacity and growth, the Trustees approved two action items designed to regularize the Foundation's use of interest income from the endowment to support the activities of the Foundation. Among these activities is an active campaign to increase FTRF's membership by reaching out to the general public and institutions with an interest in advancing intellectual freedom.

Your own membership in the Freedom to Read Foundation is needed to sustain and grow FTRF's unique role as the defender of First Amendment rights in the library and in the wider world. I invite you to join me in supporting FTRF as a personal member, and ask that you please consider inviting your organization or your institution to join FTRF as an organizational member. Please visit www.ft rf.org and join today. Alternatively, you can call the FTRF office at (800) 545-2433 x4226 and join by phone, or send a check (\$35.00+ for personal members, \$100.00+ for organizations, \$10.00+ for students) to:

Freedom to Read Foundation
50 E. Huron Street
Chicago, IL 60611

Respectfully submitted,

Julius C. Jefferson
President
Freedom to Read Foundation