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VIA EMAIL

July 7, 2023

Debra Heitman-Cayea
President, Board of Education
Carmel Central School District
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Dear Ms. Heitman-Cayea,

We write on behalf of the New York Civil Liberties Union (“NYCLU”) to express our concern that the Carmel Central School District (“Carmel” or the “District”) has inadequate library policies that fail to protect the free speech rights of students and foster a safe and supportive learning environment.

The recent challenge to *Gender Queer*, Maia Kobabe’s memoir of nonbinary identity, has brought this issue to the fore. After an individual filed a complaint, the Superintendent recommended that the book be retained in the library’s collection.¹ On April 5, 2022, the Board of Education upheld the Superintendent’s determination by a vote of 5-2.² While we applaud the District’s decision to uphold the Superintendent’s recommendation,³ the attempt to remove the book has continued to reverberate. Over the course of the last year, a small but vocal group of conservative activists have regularly attended Board meetings, repeatedly challenging the Board’s decision to retain the book in circulation,⁴ while other conservative activists have attacked school staff online.⁵

In light of this ongoing controversy, strong policies that embrace a commitment to diverse curricular and library content and establish a rigorous reconsideration process are critically important. Carmel Central School District Board Policies (“Board Policies”) should be revised to ensure that politically-motivated requests to ban materials are not used as an ongoing cudgel against the District. Specifically, we recommend that Board Policies include:

- a provision that no material will be removed from either the curriculum or library until the Board makes a final decision;
- a clear timeline for reviewing challenges to materials;
- protection for the professional judgment of school staff; and
- greater transparency in the reconsideration process.

¹ CARMEL CENT. SCH. DIST. BD. OF EDUC., BD. OF EDUC. MEETING 3 (Apr. 5, 2022), [https://go.boarddocs.com/ny/carmel/Board.nsf/files/CDLUSV7D82EF/\\$file/BOE%20Minutes%2004-05-22%20Draft.pdf](https://go.boarddocs.com/ny/carmel/Board.nsf/files/CDLUSV7D82EF/$file/BOE%20Minutes%2004-05-22%20Draft.pdf).

² *Id.* at 4.

³ Leonard Sparks, *Removing Books from Schools*, HIGHLANDS CURRENT (Apr. 22, 2022), <https://highlandscurrent.org/2022/04/22/books-in-chains-closed-padlock-isolated-on-white-background/>.

⁴ *See, e.g.*, February 7, 2023 Board of Education Meeting Video, <https://carmel.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=a4871932-e848-4605-beac-afa400525ac9> at 9:18; March 21, 2023 Board of Education Meeting Video, <https://carmel.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=eacb79d9-0c05-400f-86fa-afcd0158f7bb> at 1:12:23.

⁵ April 9, 2022 Facebook Post, <https://www.facebook.com/photo?fbid=287914503528148&set=a.115874930732107>.

We have enclosed a model policy for your consideration.

Strong Policies are Essential to Protect Students' Rights of Free Speech and Expression and Foster Safe and Supportive Learning Environments

The Supreme Court has consistently held that the students and teachers have a First Amendment right to freedom of speech and expression in school.⁶ As such, school authorities may not remove books solely because they disagree with the views expressed within them. In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,⁷ the Supreme Court concluded that library book removals violate the Constitution if motivated by an intent to deny students access to particular ideas.⁸ In the decades since, courts have consistently held that efforts to censor diverse authors' writings on race, sexuality, and gender represented discrimination on the basis of viewpoint – the “official suppression of ideas” forbidden by the First Amendment.⁹ School districts violated the Constitution where they knowingly used software that blocked websites supporting of LGBTQIA+ people¹⁰ and removed a novel depicting a romance between two teenage girls.¹¹ Courts have also found that a city resolution enacted specifically for the purpose of removing two children's books on LGBTQIA+ families from the public library constituted viewpoint discrimination.¹² Recently, a Texas court ordered that removed books be returned to shelves within 24 hours, reasoning that the library board likely removed “CRT [Critical Race Theory] and LGBTQ book[s],” because they disagreed with the views of the authors.¹³

Schools' obligation to protect students' right of free speech and expression intersects with their duty to cultivate a safe and supportive learning environment under federal and state law.¹⁴ Challenges to books about the experiences of LGBTQIA+ young people and students of color can send the message that these students are not welcome in the school community and can create a hostile environment for students. The Department of

⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”). The New York Constitution also guarantees the right of free speech and expression. See *East Meadow Cmty. Concerts Ass'n v. Bd. of Educ. of Union Free Sch. Dist. No. 3, Nassau Cty.*, 19 N.Y.2d 605, 606 (1967). In fact, the New York Court of Appeals has suggested that the scope of the right under the state constitution may be even more expansive than the First Amendment. *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557–58 (1986) (“[T]he minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression.”).

⁷ 457 U.S. 853 (1982).

⁸ *Id.* at 871.

⁹ *Id.*

¹⁰ *Parents, Families, and Friends of Lesbians and Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 893 (W.D. Mo. 2012).

¹¹ *Case v. Unified Sch. Dist. No. 233, Johnson Cty., Kan.*, 908 F. Supp. 864, 875–76 (D. Kan. 1995).

¹² *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 549 (N.D. Tex. 2000).

¹³ *Green Little v. Llano Cty.*, No. 1:22-CV-424-RP, 2023 WL 2731089 at *2, 8, 14 (W.D. Tex. Mar. 30, 2023).

¹⁴ The New York State Human Rights Law (“NYSHRL”) provides that “[i]t shall be an unlawful discriminatory practice for an educational institution . . . to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, citizenship, or immigration status, sexual orientation, gender identity or expression, military status, sex, age, marital status, or status as a victim of domestic violence.” N.Y. EXEC. LAW § 296(4). Similarly, New York's Dignity for All Students Act (“DASA”), provides that “[n]o student shall be subjected to harassment or bullying by employees or students on school property or at a school function; nor shall any student be subjected to discrimination based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex by school employees or students on school property or at a school function.” N.Y. EDUC. LAW § 12. In expanding the NYSHRL to include K-12 educational institutions and enacting DASA, the New York legislature recognized that students of color and LGBTQIA+ students are frequently targets of bullying and harassment. Sponsor's Mem., Bill Jacket, L 2010 ch. 482 (“DASA addresses the needs of certain classes of students who have been historically harassed and discriminated against based on actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender identity and expression, and sex.”).

Education’s Office for Civil Rights (“OCR”) recently investigated book removals in Forsyth County Schools in Georgia for potential violations of Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964. OCR identified concerns that comments at board meetings gave the impression that books were removed because of the identity of their authors and characters, creating a hostile environment for students.¹⁵ OCR also expressed concern that the district’s responsive steps, including posting a statement that it provides resources “that reflect all students within each school community,” were insufficient to ameliorate the situation.¹⁶ The resulting settlement required the district to issue a statement explaining its book removal process, offer supportive measures to students who were affected, and undertake a school climate survey.¹⁷ OCR recently announced the appointment of a coordinator “to address the growing threat that book bans pose for the civil rights of students.”¹⁸ OCR’s actions put school districts on notice that they will be held accountable if they fail to address the hostile environment created by challenges to diverse literature.

Courts consider school districts’ policies and procedures for considering challenges to library materials and treat a failure to comply with those policies as evidence that the board removed a book because it disagreed with the viewpoint of the author.¹⁹ Courts have also been persuaded by evidence that officials overruled decisions made by the individuals normally responsible for decision-making.²⁰ Indeed, in *Island Trees* the school board disregarded the district’s policy for considering challenges to instructional materials and, over the objections of the superintendent, formed an ad hoc committee.²¹ When the committee recommended retaining the challenged books, the board overruled it.²² While *Island Trees* is a particularly egregious case, it illustrates the importance of clear and consistent policies to ensure that challenges are fairly adjudicated.

Carmel’s Current Policies Fail to Protect the Integrity of the Reconsideration Process

The current Board Policies include both a library material selections policy and a policy establishing a curricular or instructional materials complaint process. The former, Board Policy 4513, provides that “[t]he Superintendent shall be responsible for the selection of resource materials,” including determining “factual accuracy, readability, authoritativeness, integrity and quality of format.”²³ While the other policy, Board Policy 4524, states that the library media specialist “will work cooperatively with the staff members to interpret and guide the application of the policy in making day-to-day selections . . . the Superintendent has the authority to

¹⁵ U.S. Department of Education’s Office for Civil Rights Resolves Investigation of the Removal of Library Books in Forsyth County Schools in Georgia, U.S. DEP’T OF EDUC. (May 19, 2023), <https://www.ed.gov/news/press-releases/us-department-education-office-civil-rights-resolves-investigation-removal-library-books-forsyth-county-schools-georgia>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Fact Sheet: Biden-Harris Administration Announces New Actions to Protect LGBTQI+ Communities*, WHITE HOUSE (June 8, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/08/fact-sheet-biden-harris-administration-announces-new-actions-to-protect-lgbtqi-communities/>.

¹⁹ See *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 190–91 (5th Cir. 1995) (reasoning that school board’s rejection of committee recommendations in disregard of its own policy “raised questions regarding the constitutional validity of its decision”); *Case*, 908 F. Supp. at 876 (“The highly irregular and erratic manner in which defendants removed *Annie on My Mind* from the District’s libraries and their disregard of established policy and procedure are important evidence of their improper motivation.”).

²⁰ See *Griswold v. Driscoll*, 616 F.3d 53, 58 (1st Cir. 2010) (“But the missing step is the decisive act by a superior official overruling the authority that determines content in the normal course.”); see also *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 999 (W.D. Ark. 2003) (granting motion for summary judgment against school district where Board of Education members voted to require parental permission to allow students to access the *Harry Potter* series, rejecting recommendation of Library Committee).

²¹ *Island Trees*, 457 U.S. at 857, n.4.

²² *Id.* at 858.

²³ Carmel Central School District Policy 4513: Library Materials Selection, available at https://www.carmelschools.org/district_policies.

veto any selection he/she deems inappropriate.”²⁴ The Board retains “final responsibility to make decisions concerning selections.”²⁵

Board Policy 1420-R²⁶ explains the procedure for addressing complaints about any textbook, library book, or other instructional material. If an informal meeting with the complainant is not successful in resolving a complainant’s concerns, they may submit a written complaint to the Superintendent, who in turn designates an Instructional Review Committee (“the Committee”). Committee members include an administrator, a librarian, a teacher, and a parent of a student enrolled in the district. The Committee is charged with “read[ing] and examin[ing] the challenged materials, consider[ing] the specific objections to the material voiced by the complainant, weigh[ing] the values and faults of the material as a whole, . . . solicit[ing] advice or opinion from other district faculty and staff, [and] issu[ing] a report to the Superintendent containing its recommendations.”²⁷ The Superintendent reviews the report and makes a final decision on whether to retain or remove the challenged material, a decision which is appealable to the Board of Education.

These policies are insufficient to protect the integrity of the review process. First, Board Policy 1420-R does not explicitly provide that any challenged material will remain in the curriculum or in circulation in the library until the Board makes a final decision. This provision is critical, as removing a material as soon as it is challenged effectively gives the challenger a “heckler’s veto” over students’ rights to access material.²⁸ The District’s policy also does not give a timeline for the review process. Swift resolution of complaints is important to create confidence in the process and ensure that staff have clarity on whether students can access the challenged materials. Committee membership is limited to an administrator, a librarian, a teacher, and a parent. No students are included in the committee, and there is no established process for how the parent member is selected. Committee members are not given any training on the First Amendment or principles of academic freedom.²⁹ Lastly, the lack of transparency or opportunities for public comment during the reconsideration process risks undermining public trust. This is particularly true in cases where the Superintendent elects to remove a challenged material. The policy does not explicitly allow another member of the school community to appeal this decision, effectively insulating the Superintendent’s decision from review.

Second, the Board Policies neither empower the librarian to select materials nor provide the necessary protection so that they can confidently provide access to information on controversial topics. Superintendents are described as assuming responsibility for library selection and are given power to veto librarians’ choices without explanation, undermining their authority to curate library materials. In addition to their unique training and expertise, librarians have ethical obligations to “uphold the principles of intellectual freedom.”³⁰ The District’s policy should explicitly acknowledge this expertise and identify librarians as the key decisionmaker when it comes to selecting library materials, affording deference to their selections. Policies in other districts also recognize librarians’ professional authority in the review process, providing that “[a] decision to sustain a challenge shall not be interpreted as a judgment of irresponsibility on the part of the professionals involved in

²⁴ Carmel Central School District Policy 4524: School Libraries, available at https://www.carmelschools.org/district_policies.

²⁵ *Id.*

²⁶ Carmel Central School District Policy 1420-R: Complaints About Curricula or Instructional Materials Regulation, available at https://www.carmelschools.org/district_policies.

²⁷ *Id.*

²⁸ A court reached this conclusion in *Sund v. City of Wichita Falls*, reasoning that a provision in a city resolution that required the immediate removal of a library book after receiving a petition with 300 or more signatures “effectively permitt[ed] [the challengers] to veto lawful, fully-protected expression simply because of their adverse reaction to it.” 121 F. Supp. 2d at 549.

²⁹ The American Library Association (“ALA”) recommends that the school librarian provide the reviewing committee with a short formal “Intellectual Freedom” training that covers the district’s library selection process and the ALA’s Library Bill of Rights, among other resources. *Formal Reconsideration*, AM. LIBR. ASS’N (Jan. 2018), <https://www.ala.org/tools/challengesupport/selectionpolicytoolkit/formalreconsideration> (last visited June 10, 2023).

³⁰ *Code of Ethics*, AM. LIBR. ASS’N (June 29, 2021), <https://www.ala.org/tools/ethics>.

the original selection or use of the material.”³¹ This language ensures that librarians do not face adverse consequences because of their efforts to include diverse voices in the library collection.

Activists’ explicit targeting of the Carmel High School librarian underscores the need for specific policies that honor the professional judgment of school personnel. On October 3, 2022, an article on the Parents Defending Education web site accused the librarian of “using her position to promote political positions,” citing a photo of a library display containing books by LGBTQIA+ and Black authors.³² Another conservative activist has written multiple Facebook posts attacking the librarian by name, sharing her photo and contact information, and accusing her of using “tax payer monies to purchase PORN.”³³ School librarians have a professional responsibility to ensure that students have access to materials representing a wide range of viewpoints and experiences: they should not be personally targeted when they strive to do so.³⁴

Carmel Should Adopt Stronger Policies to Protect Staff and Students

Carmel should adopt stronger library selection and review policies to ensure that future challenges to materials are handled efficiently and transparently, while protecting the professional discretion of school staff and students’ rights to access important materials. Enclosed with this letter is a copy of a model policy developed by the NYCLU to provide school districts with a roadmap for selecting library materials and considering challenges. The model policy uses the template policies developed by the New York State School Boards Association as a starting point, incorporating guidelines developed by the American Library Association and strong provisions from other district policies. Four features of the policy are particularly relevant to the situation in Carmel:

1. It provides that no material will be removed from either the curriculum or from the library until the Board makes a final decision.
2. It provides a timeline for reviewing challenges to materials.
3. It honors the professional judgment of school personnel.
4. It balances participation and transparency with the safety of committee participants.

Beyond strengthening Board Policies, Carmel should renew its commitment to providing students with inclusive curricular and library materials that reflect the history and experiences of all members of the school community. Carmel is a diverse school district: 33% of students are Latinx, 3% are Black, 2% are Asian-American, and 3% are multiracial.³⁵ All of these communities should be represented in the school curriculum. One of the most troubling consequences of book challenges is that educators, fearing controversy, may avoid assigning or selecting books on marginalized communities. But ensuring access to inclusive materials is essential to foster a more respectful school climate and promote student learning,³⁶ a fact recognized by the Board of Regents when it announced its commitment to supporting culturally responsive-sustaining education

³¹ NAT’L COALITION AGAINST CENSORSHIP, RESPONDING TO CHALLENGES TO INSTRUCTIONAL AND LIBRARY MATERIALS 10, <https://ncac.org/news/blog/guidelines-school-officials>.

³² *Carmel Central School District Allows Students to Access Gender Queer Book in Libraries; School Librarian Uses Position to Push Political Issues*, PARENTS DEFENDING EDUC. (Oct. 3, 2022), <https://defendinged.org/incidents/carmel-central-school-district-allows-students-to-access-gender-queer-book-in-libraries-school-librarian-uses-position-to-push-political-issues/>.

³³ April 9, 2022 Facebook Post, *supra* note 5.

³⁴ AM. LIBR. ASS’N, *supra* note 30.

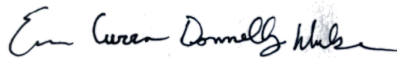
³⁵ *Carmel CSD Enrollment (2021-22)*, N.Y. STATE DEP’T OF EDUC., <https://data.nysed.gov/enrollment.php?year=2022&instid=800000039758> (last visited July 5, 2023).

³⁶ Amanda LaTasha Armstrong, *The Representation of Social Groups in U.S. Educational Materials and Why it Matters*, NEW AM. (Dec. 1, 2021), <https://www.newamerica.org/education-policy/reports/the-representation-of-social-groups-in-u-s-educational-materials-and-why-it-matter/>.

statewide.³⁷ The disclosure that three Carmel High School students recently created TikTok videos threatening Black and Latinx students demonstrates the urgent need for frank community conversations about racism and bigotry.³⁸ Now is the time to redouble the District’s efforts to ensure that all students feel represented at school in general and in the library in particular. In the words of Governor Hochul, “[f]or many kids, libraries are a place of refuge and information where they can be welcomed and affirmed for who they are. Everyone – and particularly our state’s young people,” she continued, “deserves to feel welcome at the library.”³⁹

We would welcome the opportunity to further discuss our model policy with you. We can be contacted at 212-607-3300 and ehulse@nyclu.org.

Sincerely,



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Skadden Fellow



Brandon J. Holmes
Interim Field Co-Director

³⁷ N.Y. STATE DEP’T OF EDUC., CULTURALLY RESPONSIVE-SUSTAINING EDUCATION 6 (2021),

<https://www.nysed.gov/sites/default/files/programs/crs/culturally-responsive-sustaining-education-framework.pdf>.

³⁸ Diana Dombrowski, *TikTok Videos Threatening Black Students Have Carmel Parents on Edge, District Promising Change*, LOHUD (Mar. 2, 2023, 2:21 p.m.), <https://www.lohud.com/story/news/education/2023/03/02/racist-tiktok-videos-threaten-black-kids-in-carmel-ny-worry-parents/69941181007/>.

³⁹ Nick Esposito, *Gov. Hochul “Horried” by Smithtown Library’s LGBTQ+ Display Ban, Launches Investigation*, GREATER SMITHTOWN (June 23, 2022), <https://greaterlongisland.com/gov-hochul-horrified-by-smithtown-libraris-lgbtq-display-ban-launches-investigation/>.