



# OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL

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## Memorandum

**To:** Representative Ken Ivory

**From:** Amy Shewan, Associate General Counsel

Michael Curtis, Managing Associate General Counsel

**Date:** May 17, 2022

**Re:** H.B. 374 and the Office of the Attorney General's Guidance

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This letter is in response to your request for: 1) a summary of H.B. 374 and explanation of what that bill does; and 2) a document that more thoroughly addresses some issues previously identified with a guidance provided by the Office of the Attorney General to local education agencies (LEAs) regarding materials in school libraries (AG's guidance).

### I. H.B. 374 Summary

#### a. Introduction

H.B. 374, Sensitive Materials in Schools, was passed by the Legislature in the 2022 General Session. The bill prohibits certain sensitive materials in the school setting, with some exceptions for instructional materials for certain courses.

The bill also requires the State Board of Education (state board), in consultation the Office of the Attorney General (AG's Office) to provide guidance and training to public schools on identifying sensitive materials, and to make certain reports to the Education Interim Committee and the Government Operations Interim Committee.

#### b. Definitions

H.B. 374 defines "sensitive materials" as "an instructional material that is pornographic or indecent material as that term is defined in Section 76-10-1235."

"Instructional material" is defined in H.B. 374 as "a material, regardless of format used . . . as or in place of textbooks to deliver curriculum within the state curriculum framework for courses of study by students; or . . . [used] to support a student's learning in the school setting."<sup>1</sup>

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<sup>1</sup> "School setting" is a defined term meaning in the classroom, school library, or on school property. "School setting" includes activities required or sponsored by an LEA, such as an assembly or guest lecture.

Instructional materials include, but are not limited to, “reading materials, handouts, videos, digital materials, websites, online applications, and live presentations.”

The definition of “instructional material” in H.B. 374 is broader than only library materials or curriculum materials, although the definition would include those materials.

Sensitive materials, then, are any instructional material as described above, that meets the definition of “pornographic or indecent material,” a term defined in Section 76-10-1235.

Section 76-10-1235 provides a three-part definition for the term “pornographic or indecent material.” The term means material (i) defined as harmful to minors in Section 76-10-1201; (ii) described as pornographic in Section 76-10-1203; or (iii) described in Section 76-10-1227. Material that meets any of these three definitions is “pornographic or indecent material,” and therefore any instructional material that meets one of these definitions is sensitive material as defined in H.B. 374.

1. First, Section 76-10-1201 defines “harmful to minors” as: “that quality of any description or representation, in whatsoever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it:
  - (i) taken as a whole, appeals to the prurient interest in sex of minors;<sup>2</sup>
  - (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
  - (iii) taken as a whole, does not have serious value for minors.”

Generally, then, an instructional material that meets this definition (unless an exception discussed below applies) is a sensitive material as defined in H.B. 374.

2. Second, Section 76-10-1203 describes a material or performance as pornographic if:
  - “(a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex;
  - (b) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and
  - (c) Taken as a whole it does not have serious literary, artistic, political or scientific value.”

This definition does not require an analysis of serious value for minors, or prurient interest in sex of minors. Instead, this statute is based on the U.S. Supreme Court’s standard for determining obscenity generally – including for an adult audience. Essentially, Utah Code defines pornography as anything that is obscene. In the context of H.B. 374, generally any instructional material that meets this definition of pornography is a sensitive material.

3. Finally, Subsection 76-10-1227(1)(a) provides that a “description or depiction of illicit sex or sexual immorality” means:
  - “(i) human genitals in a state of sexual stimulation or arousal;

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<sup>2</sup> “Minor” in this part is defined as a person younger than 18 years old. Subsection 76-10-1201(8).



- (ii) acts of human masturbation, sexual intercourse, or sodomy;
- (iii) fondling or other erotic touching of human genitals or pubic region; or
- (iv) fondling or other erotic touching of the human buttock or female breast.” Subsection 76-10-1227(1)(a).

In addition, Subsection 76-10-1227(1)(b) defines “nude or partially denuded figure” as:

“(i) less than completely and opaquely covering human:

- (A) genitals;
- (B) pubic regions;
- (C) buttock; and
- (D) female breast below a point immediately above the top of the areola; and

(ii) human male genitals in a discernibly turgid state, even if completely and opaquely covered.”

These definitions do not apply to “any material which, when taken as a whole, has serious value for minors.” Subsection 76-10-1227(2)(a). “Serious value for minors” here means “having serious literary, artistic, political, or scientific value for minors, taking into consideration the ages of all minors who could be exposed to the material.” Subsection 76-10-1227(2)(b). However, by definition, anything described in Subsection 76-10-1227(1)(a)(i), (ii), or (iii) (above) has no serious value for minors, according to Subsection 76-10-1227(2)(c).

In short, a description or depiction of: human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse or sodomy; or fondling or other erotic touching of human genitals or pubic region, meet the definition described in this section. Therefore, generally speaking, an instructional material (as defined in the bill, including library materials) that includes such a description or depiction is a sensitive material under H.B. 374.

Generally, an instructional material that has a description or depiction of fondling or other erotic touching of the human buttock or female breast, or a nude or partially denuded figure, may meet the definition, if it does not have serious value for minors.

### **c. Exceptions**

H.B. 374 excludes from the definition of “sensitive materials” certain instructional materials. Those materials are any instructional material that an LEA selects for health education under Section 53G-10-402; materials for medical courses; materials for family and consumer sciences courses; or materials for another course the state board exempts in state board rule.

Therefore, even if an instructional material meets the definition of sensitive material as described above, if it is an instructional material used for one of the exempted courses, it is not a sensitive material pursuant to the express provisions of H.B. 374.

### **d. Sensitive Materials in Schools**

H.B. 374 prohibits sensitive materials in the school setting. “School setting” means in the classroom, school library, or on school property, and includes activities required or sponsored by



an LEA, such as an assembly or guest lecture. The bill provides that a school may not “adopt, use, distribute, provide a student access to, or maintain in the school setting, sensitive materials; or . . . permit a speaker or presenter in the school setting to display or distribute sensitive materials.”

H.B. 374 requires an LEA to include parents who reflect the members of the school’s community when determining whether an instructional material is a sensitive material.

#### **e. Guidance and Reporting**

Finally, H.B. 374 requires the state board to consult with the AG’s Office to provide guidance and training to public schools for identifying instructional materials that meet the definition of sensitive materials.

The state board is also required to report to the Education Interim Committee and the Government Operations Interim Committee, at or before the November 2022 meeting, about implementation and compliance with the provisions in the bill. The report should include a report on any policy the state board or an LEA adopts to implement or comply with the provisions in the bill; any rule the state board adopts to implement or comply with H.B. 374’s provisions; and any complaints an LEA or the state board receives regarding a violation of the provisions. The report should also include action taken in response to complaints. And, if an LEA retains a material about which there is a complaint, the report should include the LEA’s rationale for retaining the instructional material.

## **II. A.G.’s Guidance**

As outlined above, the state board is required, in consultation with the AG’s Office, to provide guidance and training to schools for identifying instructional materials that are sensitive materials. On May 4, 2022, the state board distributed a guidance from the AG’s Office outlining Utah laws as they apply to school libraries and book challenges (AG’s guidance). Presumably this guidance was distributed to comply with H.B. 374’s requirement to provide guidance on identifying sensitive materials.

After reviewing the AG’s guidance, we identified several areas that are incorrect or incomplete. We have outlined those areas below.

#### **a. H.B. 374 Provides a New Standard**

First, the AG’s guidance states that H.B. 374 does not change the standard for school library books. H.B. 374 does change the standard for library books. In addition, H.B. 374 provides a specific standard for certain curricular and other instructional materials. H.B. 374 defines “sensitive materials” as “an instructional material that is *pornographic or indecent material* as that term is defined in Section 76-10-1235.” (emphasis added).

As discussed above, “pornographic or indecent material” is defined in Section 76-10-1235 as any material: “(i) defined as harmful to minors in Section 76-10-1201; (ii) described as pornographic in Section 76-10-1203; or (iii) described in Section 76-10-1227.” The AG’s guidance does not address the reference to materials “described in 76-10-1227.” This section changes the standard in at least two ways.



First, this section does not apply to materials when taken as a whole have “serious value for minors.” Subsection 76-10-1227(2)(a). Identifying “serious value for minors” requires taking into consideration “the ages of all minors who could be exposed to the material.” Subsection 76-10-1227(2)(b). This is a different, additional standard that LEAs would need to consider in identifying sensitive materials in schools that the AG’s guidance does not discuss.

Second, as discussed in the summary of H.B. 374 above, according to Subsection (2)(c), a description or depiction of “(i) human genitals in a state of sexual stimulation or arousal; (ii) acts of human masturbation, sexual intercourse, or sodomy; [or] (iii) fondling or other erotic touching of human genitals or pubic region” *never* has serious value for minors. These materials have no serious value by definition, without needing to apply the standards described in the AG’s guidance, or taking the work as a whole, or considering the ages of all minors exposed to the materials.

#### **b. The AG’s Guidance Overstates the Holding in *Pico***

Second, the AG’s guidance overstates the holding in *Island Trees v. Pico*. That opinion was a plurality decision, with a majority of Justices agreeing in the outcome, but disagreeing as to the reasoning. Therefore, it is unclear whether a majority of the current Supreme Court would regard *Pico* as precedential, or the reasoning binding or even persuasive. As we advised during the session, we do not think the Supreme Court has articulated a clear rule about the standard for when removal of a book from a school library would violate a student’s First Amendment rights.

#### **c. Incomplete Guidance on Identifying Sensitive Materials**

Finally, H.B. 374 requires the State Board of Education to coordinate with the AG’s office to provide guidance to LEAs on identifying materials that meet the definition of sensitive materials. We don’t know if this guidance was intended to fulfill this requirement, but if it is, it seems incomplete.

Although H.B. 374 broadly defines instructional materials in the school setting (including, for example, materials used in an assembly or as a textbook), the AG’s guidance only briefly addresses instructional materials other than library materials, by saying that library books are given wider protection under the First Amendment. This statement is supported by a quote from and citation to *Pico*, which, as explained above, was a plurality opinion.<sup>3</sup> Nevertheless, lower courts since *Pico* – and *Hazelwood School District v. Kuhlmeier* – have trended toward more deference toward school board decisions in the courts. Still, while we may see trends in courts’ rulings on school boards’ decisions related to book removal, the Supreme Court has not announced a bright line rule for when such a removal will violate a student’s First Amendment rights.

The AG’s guidance provides no analysis of H.B. 374’s impact on instructional materials in the school setting other than library materials. As described above, H.B. 374 defines “sensitive

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<sup>3</sup> Note that the Supreme Court did distinguish student speech in a school-sponsored newspaper, which the Court characterized as “part of the school curriculum” saying, “[e]ducators are entitled to exercise greater control over this . . . form of student expression[.]” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). The Court held “that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* At 273.



materials” as well as “school setting,” and prohibits a school from adopting, distributing, providing a student access to, or maintaining sensitive materials in the school setting, or permitting a speaker or presenter to display or distribute sensitive materials. H.B. 374 requires the state board, in consultation with the AG’s office, to provide guidance to schools on identifying sensitive materials. In this respect, the AG’s guidance is incomplete because it does not provide guidance to schools for identifying other instructional materials that may fall under the definition of “sensitive materials,” nor does the AG’s guidance discuss curricular materials that are exempted from H.B. 374’s definition of “sensitive materials.”

If you have any additional questions, or need any other assistance, please let us know.

Thank you,

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