

# MINORS' FIRST AMENDMENT RIGHTS: CIPA & School Libraries §

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## Author's disclaimer:

This article does not constitute a legal opinion. Readers should consult their own legal counsel for legal advice regarding their particular situation.

The United States Supreme Court has long recognized that minors enjoy some degree of First Amendment protection. Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (*Tinker v. Des Moines Independent Community School District* 1969). As one appellate court (*American Amusement Machine Association v. Kendrick* 2001) posited so aptly, “[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.” Recognizing that access to information is fundamentally necessary as a corollary to the right to speak, courts have held that minors’ First Amendment rights include the right to receive information and extend beyond the classroom.

For example, in *Board of Education v. Pico* (1982), the United States Supreme Court held that a school board’s attempt to remove controversial titles such as *Slaughterhouse-Five* and *Soul on Ice* from the school library was unconstitutional. The Court stated that “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom” (853, 867). The Court emphasized that “students too are beneficiaries of this principle”

(868). Through the years, the Supreme Court has recognized that “[s]peech...cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them” (*Erznoznik v. City of Jacksonville* 1975). Recognizing, however, that minors’ exercise of First Amendment rights must be applied

“in light of the special characteristics of the school environment” (*Pico* 1982, 868, quoting *Tinker* 1969, 506), the Court has acknowledged that the rights of minors are not equal to the rights of adults.

The Court thus has permitted school boards to restrict speech or access to information for minors in two circumstances. First, school boards may restrict materials if they are motivated to do so because the materials are “educationally unsuitable” or “pervasively vulgar.” School boards may not, however, censor materials if the removal is politically motivated and the restriction is based on disagreement with the ideas contained in the material.

Second, school boards may restrict materials that are obscene, harmful to minors, or child pornography. Whether material is obscene, harmful to minors, or child pornography generally is defined by state or local law. Definitions do vary from state to state. Moreover, a determination of whether material is obscene or harmful to minors is governed by community standards that may differ from state to state and town to town. Material deemed obscene or harmful to minors by a jury in one town might not necessarily be found to fit the definition of

unprotected speech in another town. The jury must determine whether the material would be harmful to older minors, not all minors. For example, material cannot be deemed “harmful to minors” unless it fits the definition of obscenity for a seventeen-year-old. Material also cannot be deemed “harmful to minors” if it has any serious literary, artistic, political, or scientific value when evaluated as a whole.

## Curriculum vs. Voluntary Inquiry

Courts have also distinguished between the discretion accorded school boards in the realm of curriculum decisions as opposed to extra-curricular activities. School boards have broad discretion with respect to curriculum decisions (*Hazelwood v. Kuhlmeier* 1988). For example, in *Virgil v. School Board of Columbia County* (1989), the court of appeals affirmed a school board’s decision to remove selected portions of *The Miller’s Tale* and *Lysistrata* from a humanities course curriculum, stating that “[i]n matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity” (1517, 1520). In upholding the removal of material, the court emphasized that the disputed materials remained in the school library, which unlike a course curriculum, was a “repository for ‘voluntary inquiry’” (1523, n.8 and 1525).

## The Internet at School

Internet access has posed the greatest challenge for educators and school libraries as they attempt to balance minors’ First Amendment rights against concerns over the breadth of material that is posted and accessible online. There certainly are websites that would fit the definitions of obscenity, child pornography,

and harmful to minors. There plainly is material on the Web that is educationally unsuitable and pervasively vulgar. At the same time, however, the Internet has become a powerful tool for educators and students in extending their reach for knowledge. The Web offers students a vast array of educational, cultural, and challenging learning experiences. Lawmakers, school boards, and school administrators must be cautious in limiting access to this powerful tool. Statutory restrictions on Internet access such as the Children's Internet Protection Act (CIPA) of 2001 and similar state provisions have limited access to material far beyond the categories the Supreme Court has held can be restricted. Filters restrict access to vast amounts of material that would be deemed "educationally suitable" for minors and could not be categorized as pervasively vulgar, obscene, harmful to minors, or child pornography.

CIPA provides that schools applying for certain funds for Internet access available in accordance with provisions of the Communications Act of 1996 (E-rate discounts) or the Elementary and Secondary Education Act of 1965 (ESEA) may not receive such funds unless the schools' administrators certify that they have in place a policy of Internet safety that includes the use of technology protection measures, such as filtering or blocking software, that protect against access to certain visual depictions available on the Web. Specifically, the school district seeking funds must certify that it has filtering or blocking software in place that will block access for minors to visual depictions that are obscene, child pornography, or harmful to minors. The school district must also certify that it has filtering or blocking software in place that will block access for

adults to visual depictions that are obscene or child pornography. The technology protection measure must be placed on all computers, including those computers used by staff. The statute, codified at 20 U.S.C. § 9134(f)(3) and 47 U.S.C. § 254(h)(6)(D), provides that an administrator, supervisor, or other authorized person may disable the filtering software for adults, but only to enable access for "bona fide research or other lawful purposes" (CIPA 2001). Federal law thus mandates use of a filter only if funds are accepted under these statutes. The CIPA statute does not mandate use of a particular filter. However, no existing filters can precisely block only visual depictions of child pornography, obscenity, and material harmful to minors. Thus, any filter used in a school necessarily will both over-block and under-block.

CIPA was challenged in two lawsuits filed in the Eastern District of Pennsylvania. Both lawsuits alleged that application of CIPA in the context of the public library violated the First Amendment. On May 31, 2002, a three-judge panel held unanimously that the statute was unconstitutional. The court's holding was premised on the finding that "[b]ecause of the inherent limitations in filtering technology, public libraries can never comply with CIPA without blocking access to a substantial amount of speech that is both constitutionally protected and fails to meet

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even the filtering companies’ own blocking criteria” (*American Library Association v. United States* 2002). The court also concluded that the disabling provision did not cure the unconstitutionality of the statute because requiring a patron to request access to constitutionally protected speech was stigmatizing and significantly burdened the patron’s First Amendment rights.

In June 2003 the Supreme Court reversed the holding of the district court in a plurality opinion, with no majority opinion agreeing on all aspects of the reasoning in support of the reversal. The reversal was premised on the fact that six of the nine justices of the Supreme Court accepted the Solicitor General’s assurance during oral argument that adults could ask that filtering be disabled without specifying any reason for the request. Thus, in the plurality opinion, Chief Justice Rehnquist (joined by Justices O’Connor, Scalia, and Thomas) concluded that the statute was not unconstitutional because “[t]he Solicitor General confirmed that a ‘librarian can, in response to a request from a patron, unblock the filtering mechanism altogether’...” and further explained that a patron would not “have to explain... why he was asking a site to be unblocked for the filtering to be disabled.” The Court’s plurality opinion contemplated that “[w]hen a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter” (*United States v. American Library Association* 2003, 194, 209). The case left open the question of whether denying access to a particular person in a particular case would be unconstitutional. That challenge currently is pending in a case in the state of Washington.



A challenge to the application of filtering software to adults in public libraries is the issue in the case of *Bradburn v. North Central Regional Library District*, still pending in the federal court. In November 2006 the American Civil Liberties Union of Washington filed suit against the North Central Regional Library District on behalf of three library patrons and the Second Amendment Foundation. The suit alleges that the library violated the plaintiffs' First Amendment rights under both the federal and state constitutions by refusing to disable Internet filters at the request of adult patrons. The case was removed from the federal court to the Washington State Supreme Court for an initial determination of whether the library's refusal to disable filters (with no questions asked as to why the adult is requesting unfiltered access) violates the Washington State Constitution (*Bradburn v. North Central Regional Library District*, 82200-0). Although it does not specifically address the issue of minors' rights, the Washington case is an important test of the reach of CIPA and the obligations imposed on libraries to disable filters. In May 2010 the Washington Supreme Court held that the Washington State Constitution does not prohibit filtering. The case will now return to the federal district court for a determination of whether the particular library filtering policy in place at North Central Regional Library violates the First Amendment of the United States Constitution.

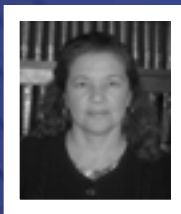
To date, no challenge to the application of CIPA to schools, school libraries, or minors in any library setting has been made. The United States Supreme Court appeared to contemplate, however, that minors could ask for sites to be unblocked if they did not fit within the definitions of

unprotected speech, i.e., sites that are obscene, child pornography, or material harmful to minors. Given that minors have explicit First Amendment rights, it would be prudent for schools—and particularly school libraries—to have a system in place to unblock sites that do not constitute obscenity, child pornography, or material harmful to minors.

Although there has been no challenge to date of a school library filtering system, schools must remain cognizant of minors' rights to receive information protected by the First Amendment. No filter can block accurately. Even with a filtering system in place, minors will be able to access material that is obscene, child pornography, or harmful to minors. Conversely, minors also will be blocked from accessing important educational and research materials when filters are used. Internet use policies should be drafted to balance these interests. Protecting minors' First Amendment rights and fulfilling the educational mission of promoting the greatest access to educational and research materials counsels for a system that allows school librarians and teachers to unblock sites with constitutionally protected material.

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