UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PEN AMERICAN CENTER, INC., et al.,

Plaintiffs,

v. **Case No. 3:23cv10385-TKW-ZCB**

ESCAMBIA COUNTY SCHOOL BOARD,

Defendant.
_____/

ORDER STAYING CASE PENDING APPEAL

Plaintiffs filed this suit in May 2023, alleging that Defendant's removal of certain books from its school libraries violated the First Amendment. There are nearly 130 books still at issue in the case—nine "Removed Books" and 119 "Restricted Books." Plaintiffs did not seek a preliminary injunction or any other sort of expedited relief,[1] and at this point, some of the books have been unavailable in the school libraries for more than two years.

The evidence pertaining to each category of books is slightly different because Defendant formally voted to remove the Removed Books whereas the Restricted Books were effectively removed by operation of state law pending resolution of the

[1] Plaintiffs filed a motion for preliminary injunction in July 2024, but they withdrew the motion the following month. *See* Docs. 87, 111

citizen challenges to those books.[2] However, the ultimate legal issues are the same for each category of books—as are the threshold issues of Plaintiffs' standing and the applicability (or not) of the "government speech doctrine" to school library book removal decisions.

Discovery is complete, except for the depositions of Defendant's board members. Defendant appealed the order authorizing those depositions,[3] so the depositions cannot proceed until that appeal is resolved. Once the depositions are conducted (or not), the case will be ripe for resolution by summary judgment or, more likely, a trial.[4]

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[2] The chart submitted by Defendant with its reply (Doc. 168-1) represents that all of the Restricted Books were challenged under §1006.28(2)(a)2.b.(I) or (II), Fla Stat., and that they were also found by library staff to include content prohibited by those sub-sub-subparagraphs in the staff's review of all of the school libraries' books under §1006.28(2)(d). That does not appear to be accurate for some of the books, *see, e.g.,* Doc. 169-2 at 166-67 ("too violent"), 287 ("anti-cop agenda"), but contrary to Plaintiffs' argument in its sur-reply, the fact that a challenge form did not use the specific statutory language in §1006.28(2)(a)2.b.(I) or (II) does not necessarily mean that the book was not challenged on one of those grounds because many of the forms included excerpts from the books from which it can reasonably be inferred that the challenge was based on one of those grounds. That said, notwithstanding the chart, the Court remains skeptical that *all* of the Restricted Books were actually challenged under §1006.28(2)(a)2.b.(I) or (II), which means that at least some of those books should have remained on the library shelves pending resolution of the challenge as permitted by §1006.28(2)(a)2 and required Defendant's policy governing book challenges. How, if at all, that impacts the disposition of this case remains to be seen.

[3] 11th Cir. Case No. 24-13896.

[4] There is also a pending motion for discovery sanctions (Doc. 159), but it makes sense to defer consideration of that motion until the appeal is resolved because the motion pertains to the actions of one of the board members and that board member's deposition may better inform the resolution of the motion. Moreover, even if the board member's deposition ultimately does not happen, there is no harm to deferring consideration of that motion until after the appeal is resolved and the case is ripe for summary judgment briefing.

After the appeal was filed, Defendant asked the Court to stay this case pending disposition of the appeal. *See* Doc. 158. Plaintiffs agreed to a stay of the claims related to the Removed Books, but they objected to a stay of the claims related to the Restricted Books. *See* Doc. 165. The Court directed the parties to brief several additional issues, which they did. *See* Docs. 168, 169. Thus, Defendant's motion to stay is now ripe for a ruling. No hearing is needed to rule on the motion.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Ortega Trujillo v. Conover & Co. Commc'ns*, 221 F.3d 1262, 1264 (11th Cir. 2000). A district court "has broad discretion to stay proceedings as an incident to its power to control its own docket," *Clinton v. Jones*, 520 U.S. 681, 706 (1997), and it can stay a case to "promote judicial economy, reduce confusion and prejudice, and prevent possibly inconsistent resolutions," *Lopez v. Miami-Dade Cnty.*, 145 F. Supp. 3d 1206, 1208 (S.D. Fla. 2015).

Here, after careful consideration of the parties' briefs and the case file, the Court finds that a stay of the entire case pending disposition of the appeal is warranted to avoid piecemeal litigation and the time and expense associated with multiple rounds of summary judgment briefing and, possibly, multiple trials. A stay is also warranted to avoid the possibility that any of the Court's rulings on the

threshold issues that would likely be raised in the summary judgment briefing related to the Restricted Books (e.g., standing, government speech) could alter the status of the case before the Eleventh Circuit or otherwise affect the issues before that court.

In balancing the equities of a stay, the Court considered whether to condition the stay on a requirement that Defendant more expeditiously complete its review of the challenges to the Restricted Books because the "expected" completion date identified by Defendant it its reply (May 2026) is patently unreasonable given how long the challenges have already been pending.[5] However, based on the procedural posture and pleadings in this case, the Court is not convinced that it has the authority to mandate a specific timeframe for resolving the challenges as a condition of the stay pending appeal.

[5] The May 2026 date was based on an estimate that the district review committees (DRC) can only review 10 books per month, *see* Doc. 168 at 13, but the Court sees no reason why that number cannot be considerably higher. For some of the books, the resolution of the challenge is likely to be clear-cut if the challenge forms accurately reflect what is in the books, *see*, *e.g.*, Doc. 169-2 at 58-61, 69-71, 121, 133-35, 146-52, 312-14, and the goal should be to complete the review of all the Restricted Books by the time the appeal is resolved so those books can either be returned to the shelves or their removal can be litigated along with the Removed Books after the appeal is resolved. Scheduling or other logistical issues with the DRCs are not an excuse for not resolving the book challenges sooner because state law does not require the use of review committees or dictate their composition (other than stating that the committees must include parents of students who will have access to the books) and there is no reason why Defendant could not simplify and expedite the process if it wanted to do so. Moreover, it is unclear why the challenges to the Restricted Books could not simply be voted on by Defendant based on a recommendation from library staff based on the results of their review of the books under §1006.28(2)(d) because use of a DRC is not even required under Defendant's book-challenge policy. *See* Escambia Cnty. Pol. 2522 ("Upon receipt of the challenge, the Coordinator of Media Services may appoint a review committee made up of eight (8) individuals.") (emphasis added).

That said, the Court unquestionably has authority to require status reports, and based on Defendant's representation that it plans to review the book challenges while the appeal is pending, the Court will require Defendant to provide regular reports on the status of those reviews. This reporting requirement will, hopefully, incentivize Defendant to do what it already should have done and ensure that the book challenges do not languish while the appeal is pending—as they did when Defendant decided to expend time and resources reviewing every book in its school libraries rather than resolving the pending book challenges.

The Court recognizes that the stay will delay the disposition of this case, but the state administrative process remains available to Plaintiffs if their goal is to get some or all of the Removed and Restricted Books back on the school library shelves sooner rather than later.[6] The state administrative process is built for expeditious dispute resolution, *see* §§120.569, 120.57, and the Court continues to believe that an administrative proceeding is a more appropriate and efficient way to resolve the merits of the removal/restriction decisions than federal litigation—particularly since Plaintiffs do not appear to dispute that Defendant can constitutionally remove/restrict books on the grounds listed in §1006.28(2)(a)2.b.(I)-(IV) such that

[6] The Court recognizes that Plaintiffs were not required to challenge the removal/restriction decisions as a prerequisite for pursuing their constitutional claims in this Court, *see Patsy v. Bd. or Regents of State of Fla.*, 457 U.S. 496 (1982), but the Court is not aware of anything that prohibited them from doing so before they filed suit—or that would prohibit them from doing so now.

the ultimate question in this case (or an administrative action) is whether the challenged books were properly removed/restricted on one of those grounds. Thus, the availability of the state administrative process mitigates the harm that Plaintiffs might suffer because of this case being stayed pending disposition of the appeal.

The Court did not overlook the position taken by Defendant that its removal/restriction decisions are not "agency action" subject to review under the state administrative process because those decisions flow from its constitutional authority to "operate, control and supervise" its schools. However, that position is meritless because (1) the "legal authority" cited by Defendant for its book-challenge policy is comprised of statutes and rules, not constitutional provisions; (2) it is undisputed that the books at issue in this case were removed pursuant to specific statutory authority and procedures in §1006.28(2)(a) and (2)(d); and (3) taken to its logical end, Defendant's argument would effectively exempt all actions taken by a school board from review under the state administrative process—which is contrary to well-settled Florida law.[7] Moreover, Defendant's heavy reliance on *Decker v.*

[7] The Court did not overlook that a state appellate judge has suggested that certain rules adopted by school boards are not subject to administrative review (a point with which this Court does not necessarily disagree), *see Escambia Cnty. Sch. Bd. v. Warren*, 337 So. 3d 496 (Fla. 1st DCA 2022) (Tanenbaum, J., concurring in result), but that has no bearing on the question of whether discrete action taken by a school board pursuant to a specific statutory directive can be challenged in the state administrative process because it meets the definition of "agency action" in §120.52(2), Fla. Stat. Moreover, although the Court recognizes that agency *inaction* generally cannot be challenged in the administrative process, *see J.H. Williams Oil Co. v. Dep't of Env't Prot.*, 707 So. 2d 904 (Fla. 2d DCA 1998), that principle does not apply here because Defendant has taken *action* with respect to the Restricted Books by removing them from the school library

Univ. of West Fla., 85 So. 3d 571 (Fla. 1st DCA 2012), is particularly inapposite because that case involved a state university (not a school board) and, unlike this case, there was no statute governing the specific agency action at issue in that case.

Accordingly, for the reasons stated above, it is **ORDERED** that:

1. Defendant's motion to stay (Doc. 158) is **GRANTED**, and this case is **STAYED** pending disposition of the appeal.

2. Defendant shall file a status report 30 days from the date of this Order (and every 30 days thereafter) listing the Restricted Books that have been reviewed since this Order and the previous report; identifying the result of that review; and listing the books that are scheduled for review before the due date of the next report.

3. The parties shall file a joint report on the status of the appeal 120 days from the date of this Order and every 60 days thereafter.

4. The motion for discovery sanctions (Doc. 159) is referred to the magistrate judge for resolution after the appeal is resolved.

5. The parties shall continue to try to resolve this case and, at a minimum, work in good faith to narrow the number of books in dispute by identifying (a) books that can at least be returned to the school library shelves pending resolution of the challenge in accordance Defendant's book-challenge policy and (b) books that

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shelves pending disposition of the book challenges. An administrative hearing could resolve (at least) whether that removal pending resolution of the challenge was consistent with state law and Defendant's policy.

plainly have content prohibited by §1006.28(2)(a)2.b.(I) or (II) and that are inappropriate for school libraries at any grade level.

DONE and ORDERED this 13th day of January, 2025.

T. KENT WETHERELL, II
UNITED STATES DISTRICT JUDGE