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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF ALAMEDA

KATHLEEN R.,)	CASE NO.: V-015266-4
)	
Plaintiff,)	MEMORANDUM OF POINTS
)	AND AUTHORITIES IN SUPPORT
v.)	OF DEMURRER OF THE CITY
)	OF LIVERMORE TO FIRST AMENDED
CITY OF LIVERMORE, et al.)	COMPLAINT FOR INJUNCTIVE RELIEF
)	
Defendants.)	Date: January 13, 1999
)	Time: 2:00 p.m.
_____)	Dept.: 50

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I. INTRODUCTION

The original Complaint filed by Kathleen R. ("Plaintiff") requested injunctive relief against the City of Livermore ("City") ". . . preventing it or its agents, servants, and employees from spending any public funds on the acquisition, use, and/or maintenance of any computer system connected to the Internet or World Wide Web for which it allows any person to access, display, and/or print obscene material or for which it allows minors access, display, and/or print sexual material harmful to minors." (Complaint, pp. 5-6, ¶¶ 2-3.) The Complaint also requested declaratory relief ". . . stating that the City of Livermore is legally liable for all future damage to plaintiff's children caused by children accessing, acquiring, displaying, and/or printing sexual and other material harmful to minors on any library computer connected to the Internet or World Wide Web." (*Id.* at p.6, ¶¶ 2-3.) These requests were based on causes of action alleging that the City is wasting public funds, creating a public nuisance and fostering potential damages claims by allowing minors to have unlimited access to the Internet.

The City filed a Demurrer to the original Complaint because it failed to state facts sufficient to state a cause of action. (Code of Civ. Proc., § 430.10, subd. (e).) On October 21, 1998, the Court sustained the City's Demurrer and gave Plaintiff fourteen days leave to amend the Complaint. In doing so, the Court held that the causes of action contained in the Complaint were defective because ". . . the federal Communications Decency Act prohibits the imposition of liability on the City library for providing access to material that is transmitted over the Internet by others. (See 47 U.S.C. § 230, subsection (c)(1).)"

On November 3, 1998, Plaintiff filed a First Amended Complaint for Injunctive Relief ("First Amended Complaint"). The First Amended Complaint alleges a cause of action under 42 U.S.C. section 1983 for a violation of the Plaintiff's Fourteenth Amendment rights to substantive due process. (First Amended Complaint, p. 3, ¶ 48.) The First Amended Complaint, like the original Complaint, does not state facts sufficient to state a cause of action. (Code of Civ. Proc., § 430.10, subd. (e).) On this basis, the City has filed a Demurrer to the First Amended Complaint.

The fundamental problem with Plaintiff's substantive due process argument is that the Fourteenth Amendment only protects against arbitrary action by the state. In this case, the crux of Plaintiff's argument is that the City took no action to protect her son against offensive material transmitted over the Internet. The City has no constitutional duty to protect Plaintiff's son from the dangers of the Internet. Furthermore, the City has not taken any action either in a legislative or executive capacity that can even remotely be characterized as arbitrary in the constitutional sense so as to

implicate substantive due process concerns. The First Amended Complaint should be dismissed without leave to amend.

II. ARGUMENT

The Fourth Cause of Action Under 42 U.S.C. section 1983 for a Violation of the Plaintiff's Fourteenth Amendment Rights to Substantive Due Process Does Not State Facts Sufficient to State a Cause of Action. (Code of Civ. Proc., § 430.10, subd. (e).)

Plaintiff's fourth cause of action, contained in her First Amended Complaint, is based on 42 U.S.C. section 1983 and alleges that the City has violated her son's Fourteenth Amendment right to substantive due process. (First Amended Complaint, p. 3, ¶ 48.)

Section 1983 provides in relevant part that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

(42 U.S.C. § 1983.)

To state a cause of action under section 1983, the conduct complained of must have: (1) been committed by a person acting under color of state law;¹ and (2) deprived Plaintiff of a constitutional right. (*Balistreri v. Pacifica Police Department* (9th Cir. 1988) 901 F.2d 696, 699.)

Plaintiff fails to show that the City deprived her or her son of a constitutional right. The City has no constitutional duty to protect Plaintiff's son and has not taken any action that can be characterized as arbitrary in the constitutional sense.

A. The City Does Not Have a Constitutional Duty to Protect Plaintiff's Son From Offensive Materials That are Transmitted Over the Internet.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." (U.S. Const., amdt. 14, § 1.)

In *DeShaney v. Winnebago County Department of Social Services* (1989) 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249, the United States Supreme Court squarely addressed the purpose and limitations of the Due Process Clause. In *DeShaney*, the county received numerous complaints that a father routinely beat his son. Although the county took some protective measures, it never tried to remove the child from the father's custody. Eventually, the father administered a beating that left the child permanently brain damaged and profoundly retarded. In upholding judgment in favor of the county, the Supreme Court stated that:

. . . [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression,' [citations]. Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political process.

(*Id.* at 109 S.Ct. p. 1003.)

Although the Supreme Court in *DeShaney* rejected liability in constitutional tort when the governmental defendant has no connection to the plaintiff other than its ability to render aid, it did recognize "certain limited circumstances" where the Constitution ". . . imposes upon the State affirmative duties of care and protection with respect to particular individuals." (*Id.* at p. 1004-1005.)

First the Court recognized that ". . . when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being. [Citation and fn.]" (*Id.* at p. 1005.) The affirmative duty to protect in the custodial setting ". . . arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. [Citation and fn.]" (*Id.* at p. 1006.) Second, *DeShaney* suggests that if the state contributes in some way to a person's peril, or if its undertakings worsen the plaintiff's position, a constitutional duty to act may arise:

While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

(*Id.* at p. 1006.)

These two duties have respectively come to be known as the "special relationship" duty and the "danger created duty." Plaintiff has failed to allege facts sufficient to trigger either of these duties.

1. The City Does Not Have a Duty Based on a "Special Relationship."

A duty based on a "special relationship" arises where the plaintiff is truly rendered helpless by his or her relation with the state, as in the case of custody or involuntary hospitalization. (*L.W. v. Grubbs* (9th Cir. 1992) 974 F.2d 119.) Where the state does not render the plaintiff helpless, no "special relationship" exists. For example, courts have refused to find that the state enters into a "special relationship" with students because it requires them to attend school. (See *J.O. v. Alton Community Unit School District 11* (7th Cir. 1990) 909 F.2d 267, 272; and *Graham v. Independent School District No. 1-89* (10th Cir. 1994) 22 F.3d 991.) Similarly, a "special relationship" does not arise where a person is required to appear in court to participate in various legal proceedings. (See *Dorris v. County of Washoe* (Nev. 1995) 885 F.Supp. 1383, 1385 ["The state may have required Dorris to appear in court, but it did not thereby assume responsibility for her 'basic human needs' or 'entire personal' life; she retained 'substantial freedom to act.' [Citation.]".])

Plaintiff does not, and cannot, allege that by entering the library her son was rendered helpless or that he was in effect placed in custody by City librarians or the mesmerizing effect of the City's Internet terminals. The City does not have a duty based on a "special relationship."

2. The City Does Not Have a Duty Based on the Creation of a Danger.

The Ninth Circuit has addressed the elements of a "danger created duty" in *Wood v. Ostrander* (9th Cir. 1989) 879 F.2d 583 and *L.W. v. Grubbs* (9th Cir. 1992) 974 F.2d 119. In both cases, the Court made clear that, in order to base a claim on a "danger created duty," there must be direct affirmative conduct on the part of the state in placing the plaintiff in danger. Here, the Plaintiff has not claimed, nor could she ever claim, that the City took any affirmative direct action to place her son in danger. If any direct action was taken, it was taken solely by Plaintiff's son when he took the steps necessary to access pornography on the Internet.²

In *Wood v. Ostrander, supra*, 879 F.2d 583, a state trooper stopped the car in which the plaintiff was riding, arrested and removed the driver, impounded the car, and left the plaintiff stranded in a high-crime area at 2:30 a.m. The plaintiff was subsequently raped. The court held that the direct affirmative conduct of the trooper in arresting the driver, impounding his car, and apparently stranding the plaintiff in a high-crime area, distinguished the plaintiff from the general public and triggered a duty of the police to afford her some measure of peace and safety. (*Id.* at p. 590.)

In *L.W. v. Grubbs, supra*, 974 F.2d 119, the State of Oregon hired the plaintiff, a registered nurse, to work in the medical clinic of a medium security prison. Although the state led her to believe that she would not be required to work alone with violent sex offenders, the State selected a known violent sex offender to work alone with the plaintiff in the clinic. In fact, according to his files, the inmate was considered very likely to commit a violent crime if placed alone with a female. The inmate assaulted, battered, kidnaped and raped the plaintiff. The court held that the actions of the state in knowingly assigning the inmate to work with the plaintiff, despite its knowledge of his violent proclivities, and enhancing her vulnerability to attack by misrepresenting to her the risks of attending her work supported section 1983 liability. (*Id.* at pp. 121-122.)

In contrast to *Wood v. Ostrander* and *L.W. v. Grubbs*, here there is no direct state action. In fact, it is the inaction of the City which is the basis of Plaintiff's claim.

Plaintiff cannot argue that, by merely inviting children to its library, the City has taken sufficient action so as to state a cause of action for a violation of substantive due process. (See First Amended Complaint, p. 2, ¶ 40 ["Upon information and belief, plaintiff alleges that the library advertises itself as a place where children are welcome and that the library puts on special programs to entertain and educate children. Upon information and belief, plaintiff further alleges that the library invites, encourages, and entices children to come to the library and use the resources at the library, including the computers."].) This type of argument was flatly rejected in *Carlton v. Cleburne County* (8th Cir. 1996) 93 F.3d 505.

The plaintiffs in *Carlton* were sightseers who were injured after a county bridge collapsed. The plaintiffs argued that, by offering the bridge as a tourist location, the county affirmatively placed them in danger, and thereby created a constitutional duty. The court rejected this argument:

Appellants assert the County appellees affirmatively placed them in a position of danger they otherwise would not have faced when the appellees, with actual knowledge of the deteriorating condition of the bridge, promoted the bridge as a tourist attraction, had the bridge placed on the National Register of Historic Places, performed cosmetic work on the bridge in order to maintain an attractive appearance, established a park, built a parking lot, removed a warning sign, and promoted the bridge through publications. According to appellants, the County appellees' conduct create the danger by impliedly assuring them of the bridges's safety and encouraging them to be on the bridge, and therefore, the appellees had an affirmative duty to protect against such harm.

Even if we accept as true that the County owned the bridge and knew the bridge was deteriorating but refused to provide any maintenance or repair, we must conclude that no constitutional violation occurred. Mere knowledge of danger to the individual does not create an affirmative duty to protect. [Citation.] Simply offering a location as a tourist attraction is not the type of affirmative government action that creates a duty to protect under *DeShaney*. Appellants allege no affirmative act on the part of government officials directly placing them on the bridge. Nor did the County appellees' actions 'create the danger' causing the bridge to collapse. To the contrary, accepting the appellants' allegations as true, the bridge cables broke because of internal corrosion caused by rust. To impose an affirmative duty to protect the general public from a situation created by the processes of nature would be to impose upon a county an impossible burden. Finally, neither the County appellees' actions nor inaction placed these particular individuals in a position of danger. [Citations.] Instead, any action on the part of the County appellees was directed toward members of the general public. There simply was no constitutional deprivation under § 1983 in this case.

(*Id.* at pp. 508-509.)

As in *Carlton*, if any action was taken by the City in inviting children to its library, it was directed towards the general public. This type of general indirect contact has never been

recognized as "state action" for the purposes of the Fourteenth Amendment. (See *Martinez v. California* (1980) 444 U.S. 277, 286, 62 L.Ed.2d 481, 100 S.Ct. 553, 559 [Girl's death was too remote a consequence of parole officers' action in releasing murderer because ". . . the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger."]; *Aitui v. Grande Properties* (1994) 29 Cal.App.4th 1369, 1383 [City's failure to abate unsafe pool was not directly related to child's drowning and was ". . . not the stuff of which the Supreme Court has declared constitutional protections . . ."]; *Fleming v. State of California* (1995) 34 Cal.App.4th 1378 [Parole officer's release of murderer and failure to arrest him after he left the state was insufficient to constitute a deprivation of substantive due process.]

DeShaney governs this case. The City does not have a constitutional duty to protect Plaintiff's son from his own actions or actions of third-parties who transmit offensive material over the Internet.

B. The City Did Not Arbitrarily Exercise Power in Violation of Substantive Due Process.

Regardless of the existence of a constitutional duty, the allegations advanced by Plaintiff fail to show that the City arbitrarily and oppressively exercised its power in violation of substantive due process.

Due process protection in the substantive sense limits what the government may do in both its legislative and executive capacities. (*County of Sacramento v. Lewis* (1998) ___ U.S. ___, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043.) The criteria used to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue. (*Id.*)

The allegations contained in the First Amended Complaint involve both legislative and executive action. To the extent that the allegations involve the adoption and implementation of the Library's Internet Policy, they relate to legislative action.³ To the extent that the Plaintiff is alleging that the Library ". . . invites, encourages, and entices children to come to the library and use the resources at the library, including the computers" and ". . . has never publicly stated that it has the policy of allowing minors to view obscenity and pornography on its computers . . .", the allegations relate to executive action. (First Amended Complaint, p. 2, ¶¶ 40, 41.) Regardless of the type of action alleged, Plaintiff fails to state a cause of action for a violation of substantive due process.

1. The Library's Internet Policy Does Not Violate Substantive Due Process.

The court does not sit as a super-legislature to determine the wisdom, need, and propriety of legislation that touches on social issues. (See *Griswold v. Connecticut* (1965) 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 519) Therefore, absent the involvement of a fundamental right,⁴ "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied"

(*Nebbia v. New York* (1934) 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940.) Furthermore, "every possible presumption" is in favor of the validity of the legislation. (*Id.* at 291 S.Ct. 516.)

The Library's Internet Policy is reasonably related to the City's legitimate goal of allowing ". . . each individual to have access to constitutionally protected materials . . ." (see Library's Internet Policy discussed in Initial Memorandum, p. 3.), and is presumed to be constitutionally valid.

2. The Executive Actions Alleged By Plaintiff Do Not Violate Substantive Due Process.

The United States Supreme Court has repeatedly emphasized that only the most egregious official conduct can be said to be "arbitrary in the constitutional sense." (*County of Sacramento v. Lewis, supra*, 118 S.Ct. 1708, 1716, citing to *Collins v. Harker Heights* (1992) 503 U.S. 115, 129, 112 S.Ct. 1061, 1071, 117 L.Ed.2d 261.) Therefore, the cognizable level of executive abuse of power is that which "shocks the conscience". (*Id.*)

The type of conduct which "shocks the conscience" was recently discussed in detail by the United States Supreme Court *County of Sacramento v. Lewis, supra*, 118 S.Ct. 1708, which involved substantive due process claims arising from the unintentional killing of an individual by law enforcement officers:

We first put the test this way in *Rochin v. California* [citation], where we found the forced pumping of a suspect's stomach enough to offend due process as conduct 'that shocks the conscience' and violates the 'decencies of civilized conduct.' In the intervening years we have repeatedly adhered to *Rochin's* benchmark. [Citations.] Most recently, in *Collins v. Harker Heights* [citation], we said again that the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. 'While the measure of what is conscience-shocking is no calibrated yard stick, it does, as Judge Friendly put it, 'poin[t] the way.' [Citation and fn.]

It should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability. Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. In *Paul v. Davis* [citation], for example, we explained that the Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States,' and in *Daniels v. Williams* [citation], we reaffirmed the point that '[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.' We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. [Citations.] It is,

on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level. [Citation.]

(*Id.* at pp. 1717-1718.)

The Court in *Lewis* then went on to explain that the level of culpability that shocks the conscience in one environment may not be ". . . so patently egregious in another . . .", and that ". . . substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." (*Id.* at p. 1718.)

The plaintiffs in *Lewis* contended only that the officers had acted in "conscious disregard " of the individual's life. Based on this, the Court held that the plaintiff's claims did not rise to the level of culpability necessary to implicate a substantive due process theory of relief. (*Id.* at p. 1721.) The Court held that ". . . in such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." (*Id.* at pp. 1711-1712.)

In this case, the offensive conduct alleged appears to be the City's failure to adequately warn parents and children of the potential dangers associated with having a policy of unlimited Internet access. This does not rise to the level of conscience-shocking as described in *Lewis*.

In *Collins v. City of Harker Heights, supra*, 112 S.Ct. 1062, the United States Supreme Court held that a failure to warn of potential dangers in the employment setting could not be characterized as arbitrary, or conscience-shocking, in a constitutional sense. The plaintiff in *Collins* was the widow of a city sanitation department employee who died of asphyxia after entering a manhole to unstop a sewer line. In rejecting the plaintiff's claim that the city's "deliberate indifference" to her husband's safety was conscience-shocking governmental action, the court stated the following:

We also are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment. Because the Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society,' [citation], we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law, [citations]. The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship. [Citations.]

Our refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of Government

programs is based on a rational decision making process that takes account of competing social, political, and economic forces. [Citation.] Decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country. The Due Process Clause 'is not a guarantee against incorrect or ill-advised personnel decisions.' [Citation.] Nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm.

(*Id.* at p. 1070.)

As in *Collins*, Plaintiff's allegations cannot be properly characterized as arbitrary, or conscience-shocking, in a constitutional sense. Plaintiff's attempt to simply repackage her defective state statutory causes of action as constitutional violations must fail. Something more than this is needed to support a substantive due process claim.

III. CONCLUSION

The Due Process Clause does not protect Plaintiff and her son against the dangers inherent in living in a free society. There is no constitutional right to a safe Internet. The First Amended Complaint should be dismissed without leave to amend.

Respectfully submitted,

Date: _____

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Attorney for City of Livermore

FOOTNOTES

1 In *Monell v. New York City Department of Social Services* (1978) 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, the United States Supreme Court held that Congress intended municipalities to be included among those persons to whom section 1983 applies. (*Id.*, 98 S.Ct. at p. 2035.) However, the Court made it clear that municipalities may not be held liable "unless action pursuant to official municipal policy of some nature caused a constitutional tort." (*Id.*, 98 S.Ct. at p. 2036.) For the purposes of this Demurrer, the City does not dispute that the facts alleged in the First Amended Complaint establish the existence of a municipal policy. Therefore, this Memorandum focuses only on whether the City deprived the Plaintiff of a constitutional right.

2 As was pointed out by the United States Supreme Court in *Reno v. American Civil Liberties Union* (1997) ___ U.S. ___, 117 S.Ct. 2329, 138 L.Ed.2d 874: Unlike communications received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely

turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.¹

(Fn. omitted.) (Id. at 117 S.Ct.2336.)

3 See Memorandum of Points and Authorities in Support of Demurrer of City of Livermore to Complaint for Injunctive Relief ("Initial Memorandum"), pp. 3-4, 12 ["The Library's Internet Policy, having been adopted by the Library Board within the scope of authority conferred upon it by the Legislature (Ed. Code, § 18919), has the same force within the City as a statute passed by the Legislature has throughout the state. (*Wheeler v. Gregg* (1949) 90 Cal.App.2d 348, 370.)"].

4 The Library's Internet Policy does not implicate any fundamental rights, including Plaintiff's right to raise her son as she chooses (see *Wisconsin v. Yoder* (1972) 406 U.S. 205, 214, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 1526). Plaintiff was not forced to send her son to the Library.