



STUDENT PRESS LAW CENTER

REPORT

SPRING 2016, VOL. XXXVII, NO. 2

SECRET POLICE

Despite a recent push for transparency at private university police departments, agencies still delay the release of records.

REPORT

SPRING 2016, VOL. XXXVII, NO. 2

The Student Press Law Center *Report* (ISSN 0160-3825), published three times each year by the SPLC, summarizes current cases and controversies involving the rights of the student press. The *Report* is researched, written and produced by journalism interns and SPLC staff.

The Student Press Law Center *Report*, Vol. XXXVII, No. 2, Spring 2016, is published by the Student Press Law Center Inc., 1608 Rhode Island Ave. NW, Suite 211, Washington, D.C. 20036, (202) 785-5450. Copyright © 2016 Student Press Law Center. All rights reserved. Yearly subscriptions are \$15. Contributions are tax-deductible.

Cover Photo © XiXinXing via Canva.com



Executive Director: Frank LoMonte

Attorney Advocate: Adam Goldstein

Outreach & Development

Associate: Karin Flom

Publications Fellow: Madeline Will

Journalism Interns: Kaitlin DeWulf, Ryan Tarinelli, Kelcey Caulder, Brooke Bean

CORPORATE BOARD OF DIRECTORS

Organizations for identification purposes only

Mark Stencel

Author | Arlington, Va. (chairman)

Geanne Belton

CUNY—Baruch College | New York, N.Y.

Kevin Corcoran

Lumina Foundation | Indianapolis, Ind.

Jane Eisner

Editor, *The Forward* | New York, N.Y.

Susan Enfield

Highline Public Schools | Burien, Wash.

Marie Groark

Get Schooled, Inc. | Seattle, Wash.

Matthew Pakula

Tyson Foods, Inc. | Chicago, Ill.

Laura Lee Prather

Haynes and Boone LLP | Austin, Texas

Sherrese Smith

Paul Hastings LLP | Washington, D.C.

Ernest Sotomayor

Columbia University | New York, N.Y.

Mary Stapp

Educator | Washington, D.C.

Nabiha Syed

Buzzfeed | New York, N.Y.



A MESSAGE FROM EXECUTIVE DIRECTOR FRANK D. LoMONTE

A handwritten signature of Frank D. LoMonte in black ink.

Momentum swings toward legal protections for student journalists

Progress toward advancing the legal rights of student journalists came to a dispiriting halt in 2007. That's when Oregon enacted comprehensive censorship protection for college and high-school media — the last law of its kind for eight long years.

The drought has many explanations. The economic crash of 2007-08 shortened the horizon for professional news media organizations; instead of investing money and political capital in future generations, their priority became just surviving quarter-to-quarter. Young people were so demonized by sensationalistic media coverage of “cyberbullying” and “sexting” that the only dialogue about students’ freedom became how rapidly schools could take it away.

It's a new day. Scholastic journalism is finally receiving recognition as a resource worth saving, in part because of a recognized national crisis in preparing young people to participate intelligently in the political process. State legislatures increasingly are run by people who've grown up in an information-saturated, always-online world. To them, tearing pages out of newspapers to keep young people from learning about teenage pregnancy is as fashionable as a polyester Bee Gees suit.

Student journalism got its “Hollywood moment” on March 10, when U.S. Sen. Heidi Heitkamp, D-N.D., took to the Senate floor to commend the organizers whose advocacy led to the drought-breaking New Voices of North Dakota statute in 2015, igniting a censorship reform movement that's sweeping the country.

“Students regularly report that they have been prevented from discussing matters of public importance in the pages of student media or, perhaps worse, they have restrained themselves from even attempting to address an issue of social or political concern in fear of adverse consequences,” Heitkamp said. “That is not an environment that values and empowers student voices, and it is not a climate conducive to the effective learning of civic participation. We can and must do better.”

Her complete remarks are available on the Student Press Law Center's YouTube channel and in printed form on the www.newvoicesus.com website. They're worth sharing with persuadable skeptics who still see journalism as a problem for schools and not a solution. We haven't yet ended the grip of legalized censorship on America's schools — but by golly, we can see the end from here.

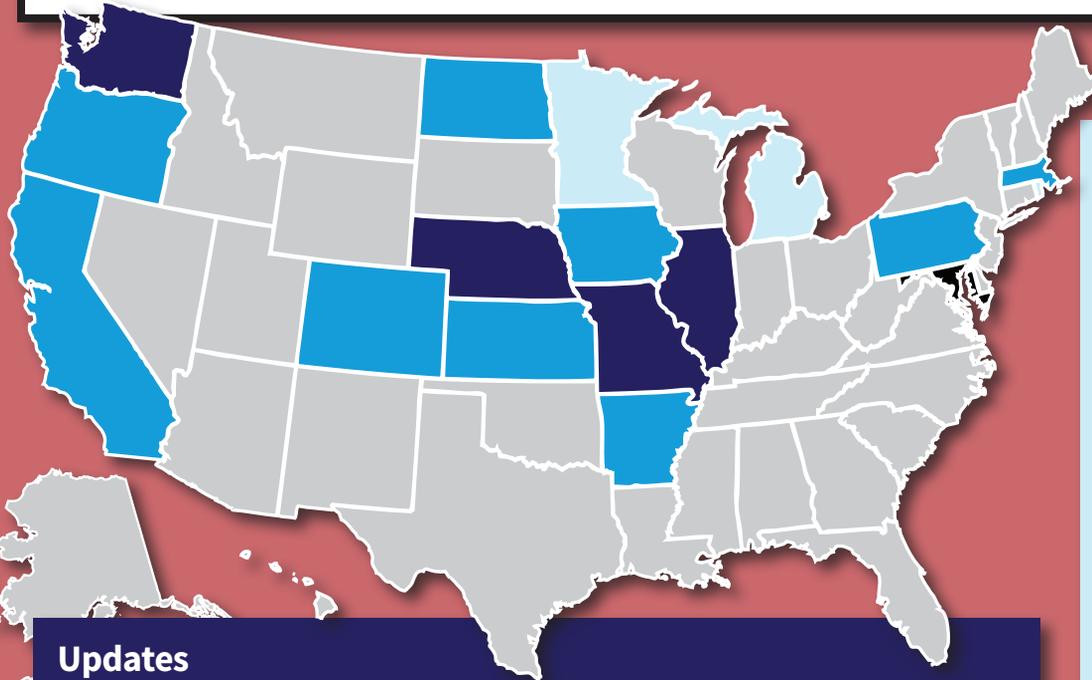
FIND MORE ONLINE

You might notice this issue of the *Report* is a bit sleeker and more colorful. We've redesigned the magazine to better highlight our work and the most important stories. You can find even more in-depth *Report* stories online at www.splc.org/section/magazine, including:

- **A Promise Unkept:** Student handbooks and codes are the last line of defense for free speech at private universities, and they're often ignored.
- **Journalism Left Behind:** The increased focus on testing core subjects may have contributed to the decline of high school journalism courses.

Victory in Maryland

With Gov. Larry Hogan's signature, Maryland became the ninth state with a law protecting the freedom of the high-school press, and the third explicitly protecting advisers against retaliatory personnel actions for what their students publish. Senate Bill 764, sponsored by Democratic Sen. Jamie Raskin, also protects the independence of college journalists and their advisers. The bill encountered only modest opposition from the Maryland Association of Boards of Education, but benefited from the enthusiastic support of the Maryland-Delaware-D.C. Press Association. It passed the Senate 36-10, then cleared the House 130-6.



Updates

Washington: Senate Bill 6233 cleared the Senate Education Committee on a split vote, then stalled in the Senate Rules Committee. It died when the legislature adjourned for the year. Sponsors plan to reintroduce it in 2017.

Nebraska: Republican Sen. Al Davis introduced LB 887 to protect college — but not K-12 — student journalists against censorship. Despite a favorable committee hearing, the bill was placed on “indefinite hold” April 20 and never made it to the Senate floor for a vote.

Missouri: The Walter Cronkite New Voices Act appeared on a fast track to approval, buoyed by outrage over the mistreatment of student journalists during protests at the University of Missouri quad. But House Bill 2058 ran into opposition from the Missouri teacher union and the Missouri Council of School Administrators, who succeeded in bottling up the measure in the Senate Education Committee despite unanimous House approval.

Illinois: Rep. Will Guzzardi's HB 5902 won unanimous approval in both the House and Senate, crossing the finish line on May 31 just hours before the legislature adjourned its term. The bill adds high schools to Illinois' existing protection for college journalists and advisers. It's on Gov. Bruce Rauner's desk; if no action is taken within 60 days, it becomes law automatically.

In the works

Bills are pending in **Michigan, Minnesota** and **Rhode Island**. Campaigns are taking shape in at least 12 other states with an eye toward introducing New Voices bills in 2017.

U.S. Sen. Heidi Heitkamp, D-N.D., is working on **national** New Voices legislation that could be considered next year.

Existing statutes

- Arkansas
- California
- Colorado
- Illinois (college only)
- Iowa
- Kansas
- Massachusetts
- North Dakota
- Oregon
- Pennsylvania (regulation)

BIG LEAGUE

little speech

College athletes generally have influence when they speak up, but they are often restricted by athletic department speech codes.

BY RYAN TARINELLI

They announced the boycott through Twitter, vowing not to participate in any football activities until embattled Missouri President Tim Wolfe resigned over perceived inaction toward an inhospitable racial climate.

“The athletes of color on the University of Missouri football team truly believe ‘Injustice Anywhere is a threat to Justice Everywhere,’” read a statement included in the tweet, which was published by Missouri defensive back Anthony Sherrils.

The boycott came with a possible price tag for the university – forfeiting the upcoming game against Brigham Young University would have cost the university \$1 million.

A day later, another tweet from Sherrils appeared. This time, the picture included white football players, staff and even head football coach Gary Pinkel, who later tweeted the same image from his personal account.

The sign of support was the final blow to the embattled president, who was already weathering a student hunger strike and an encampment of demonstrators occupying the university quad. Wolfe announced his resignation two days later.

The ability to use social media to address a political controversy and even criticize their own institution is a right that many college students take for granted. But the fact that athletes were able to do so without disciplinary consequences is a rarity in college athletics.

A 2014 project by the Student Press Law Center and journalism

students at the University of Maryland confirmed that dozens of the NCAA Division I athletic programs restrict student-athletes’ speech on social media. The project revealed that the policies allow administrators to monitor student-athletes’ social media accounts and remove social media content they deem inappropriate.

The policies and punishments can differ between athletic departments, with some programs requiring student-athletes to submit their usernames to the athletic department, while other departments prevent players from posting foul or offensive language. A policy for the men’s basketball team at the University of Georgia even requires players to get permission from their coach to have a Twitter account.

Howard M. Wasserman, a law professor at Florida International University, said the general idea behind the different policies is the same: because student athletes receive significant benefits and participate on the team, schools believe they can restrict their speech in ways that could never lawfully be applied to the larger student body.

“If I’m on an academic scholarship, I’m not told I can’t go out and speak on matters of public concern,” he said.

A spokesperson from the National Collegiate Athletic Association did not return the Student Press Law Center’s request for comment.

Kendall Spencer, chair of the NCAA Division I Student Athlete Advisory Committee, said speech regulations are a compromise

most student-athletes accept.

“There is an understanding that it’s sort of a double-edged sword,” said Spencer, a track and field star at the University of New Mexico who oversees a board of student-athlete representatives from various athletic conferences. While student-athletes do have free speech rights, he said, most players accept that there is a “brand” automatically associated with wearing a school’s jersey.

“With all these social media outlets, one wrong thing gets said and it goes viral,” Spencer said, mentioning that a number of athletic departments do provide student-athletes with resources to teach them how to communicate effectively. He said the NCAA wants student-athletes to speak their minds but also wants them to see themselves as representing their institutions.

The consequences for a poorly phrased or ill-thought-out social media post can be massive. In 2010, a University of North Carolina at Chapel Hill football player, Marvin Austin, sent a tweet that seemed to refer to potential illegal benefits for student-athletes from agents — “I live in club LIV so I get the tenant rate . . . bottles comin like its a giveaway.” After an investigation revealed inappropriate agent contact, further probing by NCAA investigators and local media uncovered a much larger academic-athletic scandal at UNC, with student-athletes receiving high grades for no-work classes.

Austin, whose now-infamous post is referred to as the “tweet heard ‘round the world,” was permanently suspended from the UNC football team after it was revealed he had indeed received improper benefits.

Wasserman said it’s unclear how a legal challenge to a speech restriction would play out in the courts. He said administrators would argue that student-athletes represent the university and its image, so the school should have some control over what they say. A court might also be swayed by the argument that restricting student-athlete speech is beneficial to team uniformity, he said.

But on the other hand, Wasserman said student-athletes still have First Amendment rights. And since they are not classified as employees or paid, student-athletes do not give up their free speech rights when they accept a scholarship, he said.

Still, Wasserman said the debate over student-athlete speech policies is more likely to play out in the press rather than in the

courts. He said athletic departments do not often heavily enforce the policies and he has not heard of a student-athlete challenging a speech code in court.

By restricting student-athlete speech, he said athletic departments try to protect and control the university’s image and message. And if a student-athlete does challenge a speech policy, Wasserman said they risk alienating their coach or teammates, which could result in reduced playing time or the loss of other benefits.

“Those are all very powerful forces,” he said.

SPEAKING OUT

Like any person with celebrity status, prominent student-athletes can draw attention to any topic when they speak out — particularly football and men’s basketball players.

As he prepared to play in the 2014 NCAA championship game, University of Connecticut basketball star Shabazz Napier made headlines when he commented that he does not always have enough money for food and sometimes goes to bed hungry.

“We do have hungry nights that we don’t have enough money to get food in,” Napier said.

“Sometimes, like I said, there’s hungry nights where I’m not able to eat, but I still got to play up to my capabilities.”

Within weeks of Napier’s comments, the NCAA announced student-athletes could receive “unlimited” meals and snacks as an “effort to meet the nutritional needs of all student-athletes.”

Before the rule, student-athletes relied on a food stipend or three meals a day. Spencer said the NCAA was considering changing its policy well before Napier’s comments.

Illustrating the power of whistleblowing on social media, a former University of Illinois football player’s string of Twitter posts led directly to the removal of the Illini’s head football coach.

Former offensive lineman Simon Cvijanovic drew national attention for a string of tweets claiming “abuse and misuse of power” by coach Tim Beckman, including pushing athletes to play while hurt, worsening their injuries. The tweets provoked an investigation that led Illinois to fire Beckman just before the start of the 2015-16 season. Cvijanovic had completed his eligibility and was beyond the disciplinary reach of the athletic program.

In September 2013, football players from Georgia Tech



The University of Missouri football team and their coaches stood in solidarity against racism on campus. Image via Anthony Sherrils' Twitter.

University, University of Georgia and Northwestern University protested the NCAA when they took the field with the letters “APU” written on their gear. The letters stood for “All Players United,” an effort organized by the National College Players Association to bring awareness to how the NCAA handles concussions and compensation.

That same season, football players at Grambling State University in Louisiana staged a protest and refused to travel to a game, criticizing the poor facilities, the firing of their head coach and travel policies, which forced the team to take long bus trips to games.

In response, school administrators fired George Ragsdale as interim head coach. Even so, Grambling was forced to cancel the game against Jackson State University when players refused to travel to the game.

Spencer, who serves as the first student-athlete on the NCAA Division I Board of Directors, said the 2015 Missouri boycott showed that student-athletes can address issues that go beyond their team or university. The public is starting to see the role college athletics can play in addressing larger societal issues, he said.

“I think that’s fantastic,” Spencer said, adding that he loves seeing student-athletes assume an added level of responsibility and speak out in a positive way. “I think that’s one of the best gifts of being a college athlete.”

Brice Johnson, a senior on the UNC basketball team, told local media after the boycott that it was powerful to see the Missouri football team play a role in Wolfe’s resignation.

“If a team here did that, say the Carolina basketball team did something like that, that guy would probably be out like two minutes after,” Johnson said, according to *The (Raleigh) News & Observer*. “The Carolina basketball program is very powerful.”

Jeremy Cash, a Duke University football player, was also quoted as saying that the Missouri incident served as a “catalyst”

for additional boycotts and protests by student-athletes.

“This has really opened up the door for athletes to stand up for themselves, to have their own voice,” he said.

Still, the boycott was criticized by some, including Republican Missouri Rep. Rick Brattin, who pre-filed a bill in December that would revoke a student-athlete’s scholarship if they call, incite, support or participate in a strike by refusing to play.

In response, former Missouri football player Ian Simon spoke out against the bill.

“They want to call us student-athletes, but they keep us out of the student part of it,” Simon said in an interview with the *Missourian*. “I’m more than just a football player. . . . As soon as we’re done playing at the University of Missouri, the University of Missouri does not care about us anymore. We are not their responsibility. . . . Our sport is just a small part of who we are.”

The bill was withdrawn shortly after it was introduced. Brattin did not return the SPLC’s request for an interview.

Wasserman said the mentality around student-athlete speech has changed in favor of tighter restrictions.

When NBA star Kareem Abdul-Jabbar played at the University of California-Los Angeles under legendary coach John Wooden, Abdul-Jabbar took part in black student protests with the approval of Wooden — the only stipulation was that he not embarrass the program, Wasserman said.

But now, Wasserman said many coaches would see any sort of off-the-field speech about political controversy as embarrassing and potentially hurtful to the program.

MEDIA RESTRICTIONS

In today’s athletic departments, the media access afforded to reporters more than 30 years ago has largely disappeared.

In September 2015, Mark Selig, a then-graduate student at the University of Missouri, published a blog post on a poll he

ON CAMPUS

Wesleyan revokes newspaper’s funding

After an outcry from offended readers over a column disparaging the “Black Lives Matter” movement, Wesleyan University’s student government revoked the newspaper’s printing budget for the remainder of the school year. Supporters of *The Argus* raised more than \$12,000 to protect the paper’s independence after the student budget committee first put the newspaper’s budget “under review.” But ironically, the success of

the crowdfunding campaign became an excuse for the student government to withhold funding; in March, editors were told they’ll receive no student activity fee money until they exhaust the donations.

Wisconsin college editors face April Fool’s harassment complaint

A University of Wisconsin-Superior graduate student filed a harassment complaint against the student newspaper after an April Fool’s Day hu-

mor edition that included a column of “pickup lines” for men to use on women and a parody article about the area’s scarcity of Jews. The dean of students at UW-Superior dismissed the complaint without taking any punitive action against *The Promethean*.

Montana principal punished over newspaper content

A Montana school board disciplined a high-school principal who failed to stop her students from pub-

“This has really opened up the door for athletes to stand up for themselves, to have their own voice.”

Jeremy Cash, a Duke University football player on the power of the Missouri football boycott

conducted with a dozen football beat reporters who cover teams in the Southeast Conference.

“Player access has steadily worsened,” James Crepea, who covers the Auburn University football team for the Alabama Media Group, said in the survey. “We haven’t been formally asked by [a sports information director] who we would like to talk to, other than after a game, in over two years, though I submit requests which almost always go unfulfilled.”

Aaron Suttles, who covers the University of Alabama football program for *The Tuscaloosa News*, said in the survey that assistant coaches are off-limits for interviews and all player interviews are in group settings, with no opportunity for one-on-one time.

The sportswriters also reported restrictions on access to team practices and head coaches. While access varies between programs, Selig, who now is at *The Baltimore Sun* as a sports content editor, said many reporters are nostalgic for older days.

Selig spoke with *Arkansas Democrat-Gazette* reporter Bob

Holt, who began covering the University of Arkansas program in 1981 when the team locker room was open after games and reporters could “just grabbed whoever we wanted to talk to that day” after practice.

“Believe it or not, in the 1980s, they used to put players’ home numbers in the media guide bios,” Holt told Selig.

Back then, Selig said college athletic departments needed newspaper reporters for press and media attention. Now, he said athletic departments have more money and can produce their own media content and promote it on their team’s website, which is often slicker than professional media outlets.

“I don’t see it getting much better any time soon,” Selig said.

Ryan Cooper, sports editor at *The Lantern*, the student-run newspaper at The Ohio State University, said access to student-athletes often depends on the team. For high-profile programs like the OSU football team, which won its eighth national championship last year, access to student-athletes and the coaching staff is controlled and operates on a strict schedule, he said.

“I think they have everything down to a science at this point,” he said.

As *The Lantern* comes out only three times a week, Cooper said they can produce enough content with the limited access they receive to the football team.

Cooper said access is better with sports that receive less media attraction, such as wrestling, women’s volleyball and men’s and women’s soccer. Student journalists, he said, are often the only people who cover those teams, besides representatives from the athletic department. Regardless of the sport, he said the best stories come when a reporter is able to get personal with a player and talk one-on-one.

Even the cleanest college programs have an underbelly, Selig said, and it’s a journalist’s job to tell those stories as well. ●

lishing a feature article about the nationwide “Free the Nipple” campaign that included profanity and a photo-illustration showing women’s breasts. Willard Alternative High School Principal Jane Bennett reviewed and approved the articles in the *Wire*, which discussed the difference in perception between male and female toplessness. The Missoula school superintendent suspended Bennett for three days without pay, and in March the district’s school board voted to uphold the penalty. A defiant Bennett accepted the

punishment but vowed, “I will never regret standing up for our journalists and their free speech rights.”

Turmoil over Maryland campus paper claims university president

The president of Maryland’s Mount St. Mary’s University resigned under criticism after firing — then reinstating — a professor who advised the campus newspaper, the *Mountain Echo*. President Simon P. Newman fired Prof. Ed Egan after the *Mountain*

Echo published an unflattering article, picked up by the national media, quoting Newman making disparaging remarks about academically struggling freshmen. Public outcry resulted in the private Catholic university reinstating Egan. Newman — who was pilloried for quotes in the *Echo* in which he told a faculty member that underperforming members of the freshman class needed to be drowned or shot — initially fought to keep his job, but stepped down Feb. 29 after the controversy failed to subside.



ACCESS DELAYED

Still waiting

Last year, the Student Press Law Center uncovered the tendency of Texas public colleges and universities to use a provision in the state's public-records law to delay the release of information. Now, a subsequent investigation reveals how the state's private institutions are using the same tactic to delay the release of police reports, despite pushes for transparency in private campus police departments.

BY KELCEY CAULDER

THE SCHOOLS

The SPLC requested records from the 10 largest private universities and colleges in Texas, by enrollment:

- Baylor University
- Southern Methodist University
- Texas Christian University
- University of the Incarnate Word
- Dallas Baptist University
- Saint Edward's University
- Abilene Christian University
- St. Mary's University
- University of St. Thomas
- Rice University

When a surveillance video of two Rice University campus police officers beating an accused bicycle thief with batons surfaced in August 2013, and a University of the Incarnate Word student was shot and killed by a campus police officer in December of the same year, questions about use of force prompted public records requests from both the media and a Texas legislator.

Both universities declined to release documents about the incidents, arguing that as private institutions, their records were exempt from public disclosure.

State Sen. John Whitmire responded with legislation.

Whitmire, a Democrat whose office had requested the documents, proposed a bill to amend the Texas Education Code to require police departments at private colleges to follow the state's public records law, just like other law enforcement agencies across the state. In September 2015, the bill passed with little resistance and was signed into law.

But a Student Press Law Center investigation has revealed that private universities and colleges wishing to withhold public information are still doing so, exploiting a loophole in the law.

Texas public records law requires that state agencies — which now include police departments at private educational institutions — seek an opinion from the attorney general if they receive a request for public records and believe that the records are exempt from production. This process can legally push the agency's response time back by as much as 45 days.

Kelley Shannon, the executive director of the Freedom of Information Foundation of Texas, said the requirement can delay transparency

from private universities.

"There tends to be too much leaning toward secrecy at universities and university systems, especially in private school situations," she said. "This request system is used as a way to delay information from being released."

Although this provision in the law is meant to be used sparingly as a check, institutions have begun requesting opinions from the attorney general routinely, leaving journalists with no choice but to watch the time run out on deadline-sensitive projects.

ONE OUT OF 10

For this investigation, the SPLC requested copies of front page police reports and arrest reports for on-campus drug and alcohol violations from the 10 largest private universities and colleges in Texas between the dates of September 1, 2015 and February 1, 2016.

Only Abilene Christian provided the documents within the initial 10 days of the request without asking for an opinion from the attorney general's office.

Rice provided one record and St. Edward's provided 10 records, but both schools ultimately requested an opinion from the attorney general's office regarding a portion of records that they claimed were not strictly related to law enforcement activities because they also fell under the category of university judiciary violations or Student Code of Conduct violations.

Similar claims came from the other seven universities as well, all of which argued that the requested records contained information not relating solely to law enforcement activities and were, therefore, ineligible for release under the new law. They took this position even though

the Texas attorney general had already stated that a police report does not cease being a public record even if used by another office within a university.

On February 8, the day before the SPLC requested its records, Texas Attorney General Ken Paxton addressed this argument in an opinion to the Baylor University Police Department, saying that even though the offense reports are maintained in duplicate by Baylor's Judicial Affairs Office, which handles campus discipline, the reports involve investigations of possible criminal violations.

"Therefore, we find these reports relate 'solely to law enforcement activities' for purposes of section 51.212(f) of the Education Code, and thus, are subject to the Act," he wrote. "Accordingly, this information must be released, unless it falls within an exception to public disclosure under the Act."

Section 51.212(f) of the Education Code is the result of Whitmire's bill. It states that private campus police departments are a governmental body for the purposes of the Public Information Act with respect to information relating solely to law enforcement activities.

The universities also claimed in delaying their response to the SPLC that records could be withheld under the Family Educational Rights and Privacy Act (FERPA), a federal student privacy law that restricts the disclosure of personally identifiable

information contained in "education records."

Texas Attorney General opinions have stated that FERPA is not applicable to records created by campus police for law enforcement purposes or that are maintained by a law enforcement unit. In fact, Congress amended FERPA in 1992 specifically to provide that records created for law enforcement purposes are not confidential, even if law enforcement is not the sole purpose for which the records are used.

In his February 8 opinion letter to Baylor, Paxton rejected the university's argument, writing that law enforcement records are maintained separately and apart from educational records.

"Further, the request for information was made to the [police] department, and the requestor seeks law enforcement records created and maintained by the department, rather than student records maintained by the [disciplinary] office," he wrote. "Accordingly, the submitted information is not encompassed by FERPA and none of it may be withheld on that basis."

Additionally, Paxton wrote that only information that identifies or could identify victims of sexual assault or other sex-related offenses may be withheld on the basis of common-law privacy.

Despite having just been told in February that police reports are subject to disclosure, Baylor's police department again wrote to the attorney general on April 28, through an outside law firm, seeking

UNDER THE DOME

Secrecy bill for Indiana campus police vetoed

Indiana Gov. Mike Pence struck down a bill pushed by the University of Notre Dame that would have overturned the ruling of a state appeals court granting the public access to police reports at private universities. Lobbyists for private universities promoted House Bill 1022 to thwart the efforts of sports network ESPN, which has been suing Notre Dame to obtain access to police incident reports involving Fighting Irish athletes. ESPN won a unanimous victory in the Indiana Court of Appeals, which ruled that the Notre Dame police department is a public agency by virtue of exercising state-delegated arrest power. Days after the ruling, state lawmakers overwhelmingly passed HB 1022 to allow colleges to conceal all but the records of actual arrests, which already are accessible

through other means. The governor's veto leaves the appeals-court ruling intact, but Notre Dame is appealing to the Indiana Supreme Court.

Law delays access to Georgia athletic records

After a personal plea by the University of Georgia's newly hired football coach, Georgia legislators tacked a middle-of-the-night amendment onto the state open-records act giving athletic departments 90 days to produce public records — while all other agencies have three days. Georgia Bulldogs coach Kirby Smart complained during a visit to the Capitol that competing universities have a competitive advantage because they are able to delay producing records of recruits who've accepted football scholarships. Unlike Georgia's three-day turnaround, one of the shortest in the country, most state open-records laws require production within

"a reasonable time." Despite pleas by open-government advocates, Gov. Nathan Deal signed the law in April.

Nebraska presidential searches closed

One of the few remaining states to afford the public access to the names of college presidential candidates has taken its searches behind closed doors. Thanks to the enactment of Legislative Bill 1109, the public will no longer have the right to know who is being considered for president or chancellor of state universities. Instead, the name of a single "president-elect" will be disclosed 30 days before being ratified, which proponents of LB 1109 argue is sufficient to let the public have input into the choice. The bill's sponsor, Sen. John Murante, said the University of Nebraska's board asked for the bill, complaining that the fear of disclosure deters top candidates from applying.

a ruling that it could withhold records requested by investigative reporter Paula Lavigne of ESPN.

Lavigne's request asked only for a blank copy of a Baylor police report form.

RESULTS AND DELAYS

The SPLC made a series of identical records requests to Texas' 10 largest private universities on February 9. Nine of them notified the SPLC between February 9 and February 19 that they believed — despite the new Texas statute — that the records were exempt from production and that they'd be requesting an opinion from the attorney general.

On April 13, the first opinion was released — Brian Berger, assistant attorney general, responded to the University of the Incarnate Word. He ruled that the university must release the police reports, with a few exceptions.

"You assert some of the reports do not relate solely to law enforcement activities, and thus, are not subject to release under the Act," he wrote. "Nevertheless, these reports were created by the department for the purpose of law enforcement. Therefore, we find these police reports relate solely to law enforcement activities for purposes of section 51.212(f) of the Education Code, and thus are subject to the Act. Accordingly, this information must be released."

The attorney general's office did approve of withholding some records under the Texas Family Code, which makes confidential certain law enforcement records of juveniles between the ages of 10 and 17.

Berger said police could lawfully withhold certain information about investigations that did not result in convictions; however, basic information about the circumstances of a crime, including the description and identity of an arrested person, is subject to disclosure.

On April 19, an opinion was released to the Texas Christian University police department — again from the same assistant attorney general, Berger.

The opinion again concluded that the university police department is a governmental body for the purposes of the Act and that records maintained by that department are subject to disclosure.

However, Berger also stated that in cases when "the department acts as the investigatory arm for the university and provides information to the Office of Campus Life — Dean's Office . . . for use exclusively within the university disciplinary process" or when records relate only to "administrative violations of the student code of conduct[and] no crime is being investigated," the documents are not subject to disclosure.

Additionally, the opinion stated that the university's claims that records were exempt from release under the Family Code were unfounded.

"We find you have failed to demonstrate any of the remaining information involves alleged juvenile delinquent conduct or conduct indicating a need for supervision," Berger wrote.

"Thus, the remaining information is not confidential . . . and the department may not withhold it."

The attorney general's office also found that the release of records would violate neither FERPA nor the doctrine of common-law privacy.

Other requests to the attorney general produced similar results directing colleges to release their records:

- Assistant Attorney General Cristian Rosas-Grillet told St. Marys University in an April 28 letter that it must entirely produce the requested incident reports about drug and alcohol offenses because the university had cited two contradictory exemptions, claiming both that the records involved unresolved pending cases but also that they involved cases that had ended without a conviction.
- On May 2, Assistant Attorney General Rahat Huq told Southern Methodist University that police reports documenting drug and alcohol offenses are not confidential education records, and that details about the nature of crimes and arrests must be disclosed.
- Rice University did not attempt to invoke FERPA, but rather, merely argued that the records were not "solely" for law enforcement purposes because a drug or alcohol case might result in disciplinary rather than criminal enforcement. Nevertheless, Assistant Attorney General Rosas-Grillet told the university in a May 2 letter that the records are public because, when a police officer interacts with a student suspect, the officer is potentially investigating a crime, even if in fact no arrest or charge results.
- St. Edward's University sought to withhold the entire narrative description of crimes, but in a May 2 letter, Assistant Attorney General Cole Hutchison told the university that the factual circumstances of a crime are covered by Texas law requiring disclosure of "a detailed description of the offense." The university was told it could lawfully withhold only dates of birth and driver-license numbers from the police reports.
- Dallas Baptist University was told in a May 4 letter from Assistant Attorney General Joseph Keeney that it could withhold one police report pertaining to an open investigation where disclosure might interfere with a pending prosecution, and remove information from driver-license or motor-vehicle records, but must otherwise produce records describing the nature of each crime.

ADDRESSING THE PROBLEM

In 2015, the SPLC documented universities' misuse of the attorney general's opinion mechanism as a tool of delay, even when records were known to be covered by the open records act.

It has become common practice for universities to invoke the attorney general's office to buy time before honoring a request for records, but then to withdraw the request for a legal interpretation just before it is issued. In that way, a university can repeatedly delay producing the very same type of record, such as a police report, by avoiding receiving a ruling from the

STOP SECRET POLICE

stopsecretpolice.org

For Sunshine Week 2016, the Student Press Law Center launched a new campaign to bring transparency into private universities' police departments. In all but seven states, private campus police forces are not held subject to open records laws and can withhold police reports from the public. SPLC Executive Director Frank LoMonte called these so-called "secret police" un-American: "These colleges have eagerly sought governmental authority to use the ultimate state power — the ability to arrest and even to use deadly force — with no interest in accepting any of the accountability requirements that go with it."



Photo © XiXinXing via Canva.com

In March, the Indiana Court of Appeals ruled that private campus police reports should be subject to the state's open-records law. ESPN had sued the University of Notre Dame Security Police Department for incident reports concerning student-athletes.

The appellate court "noted the danger of restricting access to documents that would be considered public were a private entity not involved," and ordered the trial court to evaluate ESPN's records requests to determine which records the Notre Dame police department is required to produce under public-records law.

Notre Dame is appealing the case to the Indiana Supreme Court.

Meanwhile, university officials helped push a piece of legislation through the state legislature that would have superseded the appellate court's ruling by only requiring private university police departments to release a small number of records, most of which are already public via the federal Clery Act and courthouse files and other public databases.

Indiana Gov. Mike Pence vetoed the measure in late March, saying in a statement that this would preserve the "public's right to know."

"Limiting access to public records in a situation where private university police departments perform a government function is a disservice to the public and an unnecessary barrier to transparency," he said.

For now, **Indiana** joins the small handful of states that hold private campus police departments accountable to the public-records law:

North Carolina, Texas, Ohio, Georgia, Virginia and Connecticut.

Learn more at www.stopsecretpolice.org.

attorney general that the record is public. Texas A&M University withdraws 31 percent of all of the requests it makes for attorney general guidance, according to the SPLC's public-records audit.

Although Texas is in the limelight because of the newly enacted statute, excessive secrecy is an issue at campus police departments nationwide.

"I think some administrators have a significant problem realizing that journalism is not public relations," said Jane Briggs-Bunting, president of the Michigan Coalition for Open Government. "The newspaper is not a promotional body for the school. They ask for high fees and delay records because they don't think citizens will pursue it. It's just a way to avoid publicizing what they consider to be bad things."

In May, a scandal over the concealment of sexual assault at Baylor resulted in the removal of president Kenneth Starr

and several athletic-department officials. An independent investigation by the law firm Pepper Hamilton LLP found numerous irregularities, including a separate disciplinary process within the athletic department that resulted in athletes receiving differential treatment for criminal behavior as opposed to ordinary students.

Shannon, of the Freedom of Information Foundation of Texas, said she thinks transparency issues will alleviate as journalists and universities become more familiar with the public records law.

"My advice for now would be for students to keep in mind that large requests will cost more and the best thing to do is make requests as narrow as possible," she said. "It's tempting to make large requests for several years worth of information now that it is available, but those are going to be expensive and time-consuming requests. Be narrow." ●

An unintended consequence of

TITLE IX

Without clear direction from the Department of Education, some colleges are overreaching their authority into student media to demand compliance with the anti-sex discrimination statute.

BY KAITLIN DEWULF

The intent of Title IX of the Education Amendments of 1972 was pure: end sex discrimination in academia. But an unintended and unexpected outcome of broad interpretation of the law may be a chilling effect on student press.

Passed more than 40 years ago, Title IX is a federal civil rights law that prohibits discrimination on the basis of sex — which can include sexual harassment or sexual violence, such as rape, sexual assault, battery and coercion — in education programs and activities. All public and private schools receiving any federal funding must comply with Title IX.

Before Title IX, women faced discrimination in academics, admissions, athletics and hiring. Though the effects of Title IX have increased gender equality in higher education, an unforeseen consequence of the law, as it is currently being interpreted, may be the restriction of college media.

In an effort to rid college campuses of sex discrimination in compliance with Title IX — and avoid the potential loss of funding that comes with noncompliance — some college administrators have panicked, and have taken the law too far, some First Amendment advocates say.

Just last year, the *Daily Bull*, a student comedy publication at Michigan Technological University, was slapped with disciplinary measures after satirizing issues of sexual harassment and assault.

The publication's editor, Rico Bastian, wrote an article, "Sexually Harassed Man Pretty Okay with Situation," that describes a male student receiving "unwelcomed sexual contact from members of the opposite sex, all of which he later looked back on with feelings of complacency."

The satirical article — published alongside a satirical list of "Signs that she wants the D," including reasons like she "only screams a little" — was an attempt to comically address how many people don't take male sexual assault seriously, managing editor Mike Jarasz told the Student Press Law Center. Jarasz also said it may be "considered more acceptable" for an attractive person to sexually harass someone, as the article ends with the male student saying he felt violated after receiving a sexual

look from a "kinda ugly" woman.

Still, MTU Vice President for Student Affairs Les Cook did not find the article humorous.

Cook sent out a campus-wide email denouncing the article for "advocating criminal activity on campus."

The university's office of academic and community conduct placed the *Daily Bull* on probation for two years — which meant if the publication put out another problematic article, it could be removed as a student publication altogether — and issued staffers to take a cultural sensitivity course. The *Daily Bull's* adviser stepped down, and the publication issued a retraction and apology.

And although student governments are legally not permitted to withdraw funding in retaliation for content, student legislators at MTU voted to freeze the *Daily Bull's* funding until its staffers attended a Title IX training course. The staff underwent a three-hour training, covering both Title IX and cultural competency, but "didn't really learn much," Bastian said.

Cook also told the *Daily Mining Gazette* that the university was legally required by Title IX statutes to act in cases of sexual discrimination or harassment.

"(The Constitution) doesn't supersede [Title IX]," he said. "Title IX is a federal compliance policy. Those policies supersede anything else."

That interpretation of the Constitution, however, is inherently wrong, according to the Foundation for Individual Rights in Education.

"Let's be clear about one thing: The Constitution of the United States, including the First Amendment, is 'the supreme Law of the Land,' and does in fact supersede any federal regulation that violates it," FIRE said in a statement following the discipline.

Mark Wilcox, a spokesman for MTU, said conflicting regulatory mandates regarding Title IX affect the university's compliance efforts.

FIRE President Greg Lukianoff has repeatedly blamed censor-happy administrators on the DOE's Office for Civil Rights — the department that enforces federal civil rights laws — which he

said has significantly confused administrators and students on Title IX compliance.

“For the overwhelming majority of my career what I’ve been fighting is administration overreach,” Lukianoff said in an interview with Reason.com.

ADMINISTRATIVE OVERREACH

In April, several free speech, academic freedom and education groups argued that interpreting Title IX to include speech that some students find offensive could not only threaten students’ speech rights, but also undermine their education and efforts to promote equality on campus in a letter to OCR.

The letter — authored by the SPLC, FIRE, the National Coalition Against Censorship and the American Association of University Professors — argues that the office’s definition of harassment, set forth in “Dear Colleague” guidance letters to universities, poses profound threats to free expression.

While the letter was written in response to a situation at the University of Mary Washington in Virginia, where members of a campus group called Feminists United filed several complaints alleging that online harassment of female students over social media violates Title IX, it urged the department to provide more guidance in general.

“We take the allegations of discrimination at UMW very seriously, and we urge OCR to adopt an approach that will target unlawful conduct without casting a net so wide that it scoops up innocent students and constitutionally protected speech,” the letter read.

NCAC Executive Director Joan Bertin said that since people who post on Yik Yak — the social-networking app targeted at Mary Washington — are spreading news and opinion, much like student journalists, any guidance related to online communication apps issued by OCR could ultimately affect student journalists.

“Student speech and peer-to-peer activity is of much interest to OCR,” Bertin said. “They are plainly prepared to issue citations or to start investigations if they hear things that they don’t think universities are responding to appropriately.”

She said if one student “who is really pissed off about a gender-based article published in the student newspaper” files a complaint, the

department could begin an investigation and “set the stage” against student journalists.

It could only be a matter of time, Bertin said, before Title IX requires administrators to regulate college media, and some officials are already practicing this form of censorship.

She said university administrators are highly risk-averse, so if the choice is between being the object of a Title IX investigation or disciplining a student newspaper, she doesn’t think there is any question of which option administrators will choose.

“There is a very well-founded concern that college administrators are overreaching into student media,” Bertin said. “They are acting preemptively, and are very aggressively policing speech with sexual content to avoid being on OCR’s hit list.”

The OCR maintains that its efforts to combat sexual harassment and discrimination in schools is met with equal respect for the First Amendment.

“OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination and are not intended to restrict the exercise of any expressive activities or speech protected under the U.S. Constitution,” an OCR spokesperson said in an email. “When schools work to prevent and redress discrimination, they must respect the free speech rights of students, faculty, and other speakers.”

CONFLICTING GUIDANCE

Under Title IX, no person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

While short, the statute has been given a broad scope through U.S. Supreme Court decisions and DOE guidance to cover sexual harassment and sexual violence. Though schools must respond to and remedy all sexual harassment, they can only impose discipline for harassment if it creates a “hostile environment” — when it is so “severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit” — and failure to do so puts schools at risk of losing federal funding.

Since its implementation, vital definitions



Administrators at Michigan Technological University punished *The Daily Bull*, a student comedy publication, for this satirical article on sexual harassment.

TITLE IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance

20 U.S.C. § 1681

2010 Department of Education Letter Defining Sexual Harassment

Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Thus, sexual harassment prohibited by Title IX can include conduct such as touching of a sexual nature; **making sexual comments, jokes, or gestures**; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or **written materials**; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Web sites of a sexual nature.

for compliance with Title IX have expanded drastically, despite rulings by the U.S. Supreme Court that have drawn distinctions between constitutionally protected offensive speech versus unlawful harassment.

Though sexual harassment is not mentioned in the Title IX legislation itself, the Supreme Court ruled in the 1992 court case *Franklin v. Gwinnett County Public Schools* that monetary damages could be awarded to individual victims of sexual harassment under Title IX.

In separate cases in 1998 and 1999, the Supreme Court made clear that Title IX requires schools to take action to prevent and stop the harassment of students by faculty and staff, as well as other students. The decisions in *Davis v. Monroe County Board of Education* and *Gebser v. Lago Vista Independent School District* established liability of the school, which occurs when the school knows about on-campus harassment that is creating a hostile environment and responds with “deliberate indifference.”

But some First Amendment experts say this narrow definition has been absent from guidance given to college administrators through recent pronouncements by OCR. For example, a “Dear Colleague” letter by the department from 2010 defined “sexual harassment prohibited by Title IX” to extend to “making sexual comments, jokes or gestures; writing graffiti or displaying or distributing sexually explicit draws, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Websites of a sexual nature.”

Directed by this broad definition, rather than the one given in *Davis*, what is considered a Title IX violation can be unclear – which could lead college administrators to unnecessarily restrict what student journalists publish, experts said.

AAUP recently published a report concluding that OCR’s broadened

description of sexual harassment and heightened scrutiny of speech that includes sexual references of any kind has resulted in “a frenzy of cases in which administrators’ apparent fears of being targeted by OCR have overridden faculty academic freedom and student free speech rights.”

In one recent episode, the University of Alaska-Fairbanks newspaper was the subject of a year-long university investigation – ultimately resulting in no punitive action – after a university employee filed a sexual harassment complaint after being offended by a joke about genitalia in an April Fool’s Day humor edition.

College Media Association President Kelley Callaway said while Title IX once was used to ensure women had the same opportunities as men, she has seen its scope expand to include “almost anything that may offend someone.”

“I think we’re living in a world where if anything could possibly offend, there is this idea to eliminate it,” Callaway said. “That is surely not the best environment for student journalists.”

She said the vagueness of harassment definitions in “Dear Colleague” letters creates a lack of understanding that pushes college administrators to err on the side of caution when evaluating what is punishable under Title IX.

“The fear that [“Dear Colleague” letters] put colleges under can cause it to be used in ways that could stifle various forms of free expression,” Callaway said.

But Brett Sokolow, executive director of the Association of Title IX Administrators, said OCR is not to blame for the confusion among college administrators about how and when to

enforce Title IX.

Though the OCR could be more clear on its distinction between sexual harassment and hostile environment, he said, schools still have to remedy all harassment, whether they can impose discipline or not.

Sokolow said some college administrators misinterpret OCR guidance, or misapply it as the result of malfeasance, but the lack of clarity “is not the culprit.” He said coherence is available for administrators willing to seek it out.

If colleges or universities are violating anyone’s free speech rights, Sokolow said that’s “on them.” He said it is an administrator’s job to know when something is in violation of Title IX, and whether the school should impose discipline.

“If [an administrator] doesn’t know, he or she isn’t doing their job,” Sokolow said.

Still, Callaway said this confusion could cause student journalists to self-censor in an effort to avoid being disciplined through Title IX by administrators.

“I think student journalists have a responsibility to serve their community, and if they are avoiding reporting on certain issues because of potential Title IX violations, they are not serving their community,” Callaway said. “To not talk about sexual assault on campus, that isn’t serving anyone.”

But at Central Michigan University, that is exactly what student journalists are being told.

Sydney Smith, managing editor of *Central Michigan Life*, said while attempting to publish the locations where sexual assault has occurred on campus, she was blocked several times



Survey shows females more affected by censorship

In March, the Student Press Law Center and researchers from the University of Kansas released the results of a survey about the prevalence of censorship in high school media. In the survey taken by 461 high school journalists, young women reported experiencing censorship — either overtly by a school official or self-imposed — more often than young men.

The research, conducted for the SPLC’s Active Voice initiative, lent credence to a growing body of anecdotal evidence from the makeup of calls to the SPLC’s attorney helpline: from the girl in Arkansas forbidden from writing about LGBT rights, to the girls in Michigan ordered not to discuss their struggles with clinical depression, to the girl in Tennessee prevented from publishing a column crying out for the acceptance of atheists in a community of Christian fundamentalists.

“Instead of empowering girls and building up their confidence, journalism classrooms appear to be one more setting where girls’ voices are disproportionately devalued and muted,” said Peter Bobkowski, a University of Kansas researcher who conducted the survey for the Active Voice.

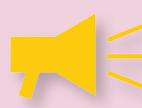
THE RESULTS

 Told by a school employee not to discuss a topic in their student media



compared to



 Refrained from discussing a topic because they anticipated a negative reaction from their school



compared to



Learn more about the initiative, volunteer to be a mentor or learn how to sponsor or apply to our fellowship program for college undergraduates.

by administrators and campus police.

Smith said she thought it was vital to the safety of students on campus to know where sexual assault was most likely to occur, but was unable to obtain this information. She said she has attempted for months to get this information through the Clery Act — which requires all colleges receiving federal funding to keep and disclose information about crime on campus and its efforts to improve it — but was unsuccessful. Smith tried several times to utilize the Freedom of Information Act — which allows the full or partial disclosure of previously unreleased government documents — but administrators denied her requests.

“Each time my requests were denied for the exact same reasons: invasion of privacy for those named in the report — even though I asked that the names be redacted — in violation of Title IX,” she said. “[CMU administrators] said that even though I wanted no names, someone could still ascertain and connect the dots to the person [through the locations] in the report.”

She said the university police told her that CMU would not allow the releasing of the locations of sexual assault under Title IX, and that publishing those locations may “re-traumatize the victim.”

“Leaving out information, especially regarding sexual assault on campus, does a tremendous disservice to the campus community,” Smith said. “As a woman, I feel it is my right to know where sexual assaults have occurred. What if there is a pattern?”

Smith said publishing this information is crucial to the community because readers should know where sexual assaults have occurred because there could be clear indications of problem areas on campus.

She said Title IX has a place, but universities need to follow the law more clearly when it comes to journalists.

“I was told that obtaining police reports of assault was a ‘gray area’ of the law and Title IX required the university to be less transparent,” Smith said. “I highly doubt that is what lawmakers intended.”

Steve Smith, a spokesperson for CMU, said redacting a name does not make it impossible to identify the survivor of sexual assault based on the location of the crime. He said location information, such as a dorm room, might lead to the identification of a victim, and would violate the student’s privacy.

“Moreover, incident descriptions of an alleged sexual assault also may identify potential survivors and witnesses,” he said. “Imagine the massive chilling effect this would have on the reporting of rapes and other forms of sexual assault.”

‘A RECIPE FOR CENSORSHIP’

Despite a newspaper’s role to disseminate vital information to its readers, some administrators are treating student

publications as an arm of the university by demanding compliance with Title IX and dictating what student journalists report on, First Amendment lawyers say.

SPLC Executive Director Frank LoMonte said Title IX was built for severe, pervasive harassment directed at specific individuals that makes them unable to continue their education, and no one will ever be able to show that a newspaper article came close to reaching that point.

Instead, he said, requiring student newspapers to comply with Title IX restricts free speech on campus and prevents student journalists from reporting key information regarding sexual assault that occurs on campus.

“I think, whether accidentally or on purpose, a growing number of institutions are treating the campus publication like an extension of the college itself and claiming that a news story will breach the confidentiality of Title IX,” LoMonte said. “That just makes no sense.”

A newspaper, just by definition, he said, cannot be harassment because it is “something you voluntarily pick up and can voluntarily put down.”

He said there are constitutional boundaries that administrators can’t cross, and guidance by OCR has created confusion in the minds of administrators about where their authority begins and ends.

This confusion, some say, creates a welcoming environment for censorship.

Will Creeley, vice president of legal and public advocacy for FIRE, said there is an incredible chilling effect of overly broad, impermissibly vague interpretations of sexual harassment on free student press.

“Any speech that has to do with sex or gender that rubs someone the wrong way — anything someone, somewhere doesn’t want to hear could be considered sexual harassment under OCR’s definition,” he said.

He said the threat to student media posed by unclear Title IX compliance requirements is perhaps as great as the threat to any campus speech.

“Student journalists are tasked with asking tough questions of those in power, like the student government or even administrators,” Creeley said. “People in power do not like being asked how they are exercising that power.”

He said the OCR has opened the door for extremely broad restrictions on student speech, and it is “only a matter of time before some administrator decides to wield them.” He said unclear guidance from OCR and what he sees as the oversensitivity of today’s college students creates a “recipe for censorship.”

Students and administrators alike, Creeley said, will censor student publications in order to avoid a Title IX investigation, if that becomes the norm.

“Censorship is a great friend of those who want to avoid conflict,” he said. ●



Tug of war

High school advisers must balance duties to students, school administrators.

BY RYAN TARINELLI

For high school newspaper advisers, standing up for students' free speech can come with a price.

Sometimes, school administrators dole out a subtle punishment to an adviser who lets a student publish a controversial article, like a room change or a denied trip to a workshop. Other times, the adviser could be reassigned to a different position within the school — or even lose their job entirely.

Many high school newspaper advisers have said the job can be a balancing act between facilitating student free speech and respecting school administrators.

"You have conflicting loyalties," said Student Press Law Center Executive Director Frank LoMonte. "The students look to you as their champion."

When an administrator tells a high school newspaper adviser to restrict student speech, he said, advisers often face a difficult personal dilemma. Do they stand up for what they believe in and risk losing their job? Or do they sacrifice their ideals for job security?

Sarah Nichols, student media adviser at Whitney High School in Rockland, California, addresses that balance by developing a good working relationship and creating an open line of communication with school administrators before any conflicts arise.

"I think that relationship building is critical to the success of any journalism program," said Nichols, who also serves as vice president of the Journalism Education Association.

But sometimes, those relationships can fall apart. And when that happens, advisers who stand up for student journalism can be punished.

JEA President Mark Newton said he has seen school officials reassign high school newspaper advisers or refuse to renew their contract over articles published in school newspapers. He said principals have also been known to hire newspaper advisers who they can bully and control.

In 2015, the Student Press Law Center news site recorded just two instances of high school newspaper advisers being punished or reassigned by school administrators — one at San Gabriel High School in California and the other at Pemberton Township High School in New Jersey.

But LoMonte said the real number is "undoubtedly

leagues of magnitude greater than that." The SPLC maintains a hotline to provide legal help for advisers and student journalists, and while the organization doesn't track the breakdown of reasons for the calls, LoMonte said it's very common for advisers to worry about losing their jobs. But most advisers, he said, are scared to go public with their stories of retaliation from administrators, fearing even worse consequences.

Adam Goldstein, SPLC's attorney advocate, said he speaks almost every day to an adviser who is fearful about the possibility of losing their job in retaliation for their student's actions, which can include fighting censorship to simply writing a story.

"What's interesting is how many administrators don't view what they're doing as retaliatory, because they sincerely believe the adviser's job is to prevent students from doing anything that's controversial or could make the school look bad," Goldstein said.

WHAT RETALIATION LOOKS LIKE

Nichols said she has heard of countless instances of high school newspaper advisers being punished or reassigned by school administrators. And the student newspapers, she said, can see their budgets cut or, in some cases, have their whole program threatened in response to published content.

That was the case last December at Steinmetz College Prep in Chicago, when Principal Stephen Ngo threatened to eliminate the 81-year-old high school newspaper, the *Steinmetz Star*, in a late-night email. The threat came after a student reporter posted a previously-censored article on a change in the school's bell schedule online on her personal website. Ngo read the story before publication due to the school's prior review policy, which allows an administrator to review content before publication.

Ngo later said he wrote the email in an emotional state after learning the story had been published online and did not have any intention to eliminate the paper. The bell schedule story ultimately ran in the January-February edition of the paper.

In New Jersey, Bill Gurden, a former high school newspaper adviser, filed a civil rights lawsuit in September

SPLC TIP SHEET FOR STUDENT MEDIA ADVISERS

- **Let your students lead**
Let them know you support them, but that they must be willing and able to take the leadership role should it be necessary to challenge administrative action.
- **Avoid insubordination**
Remember that the boss is still the boss.
- **Get it/put it in writing**
You must establish a paper trail.
- **Watch what you publicly say and write**
In recent years, courts have not been protective of the right of employees to criticize their employers — even when it’s deserved.
- **Put your union dues to work**
If at any point you feel your job being threatened, notify your union representative immediately if you have one.
- **Secure the line**
Communicate using your private telephone or home e-mail account.
- **Toot your own horn**
Enter your publications in competition.
- **Bring in the pros**
Establish regular contact with members of the professional local media.
- **Circle the wagons**
Seek out other student media advisers, the SPLC, and/or other national or regional journalism education organizations for support.

For more on these tips, find the tip sheet at www.splc.org/page/information-for-advisers

SPLC LEGAL HOTLINE
(202) 785-5450

against Pemberton Township Board of Education after being removed as adviser to the school’s newspaper, *The Stinger*. In the complaint, Gurden alleged that the school district’s actions were “taken with maliciousness, intentional desire to cause [him] harm.”

Gurden’s attorney did not respond to the SPLC’s repeated requests for comment. Tony Trongone, superintendent of Pemberton Township Schools, said the lawsuit has not been settled and no court proceedings have been set.

At San Gabriel High School in California in 2015, student journalists of the *Matador* clashed with the then-school principal Jim Schofield after he censored a story about the dismissal of a popular English teacher, instead telling students to write a positive profile without specifics of the dismissal.

The students brought their concerns to the school board, arguing Schofield violated a California law that establishes student freedom of speech in public schools. In response, the school district announced plans to implement student press safeguards and conducted an investigation into the censorship, which found Schofield did not intend to censor the *Matador*. Despite critics’ claims that the investigation was inadequate, Schofield was promoted to a district-level position.

Months later, student media adviser Jennifer Kim was put on indefinite administrative leave and barred from entering campus without an escort after she had an unspecified “dispute” with the new school principal at yearbook camp. Recent alumni filed a complaint with the state later that year, arguing that the school replaced Kim with two unqualified substitutes who had no prior journalism experience. Kim ultimately received a written reprimand and was allowed to resume teaching at the end of the fall term — but she returned to a student newspaper that had lost years of its archives because the administration had abruptly shut down the *Matador*’s website in her absence.

While adviser reassignments often make headlines, there are a number of subtle ways administrators can punish a school newspaper adviser. Nichols said school officials can assign advisers to a shared classroom or give them undesired preparation periods in retaliation for articles published in the paper.

“It’s easy to see where a teacher would walk away,” Nichols said.

In addition, LoMonte said school administrators have denied journalism educators trips to workshops and have refused to recognize awards earned by the school newspaper.

“It seems like [the possible punishments are] only limited by the imagination of the wrongdoers,” he said.

PROTECTION UNDER THE LAW

In 2008, California legislators passed the Journalism Teacher Protection Act that prevents administrators from retaliating against high school advisers who refuse to infringe on their students’ free speech rights.

Legislators passed the bill to protect high school newspaper advisers like Ellen Kersey, who was reassigned from her role as newspaper adviser in 2001 after students published controversial articles in the school paper.

Kersey, who now teaches and advises the yearbook at a private

university in Oregon, was the newspaper adviser at Adolfo Camarillo High School in Southern California for 15 years.

The student-run newspaper, *The Stinger*, stirred controversy among school administrators in spring 2000, Kersey said in an interview, when student editors decided to publish a story on teenage pregnancy authored by students at nearby Rio Mesa High School. The story was previously censored by Rio Mesa administrators.

Editors at *The Stinger* also wrote a separate article pointing out how the censorship by Rio Mesa school officials was illegal under California Education Code 48907, which protects student free speech in the state.

Then in February 2001, student editors at *The Stinger* published a story on the safety of local high schools. Kersey said the story enraged other principals in the school district, and she felt they were out to get her.

In response to the article, Adolfo Camarillo Principal Terry Tackett sent a letter to Kersey that outlined several concerns he had with the paper. In particular, Tackett had concerns with a front-page picture that showed a young man holding a gun and questioned the publication of “items regarding sensitive issues such as portraying an ethnic group in a bad light.”

Tackett wrote that he would decide whether to remove Kersey as the newspaper adviser at the end of the school year. Months later, Tackett reassigned Kersey to teach English the following year.

“I was very much in a state of shock,” she said, mentioning that her students were upset at the decision as well. “It wasn’t anything I did, it’s what I let the student do.”

Although Kersey kept her position as yearbook adviser, she left the school after that year.

Nine states currently have free expression laws that protect student journalists, while two other states have protections for student speech rights in their education code.

But without explicit adviser protection laws, LoMonte said it remains unclear what free speech rights are granted to high school advisers — or if the ability to call attention to the censorship of a student newspaper falls under protected speech for high school advisers.

In the 2006 U.S. Supreme Court case *Garcetti v. Ceballos*, the Court ruled that while the First Amendment protects speech by a private citizen, it does not protect speech by a government employee when it is expressed as part of their official job duties.

Teacher contracts can have retaliation protections similar to California and Kansas, the only two states with laws that protect teachers from retaliation from school administrators, LoMonte said. (A third law, Maryland, takes effect Oct. 1.)

There are currently bills going through the legislature in Illinois, Michigan and Rhode Island that would specifically protect high school newspaper advisers from retaliation

by school administrators for refusing to infringe on their students’ free speech rights.

FEELING THE STRESS

Besides battles with administrators, the stress of running one — sometimes two — student publications can take its toll on advisers.

Phillip Caston knows the pressure firsthand. He served as the newspaper adviser at JL Mann High School in South Carolina for seven years — in five of those years, he also served as yearbook adviser. Caston, who now serves as a yearbook adviser at Wando High School, said the job required long hours and a lot of time management.

February was always the most hectic month. Between getting the yearbook finalized and keeping up with newspaper deadlines, Caston said his regular classes were put on the backburner to deal with the publications’ deadlines.

“I think I was a little bit insane,” he said. “I think I lost a little more hair than I usually do.”

Jack Kennedy, executive director of the Colorado Student Media Association, sees a different type of self-induced pressure among media advisers. He said the expectation to learn and teach a variety of media is taking its toll on advisers and contributing to a high turnover rate among newspaper advisers.

As of 2014, 43.3 percent of high school journalism advisers have no previous professional journalism experience and almost 25 percent took no journalism classes in college, according to the book *Still Captive: History, Law and the Teaching of High School Journalism*.

But JEA President Newton said a vital part of a high school journalism adviser’s job is understanding the laws and regulations related to high school press and student free speech, including Supreme Court cases and state laws.

“I think you have to be armed with that knowledge,” Newton said. Then, he said, it’s key to communicate with a school principal and facilitate conversations between student reporters and school officials.

Advisers also lack professional support, according to *Still Captive*, with 56 percent of high school advisers stating they had no outside help from professional journalists.

Speaking to a workshop of newspaper advisers earlier this year, Kennedy told the group they didn’t have to be an expert in every sort of media. By the time the day was over, he said he had about 10 advisers approach him to say it was so good to hear that support.

At the high school level, Kennedy said journalism classes are about teaching students to think deeply about subjects and fostering good citizens, not teaching them the latest software so they can become a professional journalist.

High school journalism is about something more too, Caston said — self-discovery and personal growth.

“That to me is what does it at the end of the day,” he said. ●

Legal Analysis

May students be disciplined for recording at school?

By Sommer Ingram

It's a story that's become all too familiar: someone pulls out a phone to record news happening in a public place, and the result is an arrest, altercation, or destruction of the footage. The Supreme Court has never ruled specifically on a photographer's right to record events, but there is a growing outcry for some concrete resolution on the matter.

The lack of a conclusive body of law speaking directly to this issue for adults makes determining students' rights to photograph or video events at their schools even harder. A recent and compelling example is the shocking video a student recorded of a South Carolina school resource officer yanking a student out of her desk and injuring her, after she refused his orders to leave the room.¹ After the video went viral, public outrage followed and the officer was eventually fired.

Whether students have a constitutionally protected right to record such news events during school — especially in the face of school disciplinary codes that restrict the use of cameras and phones — is a question that remains unclear. This article will consider how constitutional claims may be resolved if student journalists — or just student bystanders — face criminal or disciplinary consequences for using photography or videography equipment in violation of school restrictions.

IS PHOTOJOURNALISM 'SPEECH'?

To evaluate whether student journalists have a constitutional right to take photos or video events on campus, we must first look to what courts have said about adults and their rights to take photos or video. The Supreme Court has said that speech consists of more than simply the spoken or written word, but extends to conduct “sufficiently imbued with elements of communication.”² In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, the high court emphasized that to qualify for First Amendment protection, a person needs (1) an identifiable message to be communicated and (2) an audience to receive that message, no matter the medium.³ When these two factors are satisfied, then the conduct is considered speech that is protected in a public forum. The *Hurley* standard appears to say that the crucial distinction lies in whether the conduct is taking place with an audience in mind. In the context of photography/videography, this means that the person videoing and photographing must do so with the intention of disseminating the content to others. This provides the communicative element needed to get under the protective umbrella of the First Amendment. Simply picking up a camera and using it does not in itself implicate the First

Amendment — there has to be more.

Professional photographers and journalists would no doubt meet the *Hurley* standard, as the purpose of their reporting is to share the news with the general public. Perhaps even a blogger or someone with an active social media presence would meet the second prong of the *Hurley* formulation if they intend to publish online what they record. Translated to a school setting, logically a student working for the newspaper or yearbook should fit the second *Hurley* prong when recording a newsworthy event such as an arrest.

What seems clearest, based on what the Court has said about speech in other contexts, is that a student who takes a video or photo for purely private use or knowledge will not be protected by the First Amendment. Other courts have also followed the Supreme Court's lead on this distinction between photos and videos captured for personal use and those captured for a communicative purpose. The Seventh U.S. Circuit Court of Appeals ruled in *Larsen v. Fort Wayne*⁴ that a father had no First Amendment right to video his daughter's school choir performance when the school rule prohibited videography for that event: “The First Amendment . . . does not protect purely private recreational, non-communicative photography.”

With that in mind, we can safely assume that communicative photography/videography — that which is captured for the purpose of sharing the content with others — is protected First Amendment speech outside of the school setting, so it's possible that a court would apply similar reasoning to students in a school setting. However, the *Hurley* distinction is only part of the equation. *Hurley* says that when its two conditions are met, the conduct will be considered protected expression in a *public forum*. Schools are not presumed to be traditional public forums,⁵ so regardless of whether a student's photography or video was meant to be communicated to a larger audience, students may still encounter obstacles impeding a constitutional claim.

In *Hazelwood School District v. Kuhlmeier*, the Supreme Court held that public schools do not possess all of the attributes of streets, parks and other traditional forums, so schools may be considered public forums only if school authorities “by policy or by practice” open those facilities for “indiscriminate use by the general public” or some segment of the public.⁶ A school may become a “designated public forum,” which is when property is “intentionally opened . . . for indiscriminate use by the public as a place for expressive activity,” but courts typically have made this a high standard to meet.

A district court in Pennsylvania said that a teacher had

not intended to open or actually opened her classroom for indiscriminate use by the public as a place for expressive speech, nor could the plaintiff direct the court to a single case where a high school classroom was designated a public forum. The court went on to declare that “this is not surprising, as it is simply not the law.”⁷ Since a school is a nonpublic forum, a student or teacher would have to provide credible evidence that his or her school intended to open or did actually open its classrooms for indiscriminate use by the public as a place for expressive speech.

Because some portions of a school building, such as the lobby and hallways, are more “public” than others, the extent of a student’s ability to claim constitutional protection for videography may vary by location. When a setting is truly a public space like the commons of a college campus, federal courts have recognized at least some limited degree of First Amendment right to record audio and video.⁸

The First Circuit U.S. Court of Appeals ruled that a man could not be arrested and charged for using his phone to record three police officers arresting a young man in a public outdoor space on the campus of Harvard University.⁹ The court in *Glik v. Cunniffe* said that there is a clearly established, constitutionally protected right to videotape police carrying out their duties in public. Further, it called the right to film government officials a “basic, vital, and well-established liberty safeguarded by the First Amendment.”

The Eleventh Circuit has also said that police cannot punish or prevent members of the public from videoing police actions. In *Smith v. City of Cumming*¹⁰ the appellate court recognized a First Amendment right to gather information about what public officials do on public property, and specifically “a right to record matters of public interest.” District courts in the Second, Fourth and Sixth circuits likewise have recognized this right.¹¹ For example, in *Higginbotham v. City of New York*, the district court judge said that a photojournalist had the right to film a violent arrest during a protest because it was public police activity. So if a school location were deemed a public space, federal courts seem to have laid a foundation to argue successfully that a student would have the constitutional right to record police carrying out law enforcement functions on campus.

INSIDE THE SCHOOLHOUSE GATE

Students have increasingly taken to social media to blow the whistle on unsatisfactory conditions in their schools, at times bringing them into conflict with school disciplinarians. While the use of social media on personal off-campus time should be entitled to significant First Amendment protection, the question becomes murkier when the content is created on campus during school time.

The school district in Wichita Falls, Texas, banned photos and videos in school locker rooms and restrooms after a student used social media to disseminate a video of a rat leaping from a urinal and skittering across a bathroom floor.¹² In Miami, a

principal agreed to take early retirement after her supervisors interceded to referee a clash between her and her students over the use of Tumblr photos to expose moldy food, crumbling ceilings and other substandard school conditions.¹³

Because the situation has yet to present itself in the federal courts, it’s unclear whether a judge would evaluate a student videographer’s First Amendment claim under the “real-world” legal framework set forth by the *Hurley* case or under the unique “school speech” jurisprudence that begins with the Court’s seminal free-speech case, *Tinker v. Des Moines Independent Community School District*.¹⁴

In *Tinker*, the Supreme Court said that students do not shed their First Amendment rights at the schoolhouse gate. More specifically, it held that a school may not censor student expression unless the expression causes a material and substantial interference with schoolwork or discipline. The famous facts of *Tinker* involve students who came to school wearing black armbands to protest the Vietnam War. The Supreme Court recognized that wearing an armband for the purpose of expressing certain views is a symbolic act that is within the Free Speech Clause of the First Amendment.

Because the Supreme Court has recognized that conduct “sufficiently imbued with elements of communication” will count as speech¹⁵, students may be able to argue that taking photos and recording video is this sort of expressive speech that needs to be evaluated under the *Tinker* standard. If this argument is successful, schools may have to use the *Tinker* standard — which permits expression unless a material and substantial disruption is shown — to evaluate whether the photos and videos can be taken on campus.

The question would then become whether recording a news event is itself disruptive. Some schools and legislators have tried to restrict video recording of student fights on the grounds that the recording itself eggs on the participants to fight, or that at times attacks have even been staged for the purpose of creating a video that the attackers find amusing.¹⁶ But if the video is of an arrest or other police activity rather than a student-versus-student fight, it would not be plausible that the event was arranged for the purpose of making a video or that the video (rather than the police activity itself) is what caused the disturbance. Consequently, a student would have a strong First Amendment argument that, in a situation such as the South Carolina police altercation, the Constitution protects the right to non-disruptively videotape police activity even inside of school during school time.

Assuming this constitutional right exists, it’s yet to be seen whether the right could overcome a school’s restrictions on cellphone use. The First Amendment generally allows a government agency to enforce “content neutral” rules that do not have the primary purpose of restricting speech based on its message, even if the rules result in limiting speech. Many schools have regulations forbidding the use of cameras or cellphones in class at any time, which should pass muster as “content

neutral” because they do not single out the expressive use of phones and have the lawful primary purpose of preventing cheating. It would be difficult for a student who pulls out a cellphone to record news in a location where cellphone use is forbidden to argue for a “news-gathering exception” to an otherwise content-neutral law.

The most intriguing constitutional case would be a challenge to a regulation such as the Wichita Falls ban on photos and videos that immediately followed disclosure of a rodent problem in the building. Such a case would have interesting parallels to the *Tinker* case itself, in which a school board enacted what it claimed was a content-neutral prohibition on armbands, but which the Supreme Court found to be a content-based attempt to suppress anti-war speech. If a student could demonstrate that a restriction on videography was enacted or enforced in a retaliatory manner because of journalistic whistleblowing activity, the restriction would be vulnerable under *Tinker*.

MAKING THE CASE FOR LEGAL PROTECTION

The public is more attuned to how police use force than ever before, after a string of news events involving recordings of violent interactions between police and suspects, including the 2014 police choke-hold death of Eric Garner in New York City, which a bystander recorded on a cellphone.¹⁷ These concerns have been felt within school as well; in one recent incident, two officers assigned to the Baltimore city schools were criminally charged with assaulting a student in a beating that came to light only because another student captured it on video.¹⁸ The fact that cellphone videos have helped bring questionable behavior by police to public attention is a strong policy argument in favor of legally protecting students’ news-gathering.

Despite occasional court rulings to the contrary, there are powerful arguments that capturing a photo or video must necessarily be protected First Amendment activity just as sharing or posting it is. While capturing the content of a video or photo is a different action than sharing it, the two aren’t wholly distinct. To treat recording as unprotected would be like arguing that the act of applying ink to paper on a printing press is constitutionally unprotected and could be banned by the government.¹⁹ Even if videoing itself may not be expressive activity, it is an “essential step” toward ultimately disseminating photos and videos, which “modern First Amendment doctrine solidly recognizes as protected media of communication.”²⁰ The two should not be disconnected.

The right to photography and videography is an issue of ongoing concern both for the general public but especially for students. All in all, there is no conclusive right for students to photo or video events at their school, but there is strong evidence to suggest that a First Amendment right exists for a person who is in a public space taking photos or video with a purpose beyond just personal use with a message to be communicated to an identifiable audience. The question will

then become whether the area of the school where the news-gathering takes place is or is not legally a public space.

If photos and videos are considered expressive speech — as they should be — schools may have to use the *Tinker* standard and determine whether the photographing or videography is substantially interfering with the operations of the school. This would be a fact-driven analysis dependent on the context, including where the videography takes place, what activity is being recorded, and with what impact on the school’s ability to maintain order.

As a final reminder, all videographers — including students in schools — should be mindful that both the Constitution and federal statutes protect against police “fishing expeditions” into cameras or cellphones to look for (or delete) images. A federal statute, the Privacy Protection Act, requires a judicial hearing (with limited exceptions) before government officials may search a journalist’s camera or other non-public space to look for journalistic work product.²¹ And although it has yet to be tested at the Supreme Court in the school context, the Court has recognized a Fourth Amendment right to be free from intrusive police cellphone searches, noting the significant amount of personal information accessible through phones that makes a cellphone unlike a suitcase, purse or other physical space.²²

Because the constitutional right to take photos and videos is so unsettled — especially in the unique context of an in-school space — it is advisable for high school student journalists and advisers to work with school administrators to establish an understanding that photography of “breaking news” events inside of the building is not a punishable disciplinary offense.

Sommer Ingram, a 2015 graduate of Georgetown University Law Center, is a former member of the Student Press Law Center’s Board of Directors.

-
1. See Joshua Barajas, “S.C. school resource officer fired after he drags student, sheriff says,” PBS.org (Oct. 27, 2015).
 2. *Tex. v. Johnson*, 491 U.S. 397, 399 (1989).
 3. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995).
 4. *Larsen v. Fort Wayne Police Dept.*, 825 F. Supp. 2d 965 (N.D. Ind. 2010).
 5. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (school facilities may be deemed to be public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public or some segment of the public) (internal citations omitted); *Larsen v. Fort Wayne*, supra; *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3rd Cir. 1990); *Murray v. Pittsburgh Bd. of Pub. Ed.*, 919 F. Supp. 838 (W.D. Pa. 1996); *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991) (holding that an ordinary classroom is not a public forum).
 6. *Hazelwood*, 484 U.S. at 267.
 7. *Murray*, 919 F. Supp. at 844.

8. *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Gilles v. Davis*, 427 F.3d 197, 212 n. 14 (3rd Cir. 2005) (recognizing that videotaping or photographing the police in the performance of their duties on public property may be a protected activity); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012) (invalidating a state eavesdropping statute as applied to the recording of police officers in the performance of their duties in traditional public fora); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a “First Amendment right to film matters of public interest”). In an outlier case that is currently under appeal, a Pennsylvania federal judge deviated from the consensus and found that photographing police was not by itself constitutionally protected activity because just taking photos is not an act of expression. *Fields v. City of Phila.*, 2016 U.S. Dist. LEXIS 20840 (E.D. Pa. Feb. 19, 2016).
9. *Glik*, 655 F.3d at 82, 85.
10. *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000).
11. *Higginbotham v. City of New York*, No. 14-cv-8549 (PKC) (RLE), 2015 U.S. Dist. LEXIS 62227 at * 20 (S.D.N.Y. May 12, 2015); *Garcia v. Montgomery Cnty.*, Civil Action No. TDC-12-3592, 2015 U.S. Dist. LEXIS 151059, at *27 (D. Md. Nov. 5, 2015) (finding that recording police activity, if done peacefully and without interfering with the performance of police duties, is protected by the First Amendment); *Crawford v. Geiger*, No. 3:13cv1883, 2015 U.S. Dist. LEXIS 126538, at *19 (N.D. Ohio Sept. 22, 2015) (holding that there is a First Amendment right “openly to film police officers carrying out their duties in public”); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D.Pa. 2005) (holding that the plaintiff’s “recording the activities of Pennsylvania state troopers as they went about their duties on a public highway” was protected by the First Amendment).
12. Christopher Collins, *Experts: WFISD bathroom camera rule would falter in some cases*, TIMES RECORD NEWS, Dec. 9, 2015.
13. Katherine Schaeffer, *Fla. high school principal retires after students said she suppressed their online speech*, SPLC NEWS FLASH, Jan. 22, 2015.
14. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
15. See *Tex. v. Johnson*, *supra*.
16. See, e.g., Celeste Bott, *Illinois legislators consider bills on policing social media*, CHICAGO TRIBUNE (April 5, 2016) (reporting on proposed legislation making it a misdemeanor to record fights and post the video online, prompted by a case involving a fight between two middle-school students).
17. See Joseph Goldstein & Nate Schweber, *Man’s Death After Chokehold Raises Old Issue for the Police*, THE NEW YORK TIMES (July 18, 2014).
18. See THE ASSOCIATED PRESS, *2 Baltimore officers charged in recorded assault on teen* (March 9, 2016) (reporting on criminal charges brought against police officers who were captured on a student’s cellphone video slapping and kicking a student in a school hallway without visible provocation).
19. See Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 381 (2011).
20. *Id.*
21. 42 U.S.C. § 2000aa *et seq.*
22. 134 S.Ct. 2473 (2014).

ON THE DOCKET

Daily Kansan challenges budget cut

The student-run newspaper at the University of Kansas is challenging a 50 percent funding cut imposed by student government that several student officials admitted was meant to punish the newspaper for a critical editorial. In a complaint filed in February in U.S. district court, the *University Daily Kansan* and its volunteer attorney, Patrick Doran, argue that the retaliatory \$45,000 cut violated the First Amendment. The lawsuit names KU’s chancellor and vice provost for student affairs, who signed off on the budget even after learning of the punitive motive for the reduction. University lawyers filed a motion to dismiss the lawsuit in March, arguing that KU administrators cannot be held responsible for the acts of elected student officials, and that the establishment of a budget is a legislative decision that cannot be challenged under the First Amendment because the motives of every Student Senate voter cannot be known.

Taylor Bell appeal denied

Depleted by the death of Justice Antonin Scalia, the U.S. Supreme Court declined a petition to hear a First Amendment case challenging a Mississippi high school’s expulsion of a student rap artist for a profane music video posted to YouTube. The Court voted in February — shortly after Scalia’s death — to reject Taylor Bell’s petition to review a ruling by the Fifth Circuit U.S. Court of Appeals dismissing his First Amendment claims. Bell’s case attracted nationwide attention, including a supportive brief filed by renowned rap artists including Killer Mike and T.I., for its potential to clarify the authority of schools to punish speech on off-campus social media sites. Bell posted the video during his senior year at Itwamba County High School to blow the whistle on what he believed was sexual harassment of female students by coaches. But a deeply split Fifth Circuit decided that Bell’s use of strong profanity and violent imagery posed a danger of substantially disrupting school operations, making the video punishable even though no disruption actually occurred and there was no evidence anyone ever viewed the video at school.

UCF wins public-records challenge

Records describing the nature of hazing cases brought against Greek houses can be withheld from public disclosure under the Family Educational Rights and Privacy Act, a Florida appeals court ruled. The Fifth District Court of Appeal ruled in February that the University of Central Florida was not required to disclose records of hazing cases to reporters from KnightNews.com, a student news site that sued for access under Florida’s open records act. The judges modified their ruling in April, however, after a petition from Knight News, clarifying that FERPA does not prevent the release of affidavits filed in support of petitions to remove student government officials from office. The court held that running for campus office implicitly waives any privacy interest in the removal process. Knight News is appealing the classification of hazing records.

STUDENT PRESS LAW CENTER
1608 Rhode Island Ave NW, Suite 211
Washington, D.C. 20036
Phone: (202) 785-5450
Website: www.splc.org

Non-Profit Org.
U.S. Postage Paid
Washington, DC
Permit No. 4702



The Student Press Law Center gratefully acknowledges the generous support of the following institutions and individuals who have joined in our effort to defend the rights of student journalists.

(Contributions from Feb. 1 through June 1)

FREEDOM FIGHTERS

(\$10,000 or more)

craigslist Charitable Fund, Ethics and Excellence in Journalism Foundation, Journalism Education Association, Robert R. McCormick Foundation

FREE PRESS PROTECTORS

(\$1,000 to \$4,999)

Thomas Eveslage*, Lumina Foundation, Ohio Scholastic Media Association

STUDENT VOICE ADVOCATES

(\$500 to \$999)

Candace Bowen*, John Bowen*, Mark Goodman*, Ronald Johnson*, Herff Jones, David McCraw, Society of Professional Journalists, Mark Stencil*

FIRST AMENDMENT FRIENDS

(\$100 to \$499)

Matt Chayes, Eastern Oregon University, Framingham State University, Robert Greenman, Paul and Elizabeth Gunterman*, Randy Hamm, Ruth Hochberger, Michael Hogan, Hope International University, Timothy Jasionowski*, JournalismSTL, Jennifer Kiel*, Robin Luce Herrmann, Brian Martinez, Johanna McCormick, John David Reed, Christopher Richert, Salve Regina University, Southern Illinois University Carbondale, Maya Suryaraman, Susan Tantillo, University of Maryland, Baltimore County, University of North Florida Spinnaker, University of Pittsburgh, Western Kentucky University, Lew Wheaton

Gifts were received in memory of:

Nick Ferentinos
Richard Milliman
Dr. James Tidwell

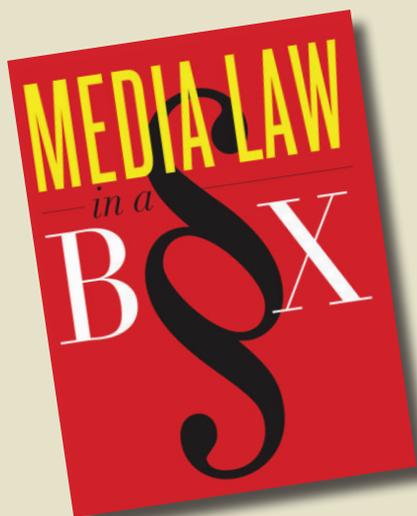
*Indicates monthly donor

To support our work,
visit www.splc.org/page/donate

The SPLC is a 501(c)(3)
nonprofit charity.

ATTENTION: STUDENT MEDIA

The Student Press Law Center's **Media Law in a Box DVD**



Designed for self-study or for the classroom, a guide to the legal basics every student needs to gather and share information in print, over the airwaves or online. Free copies of the DVD are available for college publications that purchase an SPLC membership. Visit www.splc.org/page/member and become a member today.



'Like' us on Facebook for the latest student media news. Scan this QR code or go to facebook.com/StudentPress