

IN ALABAMA, a federal judge said a graduate student has no constitutionally protected right to complain about her school's grading and disciplinary systems. IN ILLINOIS, administrators at one of the nation's biggest high schools produce a "sanitized" newspaper removing articles about a student's anti-cancer-ribbon tattoo. IN NEBRASKA, a superintendent rewrote his quotes from an interview with high school journalists and demanded that the "cleaned up" version be published. IN COLORADO, a federal appeals court threw out a student's First Amendment suit challenging the school's authority to punish her for mentioning religion during her graduation speech. IN NORTH CAROLINA, student journalists were prohibited from mentioning the fact that the school had disciplined students for underage drinking during a field trip. IN WASHINGTON, a principal removed a newspaper article critical of a school district official, asserting that "a student newspaper is not an appropriate vehicle for airing concerns, complaints or criticisms about District staff." IN TEXAS, a federal court decided school officials could ban a Gay-Straight Alliance from meeting on campus because of claims that the club's message might undermine the school's abstinence-only sex education curriculum. IN ILLINOIS, a federal judge agreed that a school could force a student to remove the phrase "God Bless America" from a yearbook cover she designed. IN MISSISSIPPI, a federal judge allowed a middle school principal to ban the use of religious images in campaign posters for a student government election. IN INDIANA, a principal forced students to remove incriminating information from a story documenting the severity of hazing of high school athletes. IN GEORGIA, a federal district judge refused to reinstate a student government officer who was "fired" by his principal after publicly advocating for same-sex couples to be considered for the Homecoming Court. IN VIRGINIA, a high school teacher was demoted and transferred in retaliation for her students' critical editorial spotlighting dangerous and unhealthy conditions in an antiquated school building. IN TENNESSEE, a student editor was told that her editorial calling for acceptance of student atheists could not be published because it might inspire "passionate conversations." A few months later, the adviser was reassigned after the yearbook published a story titled "It's OK to be gay." IN WASHINGTON, a superintendent refused students' request to play an instrumental version of "Ave Maria" as part of a musical performance at graduation ceremonies. IN NORTH DAKOTA, an award-winning journalism adviser was fired because his school board believed he was failing to prevent students from publishing criticism of school scheduling decisions and other district policies. IN PENNSYLVANIA, a student was banned from wearing a "Terrorist Hunting Permit" T-shirt to express support for U.S. troops in the Middle East, and a federal court decided that the prohibition was legal. IN ILLINOIS, a veteran journalism adviser resigned under pressure after her students wrote stories detailing the widespread practice of casual sexual "hookups" and the detrimental health consequences. IN GEORGIA, a public high school confiscated and refused to distribute the annual yearbook because it contained photos of male students playing basketball without shirts. IN TEXAS, an appeals court threw out the First Amendment claims of a high school cheerleader who was disciplined after she quietly sat down rather than recite a cheer mentioning the name of an athlete who was later criminally charged with sexually assaulting her.

STUDENT PRESS LAW CENTER
REPORT
WINTER 2013 VOL. XXXIV, NO. 1

ONE GENERATION:
25 years later, a look back at
Hazelwood v. Kuhlmeier and its
impact on student journalism
and civic education

REPORT

WINTER 2013 VOL. XXXIV, NO. 1

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.

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A MESSAGE FROM EXECUTIVE DIRECTOR FRANK D. LoMONTE

Two views on *Hazelwood* show why conversation must continue

A generation ago, Justice William Brennan warned the nation about the perils of heavy-handed school censorship.

“[U]nthinking contempt for individual rights is intolerable from any state official,” the Supreme Court’s foremost First Amendment advocate admonished. “It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.

The ruling from which Justice Brennan was dissenting — *Hazelwood School District v. Kuhlmeier* — has now been the law of the land for 25 years. The toll that it has exacted on the quality of public education came into sharp focus last fall, when scholars from the fields of law, civics, journalism and education gathered at the University of North Carolina at Chapel Hill for a two-day symposium, “One Generation Under *Hazelwood*.”

The video from the entire symposium is online and is well worth a viewing, but there were two signature moments that crystallized what *Hazelwood* means and why it’s essential to continue talking about it.

The first came from David Cuillier, director of the journalism school at the University of Arizona, who explained how his college felt compelled to require what is essentially a “remedial First Amendment 101” course after seeing the civically damaged condition in which students are arriving.

“I have been so alarmed by the kinds of students coming into our college programs who are completely unprepared for what journalism is about,” Cuillier said. “They think it’s OK to be told what to print and what not to print. They don’t challenge authority like they should. We have to reprogram them. We have to retrain them.”

The second came from a school district lawyer, whose view of *Hazelwood* censorship authority left audience members gasping. Courts cannot require schools to publish “controversial” material in student newspapers, he explained, because such an order would violate the schools’ First Amendment rights.

This is, of course, nonsense. Government agencies do not have “rights,” they have limitations. The idea that the Constitution exists to protect the “rights” of government agencies against their most helpless citizens should be consigned to the realm of “flat earthers.” But it is not.

That, ultimately, is *Hazelwood*’s legacy. It has convinced administrators that they have not just the ability to censor but the “right” to do so. And it has fed the mentality that the primary goal of the public school system is getting through a day without controversy.

This is why the SPLC is launching a campaign to “cure” *Hazelwood*, a sickness that keeps young people from learning to their fullest potential. We hope you’ll visit www.curehazelwood.org and join the race for the cure. Because the last 25 years of *Hazelwood* should be the last 25 years of *Hazelwood*.

A handwritten signature in black ink, appearing to read "Frank LoMonte".

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Blanket restrictions on talk between the media and school employees may be legally unenforceable – and such restrictions on students are almost certainly void.

IN BRIEF

GEORGIA — Charges against two Georgia student journalists arrested while photographing Occupy Atlanta protests were dropped after the National Press Photographers Association, the SPLC and five other groups wrote to the city’s mayor. Charges against a New York student arrested while photographing the Occupy Wall Street anniversary protests also were dropped.

TENNESSEE — The University of Memphis’ president reversed a 33 percent funding cut to *The Daily Helmsman* after an independent investigation found evidence that the cuts might have been based on content, a First Amendment violation. Student editors have launched a fundraising campaign to establish the *Helmsman*’s financial independence so as to avoid future funding battles with the university.

ILLINOIS — An Illinois high school suspended seven students for comments they made on Twitter and three others who protested the suspensions. Four students were suspended for tweeting or retweeting a sexually charged post about a teacher, while three were suspended over a tweet that joked about blowing the school up so students wouldn’t have to attend class.

LOUISIANA — The editor of *The Tulane Hullabaloo* won attendance records for Tulane games played at the Superdome after suing the state of Louisiana. SMG, the private company that runs the Superdome, initially declined to release the records, but agreed to in order to settle the lawsuit.

VIRGINIA — SPLC attorney Mike Hiestand was awarded the Society of Professional Journalists’ prestigious First Amendment Award. The award honors extraordinary efforts to preserve and strengthen the First Amendment. In 20 years at the SPLC, Hiestand has provided legal assistance to more than 14,500 student journalists.

FERPA Fact

FERPA Fact is a new SPLC project to fact check the use of FERPA — the Family Educational Rights and Privacy Act — when denying access to public records. Sometimes, the records are legitimately protected by FERPA. Sometimes the records are protected by other privacy laws. And sometimes, schools just don't want to release the records.

After Ohio State police reported three sexual assaults in one dorm this semester, *The Lantern* talked with police and student life officials about the assaults, who declined to say whether disciplinary action had been taken by the school, citing FERPA and HIPAA, the Health Insurance Portability and Accountability Act.

Adam Goldstein: When you have law enforcement citing HIPAA as a reason to withhold information, you're off to a bad start. HIPAA only applies to organizations primarily in the business of providing health care and certain types of billing companies they work with. In other words, it never applies to anything police or student life ever does, ever, at all. It's not that surprising, then, that their FERPA excuse is bogus, too.

The Lantern's request wasn't even for a record, let alone a record that would make a student identifiable. At worst, it was a request for information that might suggest the existence of unspecified records about unidentified individuals who may not even be students.

We rate this: Three Arne Duncans

From a reader on Twitter: "At University of Oregon I once requested emails from the student senate listserv and was told all the names would be redacted per FERPA."

Frank LoMonte: Hang on a second, I'm on the phone with the FERPA Police. "Hello, FERPA Police? Yeah, I'd like to report a violation. The University of Oregon is letting a bunch of students email confidential FERPA records back and forth to each other. Right, they're just emailing these FERPA records from

THE ARNE METER @ FERPAFACT.TUMBLR.COM



A questionable use of FERPA



Not protected by FERPA at all



one student senator to another student senator. No, they're not redacting the emails, they're letting these 20 student senators see everything. Oh good, you'll send a squad car right over?"

You see the point, right? If an email from Senator Huey to Senator Dewey is a FERPA record, then the violation occurred when the email was shown to 18 other senators on the listserv — because (except for safety emergencies) FERPA doesn't allow for confidential education records to be shared with anyone other than (a) a university employee with a business need to know or (b) a university contractor who has both a business need to know AND a signed confidentiality agreement. These students are neither.

The only way a student can create a FERPA record is by sending a

confidential communication to a university employee. A note from one student senator to another student senator about Senate business over the listserv simply can't be an education record.

We rate this: Three Arne Duncans

Earlier this year, a book about a family with two lesbian parents was taken off the library shelves and placed behind the counter at a school in Utah. *The Salt Lake Tribune* asked to see the emails and petitions submitted by parents on both sides of the issue, which the school provided with the parents' names redacted, citing FERPA.

Adam Goldstein: This is a tricky one. The names of parents are explicitly listed in the regulations as examples of personally identifiable information contained in education records. But the same section has a definition of education records that say education records are those "directly related to a student" and "maintained by" the school. While the copy of the petition in the possession of the school is presumably something they maintain, query whether a petition signed by a student's parent, with no other reference to the student, on an issue unrelated to the students' education, is "directly related" to the student.

It's certainly possible that a petition could contain information directly related to a student, so whether the names on a parent-circulated petition are FERPA-protected is going to depend on what the petition discloses about the children of the undersigned parents.

We rate this: Two Arne Duncans

Different rules: Administrators seek stricter control of online publications

As high school publications move online, they're facing stricter scrutiny from administrators who worry about the larger audiences online. Often, students wind up with less control online than they have in print.

BY BAILEY MCGOWAN

When news broke of a nearby elementary school student's disappearance on her walk to school, Standley Lake High School's monthly news magazine used Facebook to keep its students and community informed.

With every update on the case, *The Lake* linked to other news organizations such as *The Denver Post*. The student magazine shared Westminster Police Department's pictures, as well as provided quick updates in the form of wall postings.

After the missing 10-year-old girl's body was found and identified, the magazine used the page as a place for people to express condolences.

While the magazine has only had a Facebook page for a year, the staff posts to the page almost daily and has already amassed more than 800 likes. Facebook offers the staff an opportunity to get information out to the community in between monthly print editions, said Eva Hall, the magazine's co-editor-in-chief.

Hall and the other editors monitor the Facebook account and perform various duties such as editing posts or deleting comments they feel are offensive or inappropriate, she said.

Her adviser, Ben Reed, offers guidance but doesn't have final say. Instead, he said tries to teach students about the



PHOTO COURTESY OF KYLYNN DELOHERY

Senior Co-Editor-in-Chief Eva Hall, right, reviews a post on *The Lake's* Facebook page with sophomore Chaye Gutierrez at Standley Lake High School. Editors at the paper have control over the social media account, which isn't always the case at high school student newspapers.

impact of what they say.

"I'm teaching them about the ethics of journalism and the responsibilities of online journalism first and foremost, and then it's about trust," Reed said.

Only an estimated one-third of high school publications have an online component, according to a recent study conducted by University of Kansas and Kent State University researchers.

Those that do, like Standley Lake High, have had to figure out new policies for online publishing to supplement their long-established policies for print.

Often, the rules being established aren't the same online as they are for print. Schools that let students have the final say over content in the print product sometimes cede student control to an adviser when it comes to

the publication's online accounts.

The differences in how online and print publications are treated can often be traced back to administrators' fears of online, said Peter Bobkowski, a University of Kansas professor and the study's co-author.

Online, student publications can reach larger audiences outside the school wall, Bobkowski said. The perception is that things online are both less controllable and more accessible, as opposed to a printed newspaper that is just handed to students in the school and community, he said.

At Pattonville High School, *The Pirate Press* staff have the final say on what goes in the newspaper but only journalism adviser Brian Heyman has access to the student newspaper's Twitter account.

Students tweet from their personal accounts using the hashtag #PHSToday; Heyman reviews posts before retweeting them from the newspaper's Twitter account. Heyman said he decided on this process because the account is new.

The Pirate Press also requires staff to sign a social media contract that addresses journalism ethics.

"Not only did they sign it for the school, but I modified that and made it so that it was pertaining just to the journalism class as well," Heyman said, adding that he wanted to make sure students understood what the school considers inappropriate, like bullying or profanity.

Heyman said that after the account is more established, he'd like to let a student editor run it. The paper hasn't created a Facebook page because they feel it would be too difficult to monitor, he said.

At Circle High School in Kansas, the student magazine's staff is in charge of its website but not its Facebook page, said Vanessa Whiteside, the school's journalism adviser. Whiteside said she had difficulty convincing administrators to allow the page at all.

When Whiteside approached administrators last July about the idea, she said they were worried about what comments would be allowed on the site. To allay their fears, Whiteside said she presented administrators with examples of other Facebook pages run by student newspapers in Kansas.

In the end, the superintendent would only allow the student magazine to set up a Facebook page if Whiteside was the sole administrator of the page.

Whiteside also ended up setting up the page as view-only, where comments aren't allowed. The no-comment policy came about after the principal asked to have prior review of posts made to Facebook. Whiteside said she cited Kansas Student Publications Act, which doesn't allow administrative censorship, and told him she was not comfortable with prior review. Disabling comments was the compromise, which Whiteside says she's accepted.

It's important to let students establish their own ethical policies for social media, said Michael Moon, the journalism



PHOTO COURTESY OF KYLYNN DELOHERY

Co-Editor-in-Chief Eva Hall writes captions for photos posted to *The Lake's* Facebook page. Hall said that last year, the paper wasn't as active online. This year's editors are much more interested in that aspect though.

adviser at Kinston High School in North Carolina.

At the beginning of the year, Moon teaches a lesson about what students legally can print versus what they should print. This helps provide a framework for students, who are responsible for deciding what goes on the school's Facebook, Twitter and Instagram accounts.

"They can post whatever they feel is appropriate to publish," Moon said. "If they ever feel like they're uncertain about something then they'll just ask me what I think about it, and we'll talk about ethical issues.

"Usually they make the right decision without any real guidance from me. They just want reassurance." ♦

Tips for taking your student publication online

Do your research. Find other professional and student run online accounts. This way you can show your adviser and your administration what you want to do and the standard of how the account will function.

“You don’t want to surprise them with anything, do your research, bring in examples of successful professional journalists and successful student journalists that are using social media,” said Michael Hernandez, the broadcast journalism adviser at Mira Costa High School.

Even if students already have an online presence, any time they want to try something new they should show administrators an example of how it’ll work. This way advisers or administration can see what the product will be instead of just a theory of how it would work, said Jim Streisel, the adviser at Carmel High School.

Know your rights. If administrators ask for prior review of your online publication or social media account, make sure you know your rights. Seven states greatly restrict administrative censorship of high school student publications. Also check any policies that your school and district have concerning student publications.

Establish your guidelines. If you’ve based your online policy off of another organization or publication, make sure it fits what you’re going to be doing online.

If you are going to allow and monitor comments, make sure you have it spelled out in your policies beforehand in a place where your readers can find it. This way if you remove a comment, your reasoning is already established on your site. Include a way to contact editors if readers have complaints or comments.

“What’s really important is that we are a professional news organization,” Hernandez said, adding that students should write down their policies. “You can’t just talk about it and hope they’ll understand it.”

Be professional. Steisel said he teaches his students to be prepared to deal with snarky and critical comments posted online by readers. He tells his students to be professional in how they respond and tries to help them understand the impact their words can have.

“If you give kids that sense of responsibility then they know what they’re doing is bigger than them,” he said.

UNDER THE DOME

NORTH CAROLINA — A new law went into effect in December in North Carolina making it illegal for students to make fake social media profiles mocking school staff — regardless of whether the information they post about teachers or administrators is true. The law also prohibits students from posting real or doctored photos of school employees with the intent to “intimidate” or “torment.” Students who violate the law can be charged with a misdemeanor punishable by a \$1,000 fine. The American Civil Liberties Union has said it will attempt to challenge the law.

PENNSYLVANIA — State legislators failed to act on a bill that would have brought four Pennsylvania universities under the umbrella of the state’s open records law. The four universities — Pennsylvania State University, Lincoln University, the University of Pittsburgh and Temple University — are all considered state-related organizations, which are required to release limited financial information annually but which do not have to comply with other parts of the open records law. The bill, introduced in January in the wake of the Jerry Sandusky scandal, never made it out of committee.

CALIFORNIA, NEW JERSEY and DELAWARE — Legislators in each state have all passed laws protecting university students from being required to give up their social media passwords. The laws make it illegal for colleges and universities to ask for usernames or passwords.

MICHIGAN — A proposed bill would amend the state’s Freedom of Information Act to limit copying fees and increase the consequences for delays in responding to public record requests. The proposal aims to clarify the time requirements for responding to open records requests as well as grant penalties to organizations that delay on requests. In addition, it would limit copying costs to a maximum 10 cents per page and would limit agencies to charging no more than the hourly wage of the lowest paid employee capable of retrieving the records.

COLORADO — A task force that reviews criminal laws voted in July to repeal the statute making it a crime to steal free newspapers, a proposal contested by newspaper publishers. In November, Rep. Claire Levy, D-Boulder, said she’d introduce legislation that would remove the law from the theft statutes and instead classify it as “interference with the lawful distribution of a newspaper,” *The Denver Post* reported.

‘Anti-Hazelwood’ freedom of expression laws only go so far

An SPLC audit of school district publication policies in Colorado and Oregon finds many of the policies are at odds with the states’ student free expression laws, designed to give students more rights.

BY JORDAN BRADLEY

Following the Supreme Court’s 1988 decision in *Hazelwood School District v. Kuhlmeier*, there were movements in several states to enact free expression laws that would provide student journalists with more rights. The laws vary by state, but generally are designed to counteract *Hazelwood’s* effects by protecting student journalists from administrative censorship.

Massachusetts enacted its student free expression law first, followed shortly by Iowa and Colorado. In the years since, Arkansas, Kansas and Oregon have passed similar “anti-*Hazelwood*” laws. California had student expression laws in place before the *Hazelwood* ruling.

On paper, these state laws offer students significantly expanded speech rights beyond those afforded to students under *Hazelwood*, which has been cited as a defense for school censorship of curricular-based student publications, such as those produced as part of a class.

In practice, a Student Press Law Center audit of school districts in two of the states – Colorado and Oregon – found almost none of the student publication policies at the district level comply with the state’s law, and actually restrict students’ rights to freedom of expression and of the press. Many of the wayward policies are traceable to model publication policies created by school board associations in the two states.

The audit, based on public records provided by the school districts, looked at the 15 largest districts in Colorado and the 25 largest in Oregon. Together, those districts make up about two-thirds of the public school population in each state.

Colorado passed its Student Free Expression Law in 1990, defining publications written by students and generally available at a school as public forums. The law gives students editorial control over the publication’s content while still allowing the paper’s adviser to supervise the

production of the paper.

The law also prohibits any kind of prior restraint by the school, unless the content is obscene, libelous or incites students to commit unlawful acts.

Oregon’s Free Expression Law, passed in 2007, is similar. It gives high school (and college) students the right to exercise freedom of speech even if the student publication is school-funded or produced in a class. As in Colorado, the law only prohibits content that is disruptive or otherwise illegal, including libelous material or that which constitutes an invasion of privacy.

Both student free expression laws also require school districts to draft their own policies for student expression. This gives districts the ability to give students even more rights than those afforded by the First Amendment or by state law.

None of the audited districts chose to do so. Of the 40 district publication policies reviewed by SPLC attorney Adam Goldstein, 38 did not comply with the law’s minimum requirements, including all of the Oregon school districts that were reviewed. Six of the 38 non-compliant policies were very close to fulfilling the laws’ requirements, but fell short in a minor way.

The SPLC traced many, but not all, of the policies back to school board associations in each state. At least 17 Oregon school districts either completely or partially adopted the Oregon School Boards Association’s model as their own, while eight in Colorado have done the same with the model provided by the Colorado Association of School Boards. Both of the model policies deviate from the law, Goldstein said.

“Cookie cutter policies” like those provided by the school board associations are becoming increasingly common, said John Bowen, chairman of the Scholastic Press Rights Commission and a Kent State professor.

Like many school board associations around the country, Colorado and Oregon's receive funding from school districts throughout the state who pay membership fees using state taxpayer money.

OSBA released its model policy to the SPLC upon request. CASB refused to release its model, saying the policy was intended only for members. Colorado's open records law classifies the group as a local government-financed entity, exempt from many of the records law's provisions.

Kathleen Sullivan, CASB's chief counsel, threatened legal action if the SPLC sought the policy from school districts themselves through public records requests. By law, if the district maintains the record, it is subject to release under the records law regardless of where it originated. The SPLC eventually obtained a copy through such records requests.

The CASB policy says that student publications must "contain a disclaimer that expression made by students in the exercise of freedom of speech or freedom of the press is not an expression of Board policy."

"It's not that there's anything wrong with disclaimers, it's that it can't require students to make a statement," Goldstein said. "That's compelled speech. Legally, they can't require it for the same reason you can't require students to say the Pledge of Allegiance."

In addition, an editor's note says school districts in the state "are not required by law to adopt a policy on" student publications, which directly contradicts the statute.

The editor's note also suggests that school boards "may want to consider a more conservative approach," adding that the statute has never been tested in courts and that some believe boards "can be more restrictive about who exercises ultimate editorial control."

Jeri Fleuter, CASB's associate executive director of policy services, declined to comment the group's policy.

In Oregon, the association's model says that high school publications cannot contain material that "is factually inaccurate or does not meet journalistic standards established for school-sponsored media."

That's good advice for avoiding libel lawsuits and maintaining editorial credibility, but there's is nothing in the state statute requiring factual accuracy or professionalism in student publications, Goldstein said.

Peggy Holstedt, OSBA's director of policy services, said it's her understanding that the language is allowed.

"They can't produce things that are not factually accurate," Holstedt said.

Reliance on school board association policies

The audit shows school districts rely heavily on the model policies for guidance and often adopt the models with few, if any, changes. OSBA's policy offers a mix-and-match of options within the policy and instructs school districts to

choose one to adopt, noting in a disclaimer that "the policies CANNOT be adopted in their current formats."

The model policies don't offer districts guidance as to the law itself, nor do they list which parts of the policy can be removed or modified while still complying with the law. The absence of such guidance appears to be responsible for problems with a majority of the Oregon district policies that are in tension with the law.

OSBA's model policy includes policies for elementary and middle schools, stating that articles may be "restricted or prohibited ... pursuant to legitimate educational concerns." In the section on K-8 publications, the policy identifies potentially censorable material as that which is "poor written, inadequately researched, biased or prejudiced," in addition to work that is "inappropriate" for the age of the audience or advocates or condones the use of profanity.

Also censorable under in the K-8 section of the policy is work that the public might reasonably perceive to "bear the sanction or approval of the school," a line that echos the *Hazelwood* ruling itself, where the Missouri student newspaper in question was seen as bearing "the imprimatur of the school."

The anti-*Hazelwood* protections in Oregon state law don't extend to elementary or middle school students. But sixteen school districts have removed the K-8 reference, effectively applying these standards to high school publications, even though it is at odds with the state's law.

Lisa Freiley, OSBA's director of legal, labor and PACE services, said the association's model policies are just a suggestion for schools. Freiley said it's the districts responsibility to make sure the policies they adopt are actually legal and effective.

"The policy statement is not intended to be a be-all and end-all statement," Freiley said.

More than half of the reviewed policies in Colorado used the school board association's model, though it is unclear whether or how many of the remaining districts reviewed the model but decided to take the advice of the editor's note and adopt a more conservative policy.

Despite the school board association's models, districts ultimately do have the final say on what is included in their policies on student publications — and as Freiley says, the responsibility to ensure compliance with the law rests with school districts themselves.

Oregon's Roseburg school district uses OSBA's model because it's convenient, said Larry Parsons, the district's superintendent. He said that he personally supports greater student free expression rights but that he doesn't see much support for that across the state.

"They don't give up their rights just because they're going to school," Parsons said. "The ebb and flow of student expression is changing. It feels like we've been in a more

conservative mode now.”

Maureen Wheeler, a spokeswoman for the Beaverton school district, said the district typically uses OSBA’s policies as a model, supplementing them with additional guidelines as they see fit. Beaverton’s publications policy is virtually identical to OSBA’s, with no noticeable additions.

Salem-Keizer school district, the second largest in Oregon, is one of a handful of districts in the state that writes its own student publications policy.

The board’s policy is shorter than most – only three sentences long – but has faults as well, Goldstein said. The policy says that student publications must be “free from discrimination, harassment, prejudice, and racism” and that “verbal abuse of any person is not permitted.”

“The reason why these things are First Amendment protected to begin with is that they mean different things to different people,” Goldstein said. “The government just isn’t supposed to be forcing us to like each other or get along, which is what that’s trying to do.”

Salem-Keizer Chief of Staff Mary Paulson said that the policy has served them well.

“We have pretty clear language,” Paulson said. “We try hard not to duplicate what the state law says.”

Paulson said the school board has looked at OSBA’s model policy, but as of now prefers its own.

Four of the Oregon school districts – Centennial, Medford, Springfield and West Linn Wilsonville – have adopted policies regarding freedom of expression but not student publications, a direct violation of the state’s law. Centennial’s policy directs school principals to create policies, but the law requires the policies to be adopted by districts.

Medford’s freedom of expression policy, adopted in 1981, allows schools to review and restrict students’ speech if any school official thinks that a “student is unaware of the possible consequence of his/her expressions.”

“I don’t think there’s a reason to be more specific,” said Phil Long, Medford’s superintendent. “It aligns us where we need to be.”

Long said the district would consider adding a policy for student publications if it received a complaint.

Some district policies, like Cherry Creek’s in Colorado, are very close to being compliant. Cherry Creek’s policy defines libelous statements as “probably false,” which is less stringent than the actual standard of libel. To be libelous, a statement must be proven false, not “probably false.”

Of the eight audited schools in Colorado that use CASB’s model policy, Cherry Creek is one of two that removed the language requiring a disclaimer. Aurora includes it in the policy as a recommendation.

Advisers and students say the policies in place at the district level don’t necessarily correlate with how their own journalism programs operate. A student newspaper’s

relationship with its principal can have a lot more of an impact than the district’s policy, they say.

Karen Rosch formerly advised *Eye of the Storm*, the student publication at Summit High School in Oregon’s Bend La Pine school district. Bend La Pine’s policy is another virtual copy of OSBA’s model policy, but Rosch says it hasn’t had an effect at her school.

“They don’t follow that policy,” she said. “It’s up to the discretion of the principal. It’s about the relationship you have with your principal.”

Jim Rotramel, who advises Aloha High School’s *Voice of the Warriors* in Oregon’s Beaverton school district, credited his school’s principal with flexibility in spite of the policy adopted by Beaverton’s board of education.

“Maybe it’s our principal’s approach to it, but I don’t feel that the student’s voices are being silenced,” Rotramel said. “It tends to be more of his own discretion, though we sometimes talk to him in advance about an article we’re doing.”

For schools in Colorado, many describe similar situations, with principals and other administrators making their own judgments regardless of the policies.

“I’ve personally have never had any problems,” said Jeff Likes, who advises *The Owl* at Boulder High School in the Boulder Valley school district. “The district itself has been very good about following state law.”

Cam Chorpenning, the editor-in-chief of *The Silver Quill* at Poudre High School, said that his paper has had to fight to run some articles but hasn’t been stopped from publishing what the students want.

Poudre’s policy is one of the 13 in Colorado that doesn’t comply with the law. It allows student editors to determine content for the publication “subject to review and approval by the publications instructor.” Under Colorado law, prior review, but not prior restraint, is allowed, and advisers and schools can censor content only if it meets specific criteria, Goldstein said.

Poudre administrators could not be reached for comment.

Chorpenning said that at Poudre, the paper is subject to prior review. Last year, a teacher on the school’s student publications committee tried to stop a story about a dance because the article mentioned grinding and other activities. The story was published, in part because the paper’s adviser encouraged the students to push for it, Chorpenning said.

Picking from a menu

The conflict between state law and many of the policies are symptoms of a bigger divide between school administrators and the journalism community.

School board associations get caught in the middle. Holstedt, OSBA’s director of policy services, said the school board association’s job is simply to provide the policies, not

Oregon's policies

	Does the policy fully comply with the state's law?	Is the district's policy based off of a model policy, either in whole or in part?	What does the policy say?
Portland	●	●	Says material may be censored for "legitimate educational concerns."
Salem/Keizer	●	●	Says publications must be free from "prejudice."
Beaverton	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Eugene	●	●	Noncompliant. Prohibits "vulgar" speech.
Hillsboro	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
North Clackamas	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Bend La Pine	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Medford	●	●	No policy on student publications, as required by statute.
Tigard Tualatin	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Gershman Barlow	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Reynolds	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Springfield	●	●	No policy on student publications, as required by statute.
David Douglas	●	●	Bans anonymous speech and describes the paper as a pedagogical tool.
Greater Albany	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
West Linn Wilsonville	●	●	No policy on student publications, as required by statute.
Oregon City	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Redmond	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Lake Oswego	●	○	Includes "not meeting journalistic standards" as a basis for censorship.
McMinnville	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Corvallis	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Roseburg	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Klamath	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Centennial	●	●	No policy on student publications, as required by statute.
Forest Grove	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.
Bethel	●	○	Applies K-8 model policy to high school students; uses <i>Hazelwood</i> language.

Colorado's policies

JeffCo	○	●	Compliant.
Denver	○	●	Compliant.
Douglas	●	●	Says teachers exercise control like editors of privately owned papers do.
Cherry Creek	●	○	Defines libelous statements as "probably false."
Adams12	●	●	Gives advisers "control... consistent with legitimate pedagogical concerns."
Aurora	●	○	Says papers can be censored for grammar; must provide rebuttal space.
Colorado Springs	●	●	Says papers can be censored for reasons relating to "learning experience."
Boulder Valley	●	○	Requires a disclaimer.
St. Vrain	●	●	Prohibits "hostility" in publications, among other things.
Poudre	●	○	Requires a disclaimer; uses <i>Hazelwood</i> language.
Academy	●	●	Requires a disclaimer.
Mesa County	●	○	Says papers can be censored for grammar; requires a disclaimer.
Weld County	●	○	Says papers can be censored for grammar; requires a disclaimer.
Pueblo City	●	○	Says papers can be censored for grammar; requires a disclaimer.
Littleton	●	○	Says papers can be censored for grammar; requires a disclaimer.

to help districts bridge that divide. Armed with model policies, it's up to the school districts to decide on the final policies themselves.

Most of those school board members and administrators don't understand much about journalism and generally aren't open to giving students a large amount of control over publications, said Dick Clapp. Clapp is the chief executive officer of NEOLA, a for-profit corporation that sells model policies on various issues to school districts in seven states, including Florida, Indiana and Ohio.

"All they read about in their literature is the horror stories," Clapp said. "They think we need to take a very strict approach instead of a finding a good adviser."

Clapp said it could be helpful for representatives of the two sides to meet and discuss the issue of censorship.

"My experience with school boards is that they don't like being told they're wrong. So, say, 'Here are some alternative ways of thinking about this. Here's why it would be a good idea to give more latitude to students.'"

NEOLA's model policies for student publications originally gave school districts two options, both of which establish student publications as limited forums and allow administrative censorship. Bowen worked with NEOLA to develop two other options giving students more rights, but all four are presented without any explanation of the pros and cons of each that could help school district's decide which to adopt.

"The main problem with their policy is that they don't want to take a stand and say to a school system, 'This is what you should do,'" Bowen said of NEOLA's policies. "They want to say, 'We're gonna give you a menu, and you're going to pick from the menu what you want,' at least that's what they told us."

Bowen credits NEOLA for working with journalism groups to improve the policies for students, but says not all groups are as proactive. And all could take a harder line in advising districts, Bowen says. School board associations should tell districts what they need to hear, not just what they want to hear, he said.

Failing that, it's up to student journalists and advisers to be proactive in examining their school district's policies, said Karla Kennedy, the executive director of the Northwest Scholastic Press Association. They need to be more involved with the schools and the districts and constantly remind them what the law does and does not allow, she said.

Students and advisers should also try to get weak policies fixed, Bowen said.

"If the policy is weak, then the administrator can come back to it and say, 'we were just enforcing policy that you guys haven't said anything about before,'" he said. ♦

DIY: AUDIT YOUR OWN SCHOOL DISTRICT'S POLICIES

Checking up on the policies related to student free expression and student publications at your school and in your school district should be an annual task for every high school newsroom.

Ask to see the policies your school district and school have regarding free speech, free expression, or written publications. You might need to make a public records request to get this information. To do so, use the letter generator at splc.org. Put in the contact information for the school or district you're requesting the policy from and then describe what policies you want to see. Then, email it to your school or school district.

Once you get a copy of the policies your school has in place, read through them to find out whether they protect you from *Hazelwood* or put you at risk. Visit splc.org to read the SPLC's model policy for high school students and college students for an example of what a good policy looks like. If you're not sure if your school district's policy protects you or puts you at risk, contact the SPLC's hotline at **(703) 807-1904**.

If you live in a state that has enacted student free expression laws (**Arkansas, California, Colorado, Iowa, Kansas, Massachusetts or Oregon**), make sure your district and school-level policies comply with the state's law. If the state says one thing, but your school district says the opposite, the district's policies need a refresher. If you find this is the case, talk with your principal and school board. Ask them why the policies don't match up.

Lastly, it's not enough to just test your school district's policies once. School districts often change policies over the summer, when students are away on break. Do this test once a year to check where your school district stands on student free expression.

HOW WE DID THE STORY

We reviewed the publication policies provided by school districts in Colorado and Oregon through public records requests. The SPLC requested policies from the largest school districts in each state — 15 from Colorado and 25 from Oregon. They serve about two-thirds of the student population in each state.

READ THE POLICIES

To read the model policies and those from the school districts we audited, visit splc.org/news/report.asp.

Tip sheet

Using legislative records

what's out there...

Almost all state legislatures put the full text of proposed bills online in a searchable database. It's worth regularly running searches for terms like "college," "university," "tuition" or whatever other issue might interest your readers. These databases also provide the status of each bill as it progresses (or doesn't) through the hearing process and gets amended. If bill-status information is not online, each chamber of your legislature (with the exception of Nebraska, which has just a single chamber) will have a Clerk's Office that can easily provide the status of any bill with a phone call.

Reading bills can be a chore, and it's easy to get a misleading impression – but once you figure out the "code" your legislature uses, most bills are easily figured out. For instance, most legislatures use a strikethrough to indicate wording that is being removed from an existing law, and underlining to indicate wording being added. Words that are neither underlined nor struck through are part of the existing law and are being left unchanged.

The backbone of every legislature is a committee system where bills are debated and revised (and often bottled up and killed). Get familiar with the legislators and staff members assigned to the key committees impacting higher education. Know that bills directly affecting students' interests may go through committees other than the Education or Higher Education committees. For instance, the Appropriations or Budget committees will decide school funding issues, and the Judiciary committee will handle changes to the justice system bearing on students' legal rights.

A number of nonprofit organizations monitor and report on trends in legislation. One of the most prolific is the National Conference of State Legislatures, www.ncsl.org, which regularly publishes updates on the status of proposed laws dealing with hot topics in the news. Information from NCSL and other external monitoring groups can provide balance and perspective allowing you to compare your state against others.

...and how you can use it

Some of the key education issues that state legislatures have been dealing with in recent years include: (1) the ability of undocumented residents to attend state colleges; (2) the marketing and recruitment practices of for-profit colleges; (3) the ability to carry firearms on campus or in campus residences, and (4) how much remedial education four-year colleges and universities will offer. If your state has a governing board over higher ed, find out whether their legislative-affairs office compiles and circulates an agenda of higher-ed bills and try to get copies of those compilations. If your college has a director of legislative relations, find out if that person distributes memos updating administrators on legislation of interest.

State legislatures decide whether the state's credit can be pledged behind construction bonds – and bonds are what enable colleges to build stadiums, science labs and other buildings, like taking out a mortgage for a house. Following the state budget can tell you whether your school will get the \$20 million dorm it wants, or must wait until next year. Learn the key staff members in the legislature's budget office and the governor's budget office.

Larger states with well-funded legislatures often maintain full-time, year-round staff who inhabit the Capitol even between sessions, studying what's going on in their areas of expertise. Staff members assigned to individual legislators or to legislative committees can be a valuable source of information and documents – for instance, many committees conduct "oversight" or auditing hearings and issue reports on how state programs are or are not working. And if you get really stuck on a public-records request, a friendly legislator or legislative aide can often get a much faster and more cooperative answer than you can.

State legislative campaigns get little-to-no coverage in mainstream professional media. That's unfortunate – but it's also an opening for the student media. Like all political campaigns, legislative races generate a significant public-records paper trail. Most every state requires candidates to file some level of personal financial statement and to file periodic disclosures of campaign contributions. These typically are available for inspection and copying through a secretary of state's office or a state ethics commission.

the news peg

Colleges and universities spend big bucks trying to influence state legislatures. The Florida Legislature's directory shows 226 people registered to lobby on behalf of colleges. *Central Michigan Life* reported in 2012 that Central Michigan University spent more than \$110,000 on statehouse lobbyists. Almost every state requires agencies to file spending reports disclosing what they pay their lobbyists – and how much those lobbyists spend entertaining state officials. What your college is spending, and how that compares to comparable schools, is a must-do annual story.

Don't forget to check on associations your school belongs to – and check on lobbying by separately incorporated affiliates of the college, like teaching hospitals, as well. If a company – like a dining company or a dorm construction company – that does lots of business with your college starts hiring high-powered lobbying talent, then there may be legislation benefiting that company that needs watching.



In Michigan, an advocate for students' First Amendment rights

It's the only partnership of its kind — a law school, journalism school, and a scholastic press association all working together to teach high school students that they have rights, too.

BY BAILEY MCGOWAN



Once a week, Lauren Mercado teaches classes of Michigan high school students about the First Amendment. Mercado teaches as part of Michigan State University's First Amendment Law Clinic, the only law clinic of its kind devoted to student First Amendment issues.

PHOTO COURTESY OF MICHIGAN STATE UNIVERSITY COLLEGE OF LAW

When Lauren Mercado teaches high school students about First Amendment law, she always sees wide eyes when she starts talking about Facebook.

"Immediately their faces light up when you teach them about social media," said the law student and member of Michigan State's First Amendment Law Clinic. "They want to know what relates to them."

In her weekly classes with students across the state, Mercado often pulls up students' own Facebook pages to show how public pages can be. It leads into deeper conversations about what types of speech is protected by the First Amendment, and what isn't.

"I think it's really important to teach high school students because they don't know they have legal rights," Mercado said.

Since 2011, the Michigan State University College of Law's First Amendment Law Clinic has offered workshops and legal advice to high school students and advisers across the state. The clinic covers a variety of First Amendment law issues: libel, privacy, defamation, copyright, open records, freedom of information and cases involving speech on social media.

For the law students, it's a chance to get experience in First Amendment law cases as well as learn teaching skills.

The clinic got its start in 2004 as an externship with one or two students a semester. The program's first big case was representing a publisher and a Muslim woman who were being sued by the woman's family for libel after she wrote a memoir about her life, said Nancy Costello, the program's co-director.

The externs did the bulk of the work under attorney supervision and ultimately won their part of the case, earning the law school's attention, Costello said. After that success, the law school's dean encouraged Costello to pursue the idea of an expanded First Amendment Clinic.

It was an obvious fit to partner with the Michigan State journalism school and the

Michigan Interscholastic Press Association, housed at Michigan State.

"To have a synergy between the school of journalism, MIPA and the law college was a natural way to have cross-campus collaboration and it would help students, high school and college students that were facing censorship and other FOIA questions," said Jane Briggs-Bunting, the director of the school of journalism at the time who helped Costello develop the program.

Now, the program has between 10 and 16 law students a semester. Students fill out an in-depth application about their background in First Amendment issues and teaching experience, Costello said. Once in the program, students commit to either one or two semester's worth of clinical practice.

Because First Amendment cases rarely wind up in court, Costello decided to make the program more of a practical program. In addition to extensively studying First Amendment law and writing legal briefs, law students in the program are taught effective teaching methods that they then take out into the field.

Law students in the program are required to develop comprehensive lesson plans in pairs, and practice their plans before their peers before setting out on the road to teach high school students. They travel across the state, teaching two or three classes each week.

The clinic tries to cover topics relevant to students, said Brett Sachs, a former clinic member. The students also look at Supreme Court rulings that apply to students, like *Hazelwood School District v. Kuhlmeier* and *Tinker v. Des Moines Independent Community School District*.

Those are the same topics advisers would normally cover, but students seem to respond better to the guest speakers, Marilyn Hess, a journalism adviser at Plainwell High School in Plainwell, Mich.

The weekly sessions tend to be highly interactive with Jeopardy-style games, Facebook groups, blogs, music clips and YouTube videos to demonstrate case law.

“I was just so impressed at the way they were able to relate this stuff to the kids’ level,” Hess said.

Mercado said it can be difficult to teach the concepts to high school students but that it’s good preparation.

“Nothing’s harder than teaching high school students the law,” Mercado said. “They’re extremely bright so you have to be prepared. If you can teach it to high school students you can teach it to anyone.”

Former clinic member and third year law student Katherine Wheat agreed. She said the clinic helped her because it required her to learn the subject very well herself.

“Anytime you are teaching something, you are going to learn it a lot more than when you’re just studying it from the book,” Wheat said. “When you’re standing up in front of an audience and you’re actually being asked questions — especially at any type of secondary education level because they have tons of questions — you have to be on your game.”

The lessons help provide a framework for students to understand the laws and how they’re applied. The classes often lead to discussions about ways to approach school administrators on censorship issues.

“It helps to empower students but they know they have to back it up with some kind of knowledge of why they can print that or why they can print somebody saying this or that, whether it be in the school’s favor or not,” Wheat said.

Plainwell High School senior Aaron Olson said it was great having someone so close in age to come in and present. The lessons help the student journalists stay within the law, he said.

“They taught me what I can or cannot do, and that’s actually saved my butt quite a few times,” Olson said.

The classroom experience taught clinic members how to adapt quickly as well as change and correctly quickly in order to help students grasp concepts, Sachs said.

The law students are encouraged to come up with new ways to connect with students, said Caroline Kinsey, a former clinic member. Many tried to keep the conversation going after classes by posting on class Facebook pages, she said.

The day after lessons, Kinsey and her teaching partner posted questions and gave the student who answered first correctly a prize. Costello is really supportive of new teaching methods, she said.

“You come to her with a really new or unique idea and she’ll say ‘alright let’s do it,’” Kinsey said. “She really is really always excited to help us adapt our learning as technology changes.”

Advisers feel comfortable using the clinic since the program works just with Michigan high schools and has become very familiar with the problems they face, said Kimberly Kozian, the newspaper adviser at L’Anse Creuse High School-North.

Clinic members also investigate claims of censorship throughout the state and write memos for particular



PHOTO COURTESY OF MICHIGAN STATE UNIVERSITY COLLEGE OF LAW

On Constitution Day in September, First Amendment Law Clinic Director Nancy Costello and a group of clinic members taught more than 600 Ann Arbor, Mich., seventh graders about students’ free speech rights.

issues students encounter. They analyze the objectiveness of the claims to determine whether students have a First Amendment violation claim, Sachs said.

Reversing or limiting the application of *Hazelwood* was of the main reasons the clinic was established, Costello said. *Hazelwood* has been used by schools to censor student speech produced as part of a class, as many student newspapers are.

Costello said she’s always wanted to take on a case that would test *Hazelwood*, but that finding one is a challenge because cases involving high school censorship rarely make it to court. Because students eventually graduate, often the issue becomes moot before the court can hear the case, she said.

Still, Costello said the clinic is always watchful for cases that could challenge *Hazelwood*.

“We are waiting and I someday hope there might be a case that we can take that far to challenge *Hazelwood*,” Costello said. ♦

2012 Newspaper Thefts

Newspaper theft is a form of censorship — and an effective one at that. In the last year, student newspapers have reported a total of 27 thefts.

THEFTS BY STATE



1 THEFT ALABAMA ARKANSAS CONNECTICUT FLORIDA
MASSACHUSETTS NEW YORK OKLAHOMA OREGON
RHODE ISLAND SOUTH DAKOTA TEXAS VERMONT
VIRGINIA WASHINGTON WEST VIRGINIA

THEFTS BY SUBJECT



■ CONTENT-RELATED
■ NOT CONTENT-RELATED
■ UNKNOWN

“Disposing of newspapers is not only wrong, but it is unfair to the Student Body and the *Alligator* staff that works so hard to write them every day.”

— Jason Tiemeier, the former student government president pro tempore at the University of Florida, in a front-page guest column apologizing for dumping almost 300 copies of *The Independent Florida Alligator* in March.

STOLEN COPIES

12,261

LARGEST THEFT

1,500

NUMBER OF COPIES OF THE WESTERN COURIER THAT WERE STOLEN AFTER THE ILLINOIS PAPER REPORTED ON A STUDENT TRUSTEE’S ARREST.

MOST THEFTS, BY MONTH

5

REPORTED THEFTS IN SEPTEMBER.

MORE INFO

FOR A MAP OF ALL THEFTS REPORTED SINCE 2000, AS WELL AS RESOURCES FOR PREVENTING AND DEALING WITH THEFTS, VISIT: <http://www.splc.org/knowyourrights/theftmap.asp>

Seeking readers, student and professional media team up

Amid declining readership, both college and professional media outlets are finding a benefit to one-time partnerships that provide news they wouldn't otherwise be able to give readers on their own.

BY SAMANTHA RAPHELSON

When *The Technician* started planning its 2012 election coverage, editors at the North Carolina State University student paper wanted to make sure they gave readers balanced coverage of both campaigns.

Coverage of the Democratic convention a few hours away in Charlotte, N.C., would be easy; more difficult was the Republicans' in Tampa. Down in Florida, student editors faced the same problem but in reverse.

In the end, *The Technician* partnered with student newspapers at the University of Tampa and the University of South Florida in order to produce coverage of both the Democratic and Republican conventions.

"I knew that a lot of student publications are criticized for being too liberal, so I made sure that we were covering the RNC," said Mark Herring, *The Technician's* editor-in-chief. "I did it not just to show, 'hey we're not taking the convenient route,' with the coverage in the DNC, but I wanted to make sure we were covering the entire thing to inform our readers."

The three papers' agreement is just one of many one-time partnerships being forged between student and professional media aimed at adding value for readers in a time of cutbacks to staff and reporting budgets.

More broadly, the partnerships seek to keep and grow stagnating readership figures, one of the top challenges indicated by student newspaper executives nationwide.

The types of partnerships vary from projects led by professors in a class to journalism programs built around sharing content with professional outlets.

Many of the arrangements between professional outlets and students come from a recognition of the superior access college journalists have in terms of reporting on issues of concerns to their peers, said Dan Reimold, who blogs about college media and advises *The Minaret* at the University of Tampa.

"I do think the hierarchy still exists of professional first,

student second, but there seems to be a realization that in some cases the student paper may have more access to the sources that are breaking the news," Reimold said.

Before the convention, USA Today College and Yahoo! Voices both offered *Minaret* reporters the opportunity to freelance. The student freelancers used their perspective as college students to their advantage, he said.

"That's what we decided to focus on from the beginning," Reimold said. "The two things we could provide were trying to be the eyes and ears of the students, and also giving some sort of local perspective just in the sense of knowing Tampa like the back of our hand."

Local perspective was important to Herring too, who in addition to partnering with the Florida papers also reached out to college publications in other swing states.

"I wanted to get our readers to see what's going on where these guys are duking it out," Herring said. "At that point in the campaign North Carolina was still kind of a toss-up, so I wanted to see how they were appealing to other swing states."

By the end of the election, *The Technician* had published stories from eight different college newspapers.

"I think our biggest challenge was trying to find a way how we can get college students to read this, and how we can get them out and going to the polls," Herring said. "The biggest part was showing them how they had a stake in this."

Chris Poore, who advises *The Kentucky Kernel*, said partnerships have long existed — like agreements between sports sections to obtain photographs from away games — but that both student and professional media are approaching partnerships with new interest because of tightening budgets.

"I think financially independent student newspapers ... are willing to consider more because times are tighter or money's tighter," he said. "It's the same with the professional newspapers. They're reaching out to college newspapers for the

same reasons — they would like to increase audience but don't necessarily have the manpower to do it these days.”

Staff cutbacks helped prompt the formation of one of the more closely watched partnerships, where at Mercer University students have begun working alongside professional print and broadcast reporters to cover Macon, Georgia.

The John S. and James L. Knight Foundation awarded the school a \$4.6 million dollar grant after editors at *The Telegraph* and Georgia Public Broadcasting expressed interest in working with Mercer in order to bring their newsrooms into the digital age, said Beverly Blake, the Macon program director for the Knight Foundation.

The program, which launched in August, operates through what is called the “medical school model,” Blake said. Students learn the basics in the classroom and then get to practice their skills working side-by-side with veteran journalists.

There's an educational value to students who have the opportunity to partner with professionals, but Reimold cautioned that it might not lead to future employment. Still, he thinks opportunities for student journalists will keep growing.

“I think it's fascinating for its irony because students have never had more of an opportunity to build a more impressive resume, but I'm just not sure it will mean anything at all,” Reimold said. “For now I don't see a direct correlation other than the sheer joy of doing great journalism and getting your work out there for readers.”

There are also potential legal risks to students working in these types of partnerships between schools and professional media, said Frank LoMonte, the Student Press Law Center's executive director.

It's unclear whether students are covered by shield laws in these roles, which protect journalists from being compelled to testify or disclose sources and information in court, he said. Almost all states have some type of shield law, but the degree of protection becomes murky depending on the amount a journalist is paid.

Because students in these types of partnerships typically work in exchange for credit, not pay, “it's not at all clear that a student who's working at some kind of partner arrangement is going to have the benefit of the privilege,” LoMonte said.

“We've got to get really ironclad First Amendment protection for students that are doing journalism in their off-campus time for off-campus news outlets,” he said.

For his part, Herring said the relationships he built through the partnerships *The Technician* pursued were more important than any content the paper received.

“It's just been energizing just seeing how supportive everyone is in the journalism community,” he said. “When I started it's like, ‘oh man we're all competing against each other,’ and that's true to a certain degree, but in the end everyone's trying to do the same job, trying to help each other out.” ♦

ON THE DOCKET

VIRGINIA — A federal judge has upheld a Virginia ban on alcohol advertisements in college publications. The decision is the latest in a six-year-long battle between Virginia Tech's *Collegiate Times*, the University of Virginia's *Cavalier Daily* and Virginia's Department of Alcoholic Beverage Control. The regulations only allow references to alcoholic beverages in restaurant advertisements, and then only in generic terms. The papers say the ban hurts them financially. The Student Press Law Center filed a friend-of-the-court brief in favor of the papers.

MINNESOTA — A sixth-grader's lawsuit against her middle school for punishment she received because of posts she made to Facebook will continue after a judge denied the school district's motion to dismiss. The girl says administrators demanded her password after learning that she and a male student had discussed sexual topics. This was after the girl had already been punished for posting about a hall monitor that was “mean” to her.

FLORIDA — Santa Fe College has asked the state's district court of appeals for a rehearing *en banc* after the court ruled in July that the college must release emails from a former student complaining about a professor's conduct. Former professor Darnell Rhea sought the emails in 2009 after his contract was not renewed. He received the emails with the student's name redacted because the school said it was protected by the Family Educational Rights and Privacy Act. More than two dozen colleges and universities in Florida filed a friend-of-the-court brief supporting Santa Fe's claim that the records would violate FERPA.

OREGON — A First Amendment lawsuit brought by a conservative publication at Oregon State University can proceed after the Ninth Circuit Court of Appeals reversed a lower court's 2010 dismissal of the case. The appeals court said *The Liberty* has a validly stated claim of First Amendment and due process violations against school officials after university staff removed all of the monthly publication's newspaper boxes and later limited the publication's distribution. The school has said it was enforcing an unwritten policy preventing boxes from being placed on certain areas of campus, but the paper says this ban wasn't enforced equally among all publications.

Pressure describes it all *Pregnancy affects many*

by Andrea Collier
Sixteen year old Sue had it all—good looks, good grades, a loving family and a cute boyfriend. She also had a seven month old baby boy. Each year, according to Clai...

Birth control Nearly, two-thirds of sexually active teenagers do not use birth control. If birth control is used, it is used irregularly. The 62 percent who have never used birth control...

should discuss sex with their children, talking about emotions as well as actions, making their children aware of the parental standpoint and the consequences.

over ten abortions were obtained by teenagers.

A major problem in teenage abortions is teenagers deny having their abortions, thereby increasing...

teenage childbearing is the interruption of schooling. Teenage mothers who give birth before the age of 18 are only half as likely to graduate from high school.

25

years later, a look at one generation under *Hazelwood*

When the Supreme Court's ruling came down in January 1988, journalism educators feared the decision would make it more difficult for student journalists to produce good work without the threat of censorship. Now, 25 years later, many believe their worst fears — and more — have come true.

BY BAILEY MCGOWAN and SARA GREGORY

According to the national average, teenagers begin sexual activity at about age 16.

Mom and dad Parents

percent abortions, according to the United States Department of Health and Human Services. In 1980, three out of...

major cause of infant deaths, illnesses, and defects. Another consequence of...

parents are making teenage sexuality a family matter. The rule would require...

Teenage marriages face 75 percent divorce rate

by Beth Conley
Is getting married young all it's cracked up to be? If it is, then why do three out of four marriages end in the divorce court? There are several reasons why teen marriages do not last. These include lack of behavioral...

Association in New York and a clinical instructor of psychiatry at New York Medical College, talked about the advantages of early marriage in an article in *Harper's Bazaar*. He said that there is the opportunity to influence each other's development and share in...

Runaways and juvenile delinquents

Runaways

by Mary Williams

"My dad wouldn't buy me a pair of Jordache jeans. He says they are too expensive. I think I will run away!"

Not a very good excuse for leaving, right? Unfortunately for some, this is exactly the perfect excuse for escaping to a life out on their own. It is estimated, by the FBI, that one million teenagers a year run away looking for something better.

Most runaways leave for more serious reasons than a pair of jeans. For example from a Globe...

marks for gangs, drug pushers, pimps and other hardened criminals. Some are beaten, raped or homosexually assaulted or become victims of suicide.

Without adequate shelter and food, runaways are exposed to a whole range of medical illnesses, from respiratory infections to V.D. The use of dangerous drugs, petty thefts and especially shoplifting are common to runaways.

Experts offer advice to any person who is thinking of running away—don't! Seek help to patch up the cause of this temptation.

... for today's teenagers

... teens each year

notification to parents within ten days of the time their daughter, under 18, received birth control pills, a discharge or an abortion.

Proponents say that the rule would decrease pregnancies if put into effect. However, experts say that if the rule was put into effect, teen pregnancies would increase.

two months old. I plan on coming back in January when the second semester begins.

When I first found out I was pregnant, I really was kind of shocked because I kept thinking about how I was protecting my body. I wasn't

At first both families were disappointed, but the third or fourth month, when the baby started to kick and move around, my boyfriend and I felt like expecting parents and we were

have no regrets. We love our baby more than anything in the world (my boyfriend and I) because we created him. How could we not love him?? ... I was so naive and innocent...

It was only a matter of hours after the decision in *Hazelwood School District v. Kuhlmeier* was read before its effects began being felt nationwide.

Nick Ferentinos learned of the *Hazelwood* ruling right arriving at Homestead High School on Jan. 13, 1988. The California journalism adviser and his students had been following the case and had even produced a two-page spread about it in an October 1987 issue of the student newspaper.

The Epitaph planned to send an issue to the printer the next day that included a story about a student with HIV. The paper was withholding the student's name and had spent considerable time vetting the piece.

At the time, HIV/AIDS was still a taboo topic that people were unsure how to approach. Few publications, student or professional, were devoting much attention to individuals with the disease, Ferentinos said.

Still, the staff felt they had a responsibility to their readers to cover the issue, said Mike Calcagno, *The Epitaph's* editor-in-chief at the time.

"We didn't feel we could serve that mission if we didn't address issues like sexuality," Calcagno said. "These things were relevant to high school students at the time, and we thought we had all kinds of administrative support for the class."

Ferentinos learned otherwise that morning, after the school's principal told him the paper couldn't publish the article. He cited that morning's *Hazelwood* ruling — the first of many times in the next days, months and years in which administrators would cite the ruling as a defense for censoring student speech.

are common occurrences in large cities

Divorce's impact on kids may have lifelong effect

They are also notified by parents who come in and report their child as a runaway. Mr. Tom Caruso, DJO, said, "Most runaways stay close to home with a friend or relative, but every once in a while they go out of state."

The St. Louis County Police Department comes in contact with runaways from officers on the street (beat officers), parents and teachers.

Detective Williams said, "When a runaway goes out of state, they are automatically put in a computer teletype system which is relayed state to state. When a runaway is found, they are returned to their home

Mrs. Patricia Vawter, guidance counselor, said, "We help the student by listening—allowing the young person to talk freely without judgment on the part of the listener. We help explore possible actions and their consequences, and make referrals to outside agencies able to help on a more professional or continuing basis."

Help is sometimes offered through a Deputy Juvenile Officer (DJO), who checks up on the student regularly, anywhere from six months to up until they are 17 years old. According to Mr. Tom Caruso, DJO, "We exert our energies where ever necessary ac-

could go back to last year. I would not get pregnant, but I

never think about just doing things like that. An

by Shari Gordon

In the United States one marriage ends for every two that begin. The North County percentage of divorce is three marriages end out of four marriages that start.

There are more than two central

my mom really couldn't stand it any longer," said another junior.

Diann Herbert, freshman, said "My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys. My parents always

Stunned by the principal's decision, Ferentinos mentioned it to a *San Jose Mercury News* reporter who called him seeking a comment reacting to the Supreme Court's decision. Ferentinos told him about the effect the ruling was already having, and a story about the censorship went on the wire and made national news.

The national attention ultimately prompted Homestead High administrators to walk back their decision. The next day, the California Department of Education said the ruling didn't apply to students in the state because of its Free Expression law passed in 1977, which protects students from administrative censorship.

The Epitaph's story eventually was published, but the near-censorship was difficult for staff to understand, Calcagno said.

"At the time it was stressful, and we worried," he said. "We had some distant ruling come down really thinking that it didn't apply to us. Then learned that it actually did, it was difficult to take at the time."

In the first few months of *Hazelwood*, a Florida school cited the decision when censoring articles about teenage sexuality. A school in Virginia wouldn't allow the student newspaper to publish the results of its survey on teen alcohol and drug use. And a Tuscon, Ariz., community college started asking if it could apply the ruling to its adult students as well.

In the 25 years since the ruling, thousands of students have experienced the ruling's impact first-hand. Many knew little of the case before finding themselves censored; others knew of it from their journalism textbooks and classes but never anticipated it would actually apply to them.

Members of both the journalism and educational communities say they have been surprised by the degree to which *Hazelwood* has been extended by schools and courts to apply to everything ranging from student newspapers to textbook choices and even to student speech at the collegiate level. In Texas, it was even used to back a school's decision to remove a cheerleader from the team after she refused to cheer for a basketball player accused of raping her.

The case, revisited

Cathy Frey, formerly Cathy Kuhlmeier, said that when she and her classmates brought the lawsuit against their school district they felt really confident in the case because their former adviser had taught them about their rights.

The students at Hazelwood East High School had tried to publish a two-page spread featuring articles about teen pregnancy, runaways and the impact of divorce on teens. Frey, who was editor of the paper at the time, said the staff got the idea for the stories from looking at old issues of *The Hazelwood Spectrum* and were trying to update the pieces.



SARA GREGORY/STUDENT PRESS LAW CENTER

Leanne Mosby, left, and Cathy Frey, right, said in November at a conference on *Hazelwood's* effects they were surprised by how the ruling had been applied. Frey, who was editor of the paper when she, Mosby and another student brought the lawsuit, said she felt as though they had "crushed journalism hopes for students."

When the principal reviewed the issue, as was the practice at the school, he decided to cut the two pages out of the planned six-page edition. He didn't tell the student journalists of his decision; they found out only after the paper had been printed and the four-page issue, minus the spread, was delivered to the school.

Later, Principal Robert Reynolds said he censored the articles because they were inappropriate for student readers and because the articles were not fair, balanced pieces.

Frey and two staff members, Leslie Smart and Leanne Tippet, decided to sue with the help of the American Civil Liberties Union. Their lawsuit was filed a few months later in a federal district court.

Smart and Tippet, now Leanne Mosby, graduated right after the issue was published; Frey, a junior, said her last year

at the school was frustrating. She said Reynolds kept a close eye on her after becoming upset by an appearance she made on The Phil Donahue Show talking about the censorship.

“Once it started progressing it felt kind of overwhelming,” Frey said.

By the time she was in college, Frey said the case had quieted down. She was in her last semester of college when the Supreme Court’s decision finally came down, ruling that Reynolds was allowed to censor the issue.

The court said the paper wasn’t a “public forum” because it was produced as part of a class. Schools could censor student speech, the court said, based on a “legitimate pedagogical concern.”

The ruling curtailed existing student speech rights, which up to that point had been determined based on the ruling in the 1969 *Tinker v. Des Moines Independent Community School District* case. In *Tinker*, the court ruled that students and teachers did not “shed their constitutional rights” at the schoolhouse gate. Schools may censor students only if they can prove the speech would cause a “material” disruption to the school.

Mosby said the ruling didn’t come as a shock – she wasn’t optimistic after the Supreme Court agreed to hear the case – but more so as a disappointment. Frey agreed with her.

“When it finally came down that we’d lost, it felt like we’d just kind of crushed journalism hopes for students,” Frey said. “That was never really our intent.”

The purpose of journalism education

The journalism being censored under *Hazelwood* is often the type of public service truth-telling that is characteristic of the profession’s best work.

In 2002, a high school student in Michigan wrote an investigative piece looking into one couple’s claims that the school bus barn’s emissions were responsible for the husband’s lung cancer.

The story was pulled by the school district’s superintendent, who said the piece lacked research, said Gloria Olman, who advised *The Arrow* at the time.

Katy Dean, the author of the censored story, said she was surprised something like that could happen, even though she had learned about *Hazelwood*.

“I thought we had progressed in society that we no longer suppressed factual stories,” Dean said.

A district court eventually ruled that that *The Arrow* was a public forum where *Hazelwood* did not apply. Dean said she wished her case could have gone farther to try and challenge *Hazelwood*.

In the wake of Dean’s lawsuit, Olman said the school imposed restrictions on her that made her life more and more difficult as the case moved to court. Olman was required to report to administrators about student

behavior, including drinking. She felt it limited her role as an adviser because students could not be honest with her.

“It was extremely difficult and I couldn’t let the students know what was happening to me, the pressures that were being put on me,” Olman said. “There were mornings I was crying before I left for school, then you have to put on your big girl face and act as if all is well.”

Kathleen LaRoue said she felt similar pressures from administrators when she was an adviser to Madison County High School’s student newspaper in Virginia.

The students wrote about the poor condition of the school’s buildings, which were old, run-down and full of structural problems, LaRoue said. After the superintendent read the piece, it was immediately censored and LaRoue was placed on probationary status, she said.

LaRoue said the piece was “well-researched, 100 percent factual,” which administrators never questioned, she said. First, the superintendent told her it would cause “political problems,” then he said there were grammatical errors.

“The reason we were told in private that this was done was that they were worried the school board would read it and not give them money to fix the building,” she said.

Shortly after, LaRoue was removed from advising the newspaper and moved to an alternative education program with only a handful of students. She left the district and now teaches history classes at a Virginia Beach school.

The censorship at Madison was never brought to court, and the paper is still subject to prior restraint, LaRoue said.

At a November conference on the ruling, David Cuillier, the director of the University of Arizona’s journalism school, said that one of the main problems with how *Hazelwood* is applied is that many administrators don’t understand the purpose of journalism.

“It’s not to provide information that’s grammatically correct,” Cuillier said. “That’s not our primary intent. So when we talk about pedagogical reasons for journalism education and teaching, it’s not that we correct their typos and make sure they follow AP Style.

“It’s that we teach them to learn to challenge to get the information that people need.”

Mark Goodman, a professor and Knight Chair in Scholastic Journalism at Kent State University who was executive director of the Student Press Law Center when the ruling came down, echoed that thought.

Hazelwood has essentially created scholastic journalism goals that are different from professional journalism standards, he said.

“School officials who are not legally obligated to have the least concern about quality journalism can justify their acts of censorship independent of quality journalism concerns, and that makes for a real problem,” Goodman said.

Cuillier sees a big connection between the

implementation of *Hazelwood* over the last 25 years and the declining civic readiness he sees in the students that enroll at his school, noting that many arrive lacking basic critical thinking skills.

“I have been so alarmed by the kinds of students coming into our college programs who are completely unprepared for what journalism is about,” Cuillier said.

“They think it’s OK to be told what to print and what not to print. They don’t challenge authority like they should. We have to reprogram them. We have to retrain them.”

Cuillier’s concerns have been echoed by leaders in the education fields, who say students aren’t being given an opportunity to discuss controversial topics because of the way *Hazelwood* has been applied.

Ted McConnell, the Campaign for the Civic Mission of Schools’ executive director and an SPLC board member, said there’s been a big drop in the amount of time schools devote to civics education as well as a change in how they cover the topic.

A half century ago, high students were required to take multiple courses on civic issues before graduating; now they might take one. Then, students were encouraged to discuss contemporary issues, even when they were controversial. Not anymore, he said.

“We’re falling down on educating the next generation in how their rights and responsibilities as citizens in this country work,” McConnell told the November conference.

Effective, high-quality student journalism is an “essential component” of civic learning that helps develop democratic communities in school, McConnell said. Without allowing students to “take government out for a test drive,” students get the wrong impression of democracy.

“The message that sends is, ‘yes, we talk a good game about democracy – but it doesn’t apply to you,’” McConnell said.

But there are issues with allowing student speech on

controversial topics, said Neil Ramee, who represents Wake County Schools in Raleigh, N.C. Ramee said schools are in a difficult position.

“If schools were to allow more or to be required to promote and sponsor more student speech, what would happen?” Ramee asked the audience in November. “You’ll get complaints at a minimum – controversy and distraction from the educational mission.”

Ramee said there’s a difference between allowing students to wear black armbands in protest, as Tinker did, and allowing a student newspaper to publish an editorial that is critical of the Vietnam War. Forcing schools to support and allow editorials like that is “in a way” similar to compelled speech, he said.

“It’s like you’re compelling the school unconstitutionally to take a position on the Vietnam War,” Ramee said.

There is a balance that has to be struck between students’ interests and those of parents and schools, said Tom Hutton a Honolulu-based lawyer and a former attorney for the National School Boards Association.

“The law compels parents to trust schools with their children,” Hutton said. “Schools have to worry about parental prerogative and age appropriateness of the content.”

Hazelwood exists so that in difficult situations the schools have some authority over their school-sponsored publication, Hutton said. However, that does not mean schools have free reign.

“*Hazelwood* is not *carte blanche* for educators to censor anything they don’t like. It does come back to if they can articulate a legit pedagogical reason or privacy considerations,” Hutton said. “Schools run into trouble if they think they have a free hand entirely.”

Hazelwood’s limits have been tested several times since the ruling itself, and the various circuit courts have differed

HAZELWOOD THROUGH THE YEARS

Since the ruling went into effect on Jan. 13, 1988, *Hazelwood* has been cited in hundreds of cases involving student speech issues.

MAY 1983: Hazelwood East High School’s principal decides to cut two pages from The Spectrum, the school’s student newspaper.

JAN. 13, 1988: In a 5-3 decision, the Supreme Court hands down its ruling in *Hazelwood School District v. Kuhlmeier*, ruling that a school-sponsored newspaper produced as part of a class and without a “policy or practice” establishing it as a public forum for student expression could be censored if administrators demonstrated a reasonable educational justification.

JAN. 5, 2001: The Sixth Circuit Court of Appeals rules that *Hazelwood* does not apply in a lawsuit brought by a Kentucky State University student and the editor of the school’s yearbook, which was censored in part because administrators objected to the color of the cover, which was not one of the official school colors.

in their interpretation of the ruling. Five circuit courts say it applies to teacher's classroom speech, while three say it does not. Two say the ruling permits viewpoint-based restrictions; three say it does not.

The circuit courts are equally split when it comes to the issue of whether the ruling applies to college students. Four circuits have definitively applied *Hazelwood* at the college level, while only the First Circuit has said it does not.

Emily Gold Waldman, a constitutional law professor at Pace Law School and an *Hazelwood* expert, told an audience that gathered in November to discuss the ruling that the circuit splits are the result of an "over-extension" of *Hazelwood* in which it has been used to apply to a wide range of groups not specifically mentioned in the ruling itself.

"Once *Hazelwood* is interpreted as applying to all these different contexts — students, teachers, outside entities — it's not possible to come up with a uniform answer," she said. "The contexts are just too different."

Hazelwood's lasting impact

Hazelwood's effects on students has been profound, said Mike Hiestand, an attorney for the Student Press Law Center for the last 20 years.

Not as many censorship cases make it to court anymore because the *Hazelwood* ruling was so bad for students, he said. Students and teachers are more cautious about taking cases to court out of a fear that future rulings could restrict student speech even further.

More troubling though, are the chilling effects it has on students, who seem much less likely to push controversial issues that students a generation or two ago.

"You hear from advisers that are 40- to 50-years-old who lament about how they are often the most radical person in the newsroom among this group of late teen to 20-year-

olds," Hiestand said.

LaRoue said that when her students were censored, a few were upset, but most were surprised by how much more upset she was.

"Some of them felt extremely violated," she said. "But others felt this was just par for the course."

Ferentinos agreed and said he believes the fears of the journalism community in 1988, when the ruling came down, have come true. Now, many of high school reporters are afraid to tackle any kind of topic that they think could get them censored — so they don't, he said.

Students aren't the only ones who feel the pressure of censorship, Olman said.

"Students are afraid to cover topics, perhaps if the students aren't the teachers are. The teachers will be threatened; they'll lose their jobs," Olman said. "If they're not tenured the district will just release them. If they are tenured, the district will keep them in the building but take away publication."

Capri Coffer, who was editor of Kentucky State University's yearbook when administrators censored the book in 1994 and who sued and won her case when it went before the Sixth Circuit, said student journalists need to pursue excellent journalism even if they fear they will be censored.

"I would tell them not to back down and not to be afraid," she said. "We have a court system in place for this very reason."

Despite the outcome in her case, Frey said that she didn't regret standing up for what she believed in and that she encourages her own children to stand up for what they believe in as well.

"Everyone always has the impression that it won't do any good to speak up but it will, because if you believe strongly in something, you can maybe change things for others," Frey said. "If nobody does nothing will ever be changed." ♦

JUNE 20, 2005: The Seventh Circuit Court of Appeals ruled against three Governors State University student journalists who sued when their dean put a hold on publishing without prior review. The school argued that *Hazelwood* applied at the college level, which the court agreed with — a first.

SEPTEMBER 2010: The Fifth Circuit Court of Appeals threw out a lawsuit brought by a Texas cheerleader who said she was kicked off her team because she refused to cheer for the basketball player accused of raping her. The court said that in her role as a cheerleader, she served as a "mouthpiece" for the school and that the school did not have to support her decision not to cheer.

NOV. 17, 2004: A district court sided with the editor of a Michigan student newspaper whose school prohibited her from publishing a story about a couple who believed the husband's cancer had been caused by emissions from the school district's bus barn. The court said there was no legitimate pedagogical reason for the censorship.

JUNE 25, 2007: Ruling on the infamous "Bong Hits for Jesus" case, the Supreme Court declined to apply *Hazelwood* in a 5-4 ruling that said an Alaskan school could punish the student's speech because schools had a "compelling interest" in deterring drug use.

Discussion of free speech limitations playing out on college campuses

Debates about freedom of speech — and whether there should be limits placed on speech that offends, particularly religious speech — are playing out on college campuses across the country.

BY JORDAN BRADLEY

Across the country, an old discussion is growing and dialogue is being exchanged over what types of speech the First Amendment does and should protect — particularly when it comes to religious speech.

Colleges are becoming ground zero for a discussion about the limits of free speech when it comes to certain topics, as schools and students seek to reconcile the sometimes divergent goals of fostering tolerance and inclusivity with free speech and academic debate.

The debate was on full display last August, when the California Assembly passed a motion that called for administrators across California universities to stop any anti-Semitic speech on their campus.

A month later, the University of California Student Association passed its own resolution condemning the Assembly's motion, accusing legislators of confusing the idea of criticism against Israel and other beliefs as hatred against the people from the area or practitioners of the Jewish religion.

"You know, to say something Anti-Zionist isn't necessarily anti-Semitic," said Dan Barker, co-president of the Freedom From Religion foundation. "And while Anti-Semitism is very rude, it's not like it's aimed at a specific person. People should judge by their actions, not their words or their beliefs."

California's HR 35 arose shortly after the university system considered enacting hate speech codes in response to a task force's research into campus culture for Jewish and Muslim students. The task force modeled its recommendations on hate speech laws in Europe; the recommendation was ultimately rejected as well following opposition from students and free speech groups.

Zahra Billoo, executive director for the Council on American-Islamic Relations' San Francisco Bay area

branch, said that she has seen incidents of Arab and Muslim students being silenced in terms of anti-Israel speech because of the same confusion between political speech and what is considered hate speech.

Other campuses have been dealing with the confusion as well.

Earlier this year, the University of Minnesota Campus Atheists hosted a "Draw Mohammad" day that drew the ire of members of the university's Muslim Student Association.

And in November, an event hosted by Duke Students for Justice in Palestine was vandalized by a member of the Jewish Student Union who was upset at the display, *The Duke Chronicle* reported.

The student destroyed a display of the wall that separates Palestine from Israel, kicking over a table in the process. He eventually apologized for the incident.

Garrett Epps, a professor of law at the University of Baltimore, said that while it's extremely rare to find a case of religious speech being restricted in America, it has become practice in other countries, especially European countries following World War II, during which there was constant vilification of Jews and extreme anti-Semitic views.

Many, like Barker, believe religious speech shouldn't be treated differently from any other type of speech, even if some people find it offense.

"Is that what our society is, that we all just have to say 'oh, they don't like being insulted so we won't insult them?'" Dan Barker said about responses to messages that are critical of religions. "Some people should be insulted, some should be ridiculed. Some views are ridiculous."

Covering the debate

The debate on campus is naturally being reflected

in student newspapers, who are often seen guiding the conversation with their news coverage and editorial pages.

“What’s been interesting is the discussion we’ve seen in some student newspapers of the possibility of limiting First Amendment rights,” said Will Creeley, the Foundation for Individual Rights in Education’s legal and public advocacy director.

Earlier this year, Virginia Tech’s student newspaper, *The Collegiate Times*, started their own discussion on the subject after an anti-Muslim ad sponsored by Facts and Logic About the Middle East organization ran in their newspaper. The advertisement accused Middle Eastern communities of anti-Semitism.

Backlash against the advertisement prompted the paper’s editor-in-chief to respond to the criticism in a column, saying the paper did not support the message, but defended its right

“There is some content that would be so offensive, that would be so troubling, that would be so injurious to readers that editors shouldn’t publish it. It should be the editor’s decision, but free speech shouldn’t mean publishing everything.”

RACHELE KANIGEL, THE GOLDEN GATE XPRESS ADVISER

to publish the ad and the value of the discussion it created.

“We fully understand the abusive nature of these ads,” Michelle Sutherland wrote in the July column. “However, refusing to publish them does not solve the larger problem of cultural prejudices that exist in our country. Only bringing issues like this out in the open and starting a dialogue will settle it in the long run.”

Her explanation did little to allay many readers, who criticized the column with online comments like, “So you’re saying that you essentially whore out ad space to anyone who wants it? Glad to know you’re that desperate.”

“So you essentially admit to taking ANY advertising money that comes your way – regardless of what it says or implies?” asked another commenter. “That’s a good way to go about things for sure. Can we get a new school paper please?”

Following the incident, Sutherland said that the paper was working to redraft their advertising policy, though they did not know if they would be more or less lenient concerning religious ads.

Other papers, including *The Diamondback* at the University of Maryland and *The Badger Herald* at the University of Wisconsin-Madison, also received heated comments from readers after they ran FLAME’s ad.

The Golden Gate Xpress at San Francisco State University has faced continuing issues from publishing advertisements from the David Horowitz Freedom Center that are extremely anti-Muslim, said Rachele Kanigel, the paper’s adviser.

In 2004, the paper’s advertising department decided to run one of Horowitz’s ads. It prompted a general outcry from the campus and community, and the word ‘racist’ was graffitied across campus. The editor at the time ran an article apologizing for the ad and a letter from the American Arab Anti-Discrimination Committee.

Kanigel said that after that, the paper set up a policy that allowed both the editorial board and the advertising department a say whether any ad that could be considered controversial would be run.

“I think the first thing is student editors need to think about these things and anticipate reactions,” Kanigel said. “What isn’t good is if the advertising department runs an ad and doesn’t tell the editorial board that an ad is running. You want to keep editors in the loop, and make sure they know about any kind of controversial advertising.”

When another ad from the Horowitz center came in a few months ago, Kanigel said that the paper’s editors used the system to decide whether they wanted to run the ad. In the end, she said, they decided it did not have a place in the paper.

Kanigel said that it’s still the college journalist’s duty as a gatekeeper to decide what’s proper to run.

“The First Amendment keeps the government from telling the editors what decisions to make, but I think there is some content that would be so offensive, that would be so troubling, that would be so injurious to readers that editors shouldn’t publish it.” Kanigel said. “It should be the editor’s decision, but free speech shouldn’t mean publishing everything.”

Creeley said the fact that these debates are occurring, instead of violence, is proof that the First Amendment works.

“What’s reassuring to me as a First Amendment advocate and attorney is that, just as I am always counseling students and administrators to answer ‘bad speech’ with ‘more speech,’ so too did the dialogue about the usefulness and continued vitality take the same turn,” Creeley said.

“It’s been an interesting back and forth to see.” ♦

Want a credential? Better not report on athletes' injuries, schools say

A wave of football programs introduced bans on injury reporting this season, threatening to revoke journalists' credentials if they break the rules. For the most part, reporters are complying.

BY SAMANTHA RAPHELSON

When sports journalists received their credentials this past football season, new injury reporting policies left many unable to report what they saw with their own eyes.

The new bans limit reporting on injuries and practices and are now found at schools across most of the major conferences in Division I athletics.

The restrictions force reporters to make a tough choice — comply with schools' restrictions or take a stand and risk losing future access entirely.

In September, reporters covering the University of Southern California learned the hard way how serious the university took its restriction after the *L.A. Daily News's* beat reporter was banned from two weeks of football practices and the team's next game as a punishment for reporting about an injury to the Trojans star kicker.

The private school, part of the PAC-12 athletic conference, implemented a policy this summer that forbids reporters from discussing injuries suffered at practice. The ban against reporter Scott Wolf was eventually lifted after talks between the school and local sports editors.

Similar bans are found at most other PAC-12 schools, including Washington, Oregon and Utah.

Washington's policy prohibits reporters from discussing strategy and injuries observed at practice, said Jeff Bechthold, a spokesman for the school's athletics department.

The school's credential policy states that following these rules is a condition to enter practices. Reporters have generally followed the policy since it was implemented at the beginning of this season, said Kevin Dowd, *The UW Daily's* sports editor.

"The new policy just kind of made it more going to practice as a time to do interviews than doing actual reporting," Dowd said. "You were sort of restricted from reporting what you saw on the field."

These types of policies often have ripple effects throughout entire conferences. After USC and Washington stopped discussing injuries, the University of Utah's football coach followed suit.

"It put us at a competitive disadvantage, he felt," said Liz Abel, a spokeswoman for Utah's athletics department. "He didn't know why we had to announce who we had playing when they wouldn't announce who they had playing."

Others believe disclosing injuries violates the student athlete's right to privacy.

"It's no different than if someone is going to the doctor's office, those records are confidential," said Dave Williford, a spokesman for the University of Oregon athletics department. "It still comes down to the individual right to privacy."

Coaches who do not want to discuss injuries often cite either the Health Insurance Portability and Accountability Act or the Family Educational Rights and Privacy Act, but neither protect information about student athletes' injuries.

HIPAA only applies to people primarily in the business of providing health care, while FERPA only limits the disclosure of students' education records. And many schools require their athletes to sign waivers that specifically allow the release of this type of information.

The lack of legal standing makes bans like these all the more frustrating, said Kevin Goldberg, a First Amendment attorney who represents the American Society of News Editors.

"The outrage from our side is you've got a reporter who is invited to practice and being told that you can't report on this, this and this, even if you see it," Goldberg said. "It's just again way beyond what's necessary and doesn't serve the purpose they're trying to serve."

The restrictions seem to be there to discourage reporters from pursuing investigative stories, said Ryan McDonald, an assistant sports editor at *The Daily Utah Chronicle*.

“We don’t really do that a whole lot, and maybe we should be doing more of it,” he said. “We typically wait for a story to be there, and that may be because we don’t want to ruffle feathers for stories that might not even end up being there.”

“I think it is kind of a scare tactic,” he said. “I’m not sure if they would actually go through with pulling credentials. I do just wonder if its kind of an empty threat, but I guess the only way to find out is actually do it and see how they respond.”

Suspensions like Wolf’s are rare, Goldberg said. Most reporters play by the rules while also trying to compromise.

Restrictions on injury reporting vary outside of the PAC-12. The Atlantic Coast Conference is the only conference with a conference-wide injury reporting system, but even

conference-wide injury reporting system, injuries are often disclosed without specifics.

“Sometimes they’ll tell us what the injury is and other times they won’t, or they’ll say the certain area it’s in,” said Aaron Siegal-Eisman, a football beat reporter for *The Indiana Daily Student*, adding that he often has to do additional research to determine the injury.

The situation is similar in the Southeastern Conference. Schools handle injury reporting on an individual basis, said Sean Cartell, an SEC spokesman.

Some schools, like the University of Georgia, choose to disclose more than others. UGA’s sports medicine director releases an injury report after practice each day and notes

each athletes that has an injury, location of the injury and if they can participate in play, said Claude Felton, a school spokesman.

McDonald said the lack of updates usually is not a big deal.

“I think people are just kind of used to the fact that coaches don’t talk about them,” he said. “We’ve kind of moved on.”

McDonald argued that the reports really only matter when it comes to high-profile players.

“If the star running back isn’t going to be playing, the public has the right to know whether they want to spend the money to come watch that game,” he said.

In the PAC-12, the uproar after Wolf’s suspension prompted commissioner

Larry Scott to look into a conference-wide injury reporting system similar to the NFL, which requires each team to release an injury report each game week, according to Dave Hirsch, a league spokesman.

Hirsch said the division ultimately decided against the idea after talks with the schools’ athletic directors.

Because lawsuits are time-consuming, Goldberg said he advises reporters to try and meet with athletic department officials about changing the policies.

“Go in and play nice as much as you can,” Goldberg said. “Let people know you’re not going to back off, but go in and meet the people you’re going to be dealing with before you run into a problem.” ♦



PHOTO ILLUSTRATION; Creative Commons photo courtesy of John Martinez Pavliga on Flickr

When this year’s football season started, sports journalists learned a number of schools had put in place new policies restricting reporting on injuries and practices — even what they saw with their own eyes.

that system “tends to be manipulated,” Goldberg said.

Football coaches agreed to the system about five years ago and discuss at the beginning of every season whether they want to stick with it, said Michael Kelly, an ACC spokesman.

Two days before each conference game, coaches release a list of players out for the game, as well as those that are questionable or probable, Kelly said.

Some coaches are more specific than others in detailing specific injuries; others provide only the area of the body. And the ACC doesn’t enforce whether coaches comply; at least one, the University of North Carolina’s Larry Fedora, has publicly stated that he does not discuss injuries.

In the Big Ten conference, which does not have a

Student journalists struggling for access to private school police records

They can make arrests and often operate as any local police department does. But as student journalists have discovered, it's not always easy to get campus police at private schools to grant access to their records.

BY JORDAN BRADLEY

The staff of *The Tan & Cardinal* used to have no problems getting information about crimes on its Ohio campus.

The Otterbein University student newspaper had a working relationship with Westerville city police, who patrolled alongside campus security officers. Getting information was as easy as asking for the incident reports.

Then, in 2011, the security team at Otterbein, a private university, was converted into a commissioned police force. The force now handles incidents on campus that the city police once did, but their relationship with the student newspaper is completely different.

Initially, campus police would not release any information, not even the reports required under the Jeanne Clery Act, said *Tan & Cardinal* co-adviser Hillary Warren. The Clery Act requires any college or university that receives federal funding to maintain a daily police log, release timely reports and produce an annual report on campus safety.

For awhile, campus police consented to release “really short, abbreviated reports,” Warren said, along with what the Clery Act required. Then the situation got worse in fall 2012.

“When the student came back this year, the police notified them that there would be no reports period,” she said.

Warren and the paper's staff met with the police, but were told that as a private institution they did not have to release anything besides what the Clery Act requires. Now, information has trickled down to brief descriptions, like “stolen bag of pretzels” or “sexual assault.”

As colleges public and private have assumed greater control for policing on campus, situations like the one facing *The Tan & Cardinal* are becoming more common. Numerous private universities have declared their police forces to be private entities as well, even when they have the same powers of arrest as local police.

And among both private and public colleges, many incorrectly fall back on the Family Educational Rights and Privacy Act to restrict access to police records, even though Congress amended the privacy law in 1992 to specifically exempt law enforcement records from the act.

Society of Professional Journalists President Sonny Albarado said from what he's seen, private police forces have a case of mistaken identity.

“The overall situation today is that campus police forces still think of themselves as private security forces,” Albarado said. “Their loyalties lie with the administration and the universities, and their general view is that public relations is more important than informing the public.”

A case waiting on appeal in North Carolina could set a precedent for what records private school police must disclose.

In 2010, Nick Ochsner, then a student reporter for the campus TV station, filed a lawsuit against Elon University after campus police would not release information about an arrest.

“I knew there had been a chase, the student had tried to run — the town police officers had told me that,” Ochsner said. “That was nowhere on the forms they gave me, and I went back and forth with the police chief, but he said they gave me all the law required them to give me. I said ‘no, you didn't.’”

The debate in North Carolina lies in a statute that organizes police units in the state into different categories of transparency based on what power they wield. Ochsner — and the Student Press Law Center, which filed a friend-of-the-court brief in his support — contends that Elon has a full-force police department subject to the greatest transparency requirements of the law.

“It's frightening to think of an agency out there with arrest power, and that they can be arresting people and don't have to be telling the public about it,” said Ann Ochsner, Nick's

mother and the attorney who is representing him.

Both the district court and the North Carolina Court of Appeals ruled in Elon's favor. Ochsner appealed the case to the state's Supreme Court, which agreed to hear the case last fall. Oral arguments in the case are expected this spring; a decision would be binding for private college police in North Carolina but would likely influence future challenges elsewhere.

Besides asserting their status as a police force at a private college not subject to open records laws, many have turned to FERPA as a way of restricting access to records.

S. Daniel Carter, director of 32 National Campus Safety Index for the VTV Family Outreach Foundation, said that police departments have been more forthcoming with records since the 1992 amendment passed. Still, there are often problems with schools misusing the law, he said.

In September, editors at *The Butler Collegian* received reports that a basketball player had been released because he broke team rules, followed by rumors that he had shot a student with a pellet gun. Jill McCarter, *The Collegian's* editor-in-chief, said the school's public safety director immediately told them the report was protected by FERPA.

McCarter said the school's chief of police blocks all of the paper's attempts at getting police records, even those detailing reports of sexual assault.

"He literally laughed at me when I said 'We're not releasing the victim's names, why won't you guys release it?'" McCarter said. "He laughed and said, 'Because I don't have to.'"

Student journalists at public colleges also frequently report getting the FERPA excuse when seeking police records. The University of Memphis initially withheld incident reports from an on-campus rape until it relented after pressure from *The Daily Helmsman* and the SPLC.

And a Hudson Valley Community College in New York, campus police refused to release information about an incident where a student pulled a knife on another student.

"No one would say anything, people were coming up with excuses like FERPA," said Zach Hitt, *The Hudsonian's* editor-in-chief. "Then we started looking into it, and we realized FERPA did not cover criminal records."

After Hitt met with college's vice president and presented the laws governing open records for public colleges, police relented and released the records.

Absent legal precedents, student journalists have only a few options open to them, Albarado said. One is to work towards informing police of what information they should be releasing, as the *Hudsonian* did.

Carter agreed with Albarado, and said that it can be done through forging a relationship with campus police.

"I realize it's difficult for a student journalist to build a relationship with their police department, but having a contact where they can reach out to each other and having a relationship is the most important," Carter said.

LET'S 'BREAK' FERPA

FERPA, the Family Educational Rights and Privacy Act, is one of the most commonly used excuses when denying access to campus records, including (incorrectly, because they're not FERPA records) police reports.

In the absence of clear guidance from Congress or the Department of Education, schools abuse FERPA to conceal information that should be public under federal and state open-records laws. Costly and time-consuming lawsuits are proving the only way to fight misuse.

Decades of FERPA abuse prompted the SPLC to launch **breakferpa.org**, a campaign to expose the inconsistencies in how colleges define "confidential education records."

FERPA is more than just a privacy statute — it's also a mandatory disclosure statute. As the Department of Education has said, if a record is protected by FERPA, then the students named in the record have a right to inspect, review and challenge the content of the record.

When it comes to journalists' requests for public records, colleges often will define every last scrap of paper as a FERPA record. Let's test how they respond when a student — you — tries to get those same records under FERPA's disclosure requirement. Visit breakferpa.org to fill out a request to send to your college for your own FERPA records — defining "records" in the same over-broad way that colleges do when they're trying to withhold a public record. Legally, the school has 45 days to give you your own records, and can't charge you for the search.

See if they comply. Or if they get so overwhelmed that they cave and tell you — rightfully — those records aren't really covered by FERPA.

Albarado said the second option — legal action — isn't as nice, but may be the only way some student journalists can obtain information.

"If the education doesn't work, you just have to sue them," Albarado said. "Suing is always a roll of the dice. You never know if you're going to get the result of a roll you're seeking."

The student editors all suggest a third option: public shaming.

"You print it, you print every single time they say they're not going to give you something," McCarter said. "You just keep putting it in their face that they're not doing it right."

"We're not going to stop asking for them, just because I was told by one person that they're not going to tell me what happened when a kid committed sexual assault on another student. It's not going to end there. It's just not going to end." ♦

Legal Analysis

Law offers some protections for employees, students to speak out

Blanket restrictions on talk between the media and school employees may be legally unenforceable – and such restrictions on students almost certainly are void.

BY FRANK LoMONTE

It's a disturbingly common refrain for journalists to hear: "I'm not allowed to talk to you, everything has to go through Media Relations." Few responses are more frustrating and unwelcome to a reporter on a deadline who needs first-hand information, not a prepared statement.

But is it even legal for a school or college to impose such a gag order? Can employees – or students – be punished simply for providing truthful information to journalists?

It turns out that the law is more protective of the rights of employees – and, especially, of students – than many institutions think. Even employees at private schools and colleges may be legally protected against retaliation if they discuss matters of public concern.

Many variables can affect the scope of employee rights, including employment contracts and tenure. Because those variables are so case-specific and often dependent on state law, this article does not attempt to cover every way in which an employee might defend against discipline for speaking with the media without authorization. The following is an attempt to identify some of the more promising legal theories in response to overbroad gag orders, and point out where the law might *not* offer relief.

Gag orders at public institutions

The reaction of schools and colleges to controversy often results in gag orders directing employees not to discuss particular matters. At times, schools go even further and prohibit any contact between their employees and the media.

For instance, a "model policy" put forth by the Pennsylvania School Boards Association for consideration by its member districts states: "Staff members shall not give school information or interviews requested by news media representatives without prior approval of the district's communications representative."¹

There is a long history of public employees successfully challenging government policies that categorically ban communicating with the media. A broad rule that gets in the way of employees' ability to speak out on

matters of public concern will very likely be declared unconstitutional.

The starting points are the U.S. Supreme Court's rulings in the cases of *Pickering v. Board of Education*² and *Connick v. Myers*.³ In those cases, the Court established a "balancing test" between the free-speech rights of public employees versus the ability of government managers to reasonably regulate the messages that might appear to be official speech on behalf of the agency. In these rulings, the Court affirmed that government employees have First Amendment protection against retaliation when speaking out on matters of public concern, as opposed to simply airing personal grievances.

The key Supreme Court case addressing a blanket restriction on employee speech is *United States v. National Treasury Employees Union* (known as the "NTEU" case).⁴ In that 1995 ruling, the Court struck down ethics laws that prohibited federal workers from accepting payment for writing articles or giving speeches.

The Court found that ban was not narrowly tailored to respond to the government's concerns over influence-buying: "Deferring to the Government's speculation about the pernicious effects of thousands of articles and speeches yet to be written or delivered would encroach unacceptably on First Amendment protections."⁵

The standard that the Supreme Court recognized in the *NTEU* case is considered even more protective of free speech than *Pickering* or *Connick*. That's because the policy being challenged by the workers in *NTEU* was a blanket "prior restraint" applying to many thousands of workers, not just an individual disciplinary decision.

Applying the principles of the *NTEU*, *Pickering* and *Connick* cases, courts have regularly struck down blanket prohibitions that cut off public employees from discussing government business with the media.

In a key case involving college students and employees, a federal appeals court decided that the University of Illinois violated the First Amendment by interfering with a protest

against the use of a Native American character (“Chief Illiniwek”) as a school mascot.⁶

Students and faculty who found the mascot racially insensitive announced a plan to contact Illinois athletic recruits, in hopes that pressure from sought — after athletes might change the university’s mind.

The chancellor of the university responded with a campus — wide email forbidding employees from contacting a student recruit without permission from the athletic director’s office. The directive was later broadened to limit communications by students as well as by employees.

The Seventh Circuit U.S. Court of Appeals applied the Supreme Court’s *NTEU* standard and decided that the university’s rationale for the ban — that the contacts might get the school in trouble with the NCAA — was inadequate to justify a blanket restriction covering some 44,000 potential speakers: “The free-speech interest of the plaintiffs — members of a major public university community — in questioning what they see as blatant racial stereotyping is substantial. That interest is not outweighed by fear that an athletic association might not approve of what they say.”⁷

In a prominent case involving a gag order on public employees, the Second Circuit U.S. Court of Appeals decided that a child welfare agency could not enforce a ban requiring pre-approval of all comments to the news media “regarding any policies or activities of the agency.”⁸

An employee of the New York City Child Welfare Administration was suspended for giving an interview to ABC News — on her lunch hour, off the agency’s premises — commenting on the under-reporting of child-abuse deaths. She challenged the discipline as a violation of her First Amendment rights, and the appeals court agreed.

The Second Circuit observed that “prior restraints” on speech — policies that forbid speech entirely, rather than simply punishing it afterward — are viewed skeptically and are difficult to justify. In this case, the court said, the agency’s policy was too broad and prevented too much “whistle-blowing” speech that might be important for the public to hear.

Many other broad-based gag orders prohibiting all contact with the media have declared unconstitutional as well. Examples include:

- An Ohio court struck down a fire department rule requiring assistant fire chiefs to get the chief’s approval before speaking publicly on any department matters.⁹

- A South Dakota court threw out a municipal ordinance prohibiting city employees from commenting on internal business decisions or department regulations without prior approval.¹⁰

- A Massachusetts court decided that a police department rule barring the release of information to the media by all but the chief of police or his designee was

unconstitutionally overbroad.¹¹

Most successful challenges to gag orders predated the Supreme Court’s latest ruling about government employee speech, *Garcetti v. Ceballos*.¹² In that case, the Court decided that a supervisor did not violate the First Amendment in disciplining an assistant district attorney who wrote a memo raising questions about the validity of a case that his office was prosecuting.

The decisive factor in the *Garcetti* case is that the speech — a legal memo to supervisors — was a mandatory part of the lawyer’s job responsibilities: “We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”¹³

Although it is not clear exactly when a judge will interpret a government employee’s speech as being “pursuant to official duties,” it should be relatively easy to prove that speaking to the news media is not an “official duty” of most public employees. Therefore, such speech should be entitled to First Amendment protection, as long as it involves something beyond a purely personal grievance.¹⁴

The argument will be stronger if the ban applies to all communications between the employee and the media, regardless of subject. For instance, a college will have a relatively strong interest in preventing a low-level employee in the finance office from giving out information about the college’s budget, but a relatively weak interest in preventing that same employee from giving an interview about her anxieties over crime or traffic on campus.

Gag orders at private institutions

Although journalists typically have narrower access to information at private universities than at public universities, one recent federal ruling actually gives employees at private colleges a strong argument against censorship of their communications.

Workers at private schools and colleges do not have the benefit of the First Amendment, since it applies only to government agencies. But they do have some protection under federal laws such as the National Labor Relations Act.

The National Labor Relations Board, or NLRB, is a federal agency that enforces worker-rights laws. In recent years, the NLRB has been cracking down on employers who interfere with the rights of their workers to organize to improve job conditions, even when the “organizing” is very informal. This type of organizing among employees is referred to in the law as “concerted activity.”

In a ruling issued July 30, 2012, the NLRB decided that a health care company violated the rights of its workers by ordering an employee not to talk to anyone about an internal company investigation.¹⁵

On a 2-1 vote, the NLRB decided that imposing a gag order on an employee involved in an internal investigation requires proof of a “legitimate business justification” that outweighs the employees’ right to engage in concerted activities.

This ruling probably does not really change the landscape in terms of an employee’s ability to give interviews to the news media. But it might affect an employee’s right to speak out in other ways, such as writing op-ed columns or — as an NLRB judge ruled in one recent case — trying to rally co-workers through social media to improve working conditions.¹⁶ The key is whether the employee is attempting to communicate with co-workers for the purpose of organizing around workplace issues.

The NLRB ruling highlights an interesting difference between the rights of public versus private employees: The First Amendment protects speech so long as it is not merely the employee’s complaint about his own working conditions, while the National Labor Relations Act protects exactly that in a private workplace: Complaints made to co-workers about working conditions.

The NLRB does not have jurisdiction over government workplaces, so its rulings only apply to private colleges.

Gag orders on students

The rights of students are governed by legal standards different than those for employees.

At a public K – 12 school, students speaking on campus during the school day have the benefit of the level of First Amendment protection recognized by the U.S. Supreme Court in its landmark 1969 case, *Tinker v. Des Moines Independent Community School District*.¹⁷ School officials cannot prevent or punish speech under *Tinker* unless it substantially interferes with the orderly operation of the school. Simply discussing a matter of public controversy would not be a legally adequate reason.

At a public college or university, students speaking on campus during the school day have at least the *Tinker* level of protection. A few courts have gone further and equated college students’ rights with the rights of non-student citizens speaking outside the campus setting – meaning that the government will almost never be able to justify restricting speech on the basis of its content.¹⁸

There is well-documented confusion over when, if ever, it is permissible for a school or college to regulate what students say when they are off campus.

At least two of the 12 geographic federal circuits, the Fourth and the Eighth, have firmly decided that off-campus speech is governed by the same *Tinker* standard as speech on school grounds during the school day.¹⁹ Two other circuits, the Second and Third, have expressed uncertainty whether *Tinker* is sufficiently protective of students’ rights when they are speaking on their own time.²⁰

Even assuming that students’ contact with members of the news media is governed by the *Tinker* standard, a school or college almost never will be able to show that merely giving interviews constitutes a “disruption” of school functions. Unlike an employee, a student neither speaks as an official representative of the school nor is privy to confidential information that might be compromised.

Thus, an order directing students not to discuss particular school matters when they are on their own time would almost certainly be struck down as unconstitutional, as would any punishment imposed on a student who violated such a ban.

Media-specific gag orders

Finally, any gag order that is directed at a specific media organization – for instance, an order selectively restricting only one news organization’s access to interviews with public employees – may be vulnerable to First Amendment challenge if a retaliatory motive can be shown.

Very few cases have gone to court challenging the ability of the government to pick-and-choose among which journalists receive preferred access (or which receive inferior access).

As a general rule, government agencies can make reasonable distinctions in how they treat media organizations, especially if there is a scarce resource that must be divided up, such as seats in a press box. It would not implicate the First Amendment if a government agency decided to award limited seats only to media above a certain circulation, or only certain types of specialty media; for instance, a soccer magazine might be given first choice of seating and sideline access at a soccer match.

Government employees also are free to give tips and leaks to the media organizations they like and trust. It is not a First Amendment violation simply to give inside information to one news outlet and not the competitor.

But it is at least possible to make out a First Amendment claim if access to events that is otherwise made available to comparable media organizations is denied or withdrawn based on a particular journalist’s viewpoint or the views of his publication.

For example, in the case of *Sherrill v. Knight*,²¹ a reporter for a liberal newsmagazine, *The Nation*, successfully challenged his exclusion from White House press conferences. The reporter had received press credentials without problems for several years, but suddenly had his credential revoked by then-President Lyndon Johnson’s administration.

The White House claimed that a background check showed that the reporter was a security risk. But a federal appeals court looked skeptically at that claim, because the White House did not appear to have any standards about

what a “security risk” meant, so that they could manipulate that standard as a way of excluding reporters they disliked.

The court in *Sherrill* was careful to say that there is no First Amendment right to demand access to the White House or to any government press room. But once a government agency sets up a credentialing system with certain rules and standards, it cannot deviate from those standards and deny access based on the journalist’s speech.

In a comparable case, a Texas state court found that there was a First Amendment right for news publications to be given equal opportunity to gather information, and that a state prosecutor could not create differential barriers to access impeding one particular newspaper that had given his office critical coverage.²²

More recently in a case involving access to records from the Los Angeles Police Department, the Supreme Court indicated that there may be First Amendment issues if a government agency makes viewpoint-based decisions about which journalists do or don’t get public documents.

In that case, *Los Angeles Police Department v. United Reporting Publishing Corp.*, the Court ruled that it was legal for the police department to give certain records only to non-commercial users, such as journalists or scholarly researchers, while denying the records to those wanting to re-sell them for profit.²³

In a concurring opinion, Justice Ruth Bader Ginsburg – joined by three other justices, including one current one, Justice Stephen Breyer – said the LAPD’s distinction was lawful, but that a distinction based on the requester’s viewpoint would be “illegitimate.”²⁴ Two dissenting justices (including one currently sitting one, Justice Anthony Kennedy) voted against the ruling but agreed with Ginsburg that viewpoint-based distinctions on access to records would be clearly unlawful.²⁵ So at least three of nine current justices are on record saying they would find it unconstitutional to differentiate among journalists based on viewpoint in making public records accessible.

Cases involving discriminatory treatment of news organizations are rare, and it will be difficult for journalists to successfully bring a challenge if the retaliatory treatment is intangible – for instance, being the last to receive a return phone call – rather than a matter of, as in the case of *Southwestern Newspapers*, a formal policy or procedure.

If particular journalists or particular news organizations can show, for example, that only their freedom-of-information requests go through extra steps that take longer, or that only they are required to go through a demanding booking process to get interviews, then – if there is an obviously retaliatory cause-and-effect – a First Amendment claim might succeed.

Conclusion

The bottom line is that blanket restrictions on communications between the media and employees of schools and colleges, even private ones, may be legally unenforceable – and such restrictions on the speech of students almost certainly are void. It generally will be the speakers – not the journalists who wish to speak with them – who are in the best position to bring a challenge, however.

A challenge will have the best chance to succeed if brought against an unconstitutionally broad policy as a whole, rather than as one employee’s defense after being disciplined. Judges are more willing to defer to managers in fact-specific employee discipline decisions than they are when a legislative body, such as a school board, enacts a policy applicable to all employees.

Frank LoMonte is executive director of the
Student Press Law Center.

Endnotes

1. Pennsylvania School Boards Association, Policy No. 911, News Media Relations, 1/08 Revision, available at <http://www.splc.org/pdf/psbamodel.pdf>.
2. 391 U.S. 563 (1968).
3. 461 U.S. 138 (1983).
4. 513 U.S. 454 (1995).
5. *Id.* at 475 n.21.
6. *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004).
7. *Id.* at 680.
8. *Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1998).
9. *Spain v. City of Mansfield*, 915 F. Supp. 919 (N.D. Ohio 1996).
10. *Wolf v. City of Aberdeen*, 758 F. Supp. 551 (D.S.D. 1991).
11. *Wagner v. City of Holyoke*, 100 F. Supp. 2d 78 (D. Mass. 2000).
12. 547 U.S. 410 (2006).
13. *Id.* at 421.
14. Some examples of what qualifies as speech addressing matters of public concern are spelled out in *Brooks v. Univ. of Wisc. Bd. of Regents*, 406 F.3d 476, 482 (7th Cir. 2005). They include: providing information to the media about a school board’s violation of an open-meetings law, writing a memorandum criticizing the school grading policy, speech revealing misconduct by fellow college faculty members, and sending a memo to a college ombudsman complaining about administrator pay raises.
15. *In re Banner Health System*, 358 NLRB No. 93, Case No. 28-CA-023438 (2012).
16. *Hispanics United of Buffalo*, Case No. 3-CA-27872, 2011 NLRB LEXIS 503 (Sept. 2, 2011).
17. 393 U.S. 503 (1969).
18. This more speech-protective view appears to be the position in the Third Circuit, covering Pennsylvania, New Jersey and Delaware. See, e.g., *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 247 (3d Cir. 2010) (“Public universities have significantly less leeway in regulating speech than public elementary or high schools.”).
19. *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011); *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011).
20. *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011); *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc).
21. 569 F.2d 124 (D.C. Cir. 1977).
22. *Southwestern Newspapers Corp. v. Curtis*, 584 S.W.2d 362 (Tex. Civ. App. 1979).
23. 528 U.S. 32 (1999).
24. *Id.* at 43 (Ginsburg, J., concurring).
25. *Id.* at 44 (Stevens, J., dissenting).

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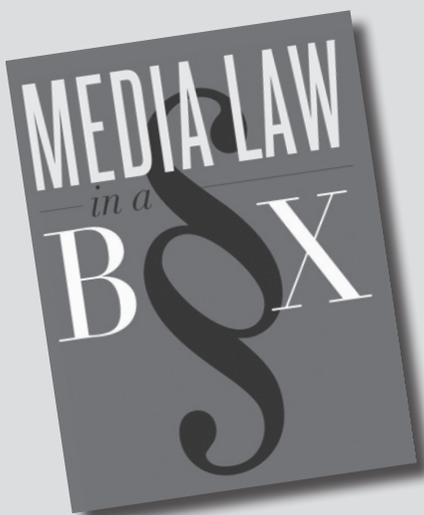
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