January 24, 2024

Spencer Head  
President, Board of Education  
Omaha Public Schools  
3215 Cuming Street  
Omaha, NE 68131  
Sent via Email to spencer.head@ops.org

Dear President Head:

Greetings from the Student Press Law Center. We write to you regarding comments and discussions surrounding the board's pending decision to support or oppose Legislative Bill 1071, relating to student journalism. We were alarmed by many misunderstandings surrounding this area of law expressed at the board meeting on January 22, 2024. We aim to sort out these misapprehensions and clarify the benefits to not only your district's award-winning and enterprising student journalists, but to your district as a whole.

Founded in 1974, the Student Press Law Center is a nonprofit center of legal research serving the student media nationwide. Our mission is to promote, support and defend the First Amendment and free speech rights of student journalists and their advisers. We support advancing bills like LB 1071 across the country, as 17 other states have similarly-adopted laws. This effort is nonpartisan: conservative and liberal-leaning state legislatures alike pass these laws. They enshrine time-tested best practices in journalism education at the secondary level, and pave the way to civic engagement and accountability unique to this space. Laws like LB 1071 do not allow publication with impunity and without the dialogue so important to students understanding and practicing good journalism.

Importantly, LB 1071 does not create a means for anyone to say what they want: this is not the legal definition of a public forum. During the board meeting on January 22, it was posited that a public forum “becomes quite messy and uncontrollable,” asserting that student newspapers under LB 1071 must publish anything that anyone outside the district send in, without question. Fortunately, this is an incorrect premise. First, the student journalists would be the gatekeepers of this speech. The bill provides that “each student journalist is responsible for determining the news, opinion, feature, sports, and advertising content.”
discussed further below, the notion that anyone outside the district may dictate the published content absolutely runs counter to the bill’s provisions.

Next, the bill also provides important constitutionally-tested guardrails for student-produced and edited content. Student journalists cannot post or print anything they want. Under the bill, they cannot publish always-unprotected speech that interferes with the rights of others (e.g. libel, invasion of privacy and other forms of unlawful speech) or speech that disrupts the educational process. This has been the standard in the 17 other states with such legislation, some with similar laws on the books since the 1970s, and the standard has worked.

The legal analysis during the board meeting was mistaken. The board discussed the implications of making student media a “public forum.” However, the discussion left out important distinctions between the types of public forums: traditional and designated. A traditional public forum is government property like a public sidewalk or public park. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). Traditional public forums are limited to locations that have historically been “held in public trust” and must be rooted in some historical evidence that the public has enjoyed broad freedom of expression rights there. International Soc. for Krishna Consciousness v. Lee, 505 U.S. 672, 679-80 (1992). This is not what LB 1071 is creating, nor could it change the status of school-sponsored media to a traditional public forum.

Rather, LB 1071 is creating a designated public forum, specifically opening the forum for student journalists. This type of public forum is created when the government intentionally opens the property for a particular class of speakers or for discussion on a specific topic. Arkansas Educ. Television Com’n v. Forbes, 523 U.S. 666, 67 (1998). Restrictions on who is able to utilize the limited public forum is “inherent and inescapable” and this type of forum can be limited to a certain class of speakers, such as students in a high school journalism program. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 49 (1983). These “status-based” distinctions have been upheld within the context of a limited public forum, meaning that the student editors of a publication could decide if they wanted to open up their paper to submissions to those outside of their staff, but they are in no way required to do so. See e.g. Victory through Jesus Sports Ministry Foundation v. Lee’s Summit R-7 School Dist., 640 F.3d 329, 337 (8th Cir. 2011) (a school district did not violate the First Amendment rights of a third-party community foundation for excluding its publication from a district program).

Student media have been held to be operating as a designated public forum before, without creating the possibility that the school would have to publish materials from “random members of the public,” as was a concern expressed at the board meeting. See Kincaid v. Gibson, 236 F.3d 342, 356 (2d. Cir. 2001). Those outside of the student newsroom will not be able to “take advantage” of the student media. Rather, this law will protect the rights of student media and allow for students to determine what content they would like in their own publications, without fear of censorship or retaliation from the school’s administration. The publication’s editorial team will not be required to publish any material they find objectionable, whether that be from members of the school community or the public at large. See e.g, Yee v. Town of Lexington, 131 F.3d 241 (1st Cir. 1997) (en banc), cert. denied, 524 U.S. 904 (1988) (holding that the editors of a Massachusetts high school student newspaper, who were protected by a state law similar to LB 1071, were not required to

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run an advertisement submitted by a community group urging sexual abstinence where no state action was involved in editor’s rejection of the ad).

Finally, even if LB 1071 does not pass, the student journalists in your district already have some level of latitude in publication, as they have enjoyed a pattern and practice of determining their content for years. They have been nationally recognized for doing so. This has created a designated public forum. The paper operates as a student-run paper, with student editors, not administrators, making editorial decisions. Factors such as students determining the content of the paper, a lack of prior restraint from administration, and a policy of protecting student’s First Amendment rights all have been found to favor a determination that a student paper is a designated public forum. Dean v. Utica Community Schs., 354 F.Supp.2d 799 (E.D. Mich. 2004). A designated public forum, fortunately, is not a “very very different thing than [you] currently have,” as suggested by the school board’s counsel; instead, it seems to be how your district is currently operating anyway.

Since the public forum question appeared to be the sole reason that your legislative committee opposed LB 1071, and given that opposition’s reliance on a mistaken interpretation of the law, you have an opportunity to make an important course correction. As the board of education for the state’s largest school district, we urge you not to oppose legislation that would benefit other Nebraskan school districts that may not have such robust and celebrated journalism programming. Board Member Bri Full articulated this point perfectly, pointing out that while Omaha Public School students are enjoying broad protections, that is not the same for their peers at other schools in other districts.

We hope that this information has been of some help. We are here for your administrators, educators, and students: we offer training on the law pertaining to scholastic journalism to any of these groups free of charge. Your district is home to important and storied student journalism programs, and opposing legislation designed to bolster their work outwardly diminishes the pride you should have in them. We urge you to decide as a board to support LB 1071 with an accompanying letter to the legislature. If you have any questions, please feel free to contact us, we are very interested in discussing this legislation and your concerns further.

With Respect,

[Signature]

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