



TESTIMONY IN SUPPORT OF SB 571 - FREEDOM OF THE PRESS IN SCHOOL-SPONSORED STUDENT MEDIA

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The Student Press Law Center (SPLC) is an independent, non-partisan organization that supports, promotes and defends the press freedom and First Amendment rights of student journalists and their advisers. Our free legal hotline provides services to students and teachers across the country. As such, we see daily the significant need for legislation like SB 571, a version of which is now law in seventeen states,¹ and strongly support its passage. We do request small clarifying amendments be made to avoid inadvertently incentivizing some censorship of student media, and have detailed those concerns and included suggested language below. The amendments as proposed unfortunately create loopholes to undermine the purposes of SB 571. **Of particular concern is Senate Amendment 3**, which should be fully stricken from consideration, treated below.

In *Hazelwood School District v. Kuhlmeier* (1988), the U.S. Supreme Court ruled that any censorship of school-sponsored K-12 student media must be “reasonably related to legitimate pedagogical concerns.” Unfortunately, what constitutes “legitimate pedagogical concerns” has never been clarified or widely understood.

In contrast, all other student speech is held to the so-called “*Tinker* Standard,” a precedent stemming from the Court’s *Tinker v. Des Moines* (1969) ruling. Under *Tinker* student speech cannot be censored unless it violates state and federal laws (including those against libel and slander, as well as privacy and copyright laws) or materially or substantially disrupts the school environment. That is effectively the standard this legislation seeks to restore for student media.

While a student journalist adhering to proper journalistic procedures is unlikely to stumble over the *Tinker* standard, students at one school are too often censored under *Hazelwood*’s much more nebulous standard for writing stories that administrators at another school would never contend violates any legitimate pedagogical standard. *Hazelwood* remains, three decades after the Court’s ruling, an arbitrary and capricious standard that causes confusion among student journalists and school administrators alike. This legislation would resolve that confusion.

Nationwide, SPLC has seen yearbooks censored because students wore MAGA shirts or the swim team wore bathing suits, newspapers censored for reporting on graffiti visible to all students, and administrators restricting otherwise accurate news stories critical of the administrators’ own activities. Award-winning advisers have been reassigned or fired for refusing to infringe upon students from reporting on, among other things, the high cost of feminine hygiene

¹ Arkansas, California, Colorado, Hawaii, Illinois, Iowa, Kansas, Maryland, Massachusetts, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, Vermont, Washington and West Virginia.



products, a vigil for a current student, the improper withholding of documents relating to an administrator's resignation and curriculum changes.

In 2014, for instance, Fond du Lac high school imposed a prior review policy following the school paper's reporting on the impact of callous jokes about sexual assault survivors. The policy was then used to censor an illustration about the prior review policy, as well as multiple parts of the final issue that year. (The policy was changed after SPLC intervention.) This legislation will resolve the confusion and unwarranted censorship stemming from *Hazelwood* by providing appropriate and consistent guardrails for student media content. It will protect school districts, and will ensure that Wisconsin's students can be the independent, civic-minded leaders Wisconsin schools encourage them to be.

As to our concerns: first and foremost, we take issue with Senate Amendment 3, which would force an additional requirement that a student journalist "obtain[] the written consent of the pupil's parent or guardian" before participating in student media. This requirement immediately puts a student's ability to exercise their First Amendment rights in the hands of someone else. In a way, this institutionalizes a new and improper form of censorship simply by bureaucratic omission if a parent simply neglects to provide this affirmative consent. Arguably, this puts Wisconsin student journalists in a worse position than even under the *Hazelwood* decision because they may not gain access to publish school-sponsored media in the first place.

Free speech and free press rights — unlike, for example, the ability to join the school Ski Club — are fundamental, constitutionally protected rights. The Supreme Court briefly addressed this issue in 2011, when Justice Scalia noted that it would be unconstitutional for the government "to prevent children from hearing or saying anything *without their parents' prior consent.*" *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, fn. 3 (2011) (emphasis in original). The requirement that a student get written consent from a parent to participate in student media is a clear example of the type of law Justice Scalia was envisioning, and one that would not pass the strict scrutiny test that is required of a speech restriction. This amendment would also chill the speech of students and discourage them from exercising their free speech rights by placing an unnecessary burden on their ability to join school publications.

This additional requirement is not only a restriction on the First Amendment rights of students, it disproportionately affects some students over others. Parents and guardians who are less responsive to engagement by school districts will unknowingly put their children at a significant disadvantage when it comes to engaging in speech protected by the First Amendment. This further says nothing to students in foster care or other comparable home situations where parent involvement is limited or nonexistent: those students should not be silenced in school-sponsored media simply by virtue of their home lives.



The concern that parents are potentially liable for the pieces written by their children are unfounded. The bill makes it clear that the liability for the content included in the paper falls on the students, rather than the school. However, it does not follow that the parents are then legally responsible for the actions of their children. The parents will only be liable if, somehow, it was found that they themselves were involved in publishing the material at issue or were negligent in controlling the child. As this content is school-sponsored media, it is unlikely that the parents will have any involvement in the process, therefore ridding them of any liability. Moreover, this same risk of liability for parents is identical to the risk students have using their personal social media accounts; in the student media context, however, publication operates within structured and time-tested boundaries.

Further, this amendment places an undue burden on the functions of school districts by adding a vague bureaucratic requirement to their already full plates. Must districts track this written consent annually? What form must it take? Are there separate permissions for newspaper, yearbook, broadcasting, and literary magazine? Does this apply to only classes or also clubs? Are interested students barred from the classroom without this consent? This amendment opens a can of worms that would create an unmanageable patchwork of requirements that no other student activity requires. Ultimately, we recommend that the parental permission requirement of the bill be completely stricken to keep the law constitutionally-sound and protect the First Amendment rights of student journalists.

If an amendment must address limiting parent liability, we offer the language that Illinois passed in their New Voices law. That “No expression made by students in the exercise of freedom of speech or freedom of the press shall be deemed to be an expression of school policy, and no school district or employee or parent, legal guardian, or official of the school district shall be held liable in any civil or criminal action for any expression made or published by students, except in cases of willful or wanton misconduct.” This would address the concerns of parental liability, without the undue burden placed on school administrators and students to get parental consent prior to participating in student media.

Next, in multiple places, SB 571 would state that speech is not protected if it is "rejected by a student-editor or an all-student editorial board." This is a new exemption added by the Assembly on AB 551 and introduced as an amendment by Senator Cabral-Guevara in an apparent effort to avoid litigation by students or others whose work is rejected for publication by a student editor or editorial board. It's worth noting that this exemption does not appear in any other state with a similar law. In defining unprotected speech, those laws only include speech that the law has clearly identified as not entitled to First Amendment protection, including such common categories as libel, obscenity and copyright infringement. While we agree with the concern expressed, we



think the proposed fix may be unnecessarily confusing and can be accomplished in a simpler way. We propose that the given amendment language be stricken, and that instead, either:

- all lines stating “a student journalist is responsible for determining the news” et cetera be changed to “a student editor is responsible for determining the news” et cetera (similar language appears in several state laws similar to SB 571); or
- A line be added to each section stating “This section shall not be construed to limit the ability of student editors to reject or edit any student-created material.”

We have concerns with whether a provision in Senate Amendment 2 to Senate Bill 571, in particular, “2. Page 3, line 23: after ‘law’ insert ‘including a violation of s. 948.11....’” Reviewing Section 948.11, the full text would be an inappropriate restriction on college students, one that would not likely pass constitutional muster. Specifically, under the statute, “harmful material” would include anything that “depicts nudity” (948.11(1)(ar)(1)). We do not object to including such a provision in the section of the statute affecting high school and elementary school students (see *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)), but the ability for college students to express themselves artistically or politically, whether it uses nudity or not, is a compelling interest. Further, inclusion of nudity may accurately depict a newsworthy event on a college campus or advocate for sexual health in a manner that is appropriate for college-aged adults, but may not be appropriate for children. The discussion surrounding bifurcating this bill into separate high school and college bills may be apt.

Further, we are concerned by inclusion of language exempting from the policy requirement any institution or school board that “demonstrates to the department that only pupils are involved in making editorial or publication decisions.” We believe that this section as written raises more questions than answers and will leave schools and districts inadvertently in violation of the law.

Censorship is often not policy; even schools whose internal policy is to promote the independence of their student media have grappled with cases of censorship. Yet a policy can be crucial to setting expectations and informing all students and administrators, particularly during periods of transition, as to the rights and responsibilities of all parties.

This amendment goes into no detail about how a district or institution is to certify to itself that their student media is free from interference, how that freedom is to be verified, how often that certification is to occur, or give student journalists crucial appeals processes when administrators violate the policies and the law. As such, we believe it will simply be used to circumvent the policy requirement at a detriment to all parties.



We understand that some in the University of Wisconsin System (U-W) are concerned that the law will conflict with their existing policy. We have looked at U-W's existing policy and are concerned that, while it holds for the freedom of the student press, it also requires the Chancellor or a designee to discuss with the student media "their legal responsibilities" and financial liabilities. Setting aside the fact that student journalists take classes in media law and ethics and are well-versed in their legal rights and responsibilities, this is a situation ripe for censorship pressure under the wrong administrator and misinterpretation by student journalists. If a school says that their student media are independent but a student disagrees, are they immediately in violation of the policy requirement of this law? Without a clear policy and procedure for students to appeal the rare censorship that does occur, students are left with no recourse but to go to court - a costly and time-consuming procedure for all involved.

We recommend that the amendment be replaced with:

"It is sufficient for a policy to state that decisions regarding the content of student media are made solely by students, and that at no point may any school official attempt to influence the content of school-sponsored student media."

With these small amendments, and the complete purge of Senate Amendment 3, we urge swift passage of this legislation. Wisconsin will join the seventeen states that have already enacted similar student press freedom laws. The outcomes are abundantly clear: these laws do not impact the safety of the school or keep administrators from intervening when necessary. In no state has there been an outbreak of unethical journalism. No school has witnessed a successful libel lawsuit. (In fact, libel lawsuits initiated against high school student journalism programs are exceedingly rare; to date, we are aware of no published libel lawsuit in the country holding a school district liable for work published by its student media.)

Thank you for your support of SB 571, and Wisconsin's student journalists.

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