Hazelwood School District v. Kuhlmeier

A complete guide to the Supreme Court decision

In January 1988, the United States Supreme Court handed down its opinion in *Hazelwood School District v. Kuhlmeier.*[1] The decision upheld the authority of public high school administrators at Hazelwood East High School in suburban St. Louis, Mo., to censor stories concerning teen pregnancy and the effects of divorce on children from a school-sponsored student newspaper.

Hazelwood was in dramatic contrast to court decisions from across the country handed down over the previous two decades that had given student journalists extensive First Amendment protections.

Although the Supreme Court was only dealing with a student newspaper in *Hazelwood*, all public high school student news and information media have been affected. Student newspapers, yearbooks and literary magazines as well as online student media and non-broadcast radio and TV programs can use the information in this guide.

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Probably the most significant aspect of the *Hazelwood* decision was the emphasis it placed on determining whether a student publication is or is not a "public forum" for student expression.

As a growing number of lower court cases have confirmed, student media that qualify as public forums receive greater First Amendment protection than non-public forum student media and are not subject to *Hazelwood*'s censorship standards. The determination of forum status may not always be clear, but this guide points out the factors that a court is likely to consider.

Recent court decisions have also helped to more clearly define what types of administrative censorship *Hazelwood* allows and what types it does not. While the *Hazelwood* standard remains far from clear, these cases provide some useful guidance about where the outer boundaries lie.

Please note one thing above all else: All public high school students still have important First Amendment protections that limit the ability of school officials to restrict what students publish or to punish them for what they say or write. Public school officials — no matter what they may say or think — do not have an unlimited license to censor.

What the Decision Says

Hazelwood School District v. Kuhlmeier was decided on January 13, 1988. The 5-3 vote reversed the decision of the U.S. Court of Appeals for the Eighth Circuit in St. Louis, which had upheld the rights of the students. Justice Byron White wrote the Court's majority opinion, which was joined by Justices Rehnquist, Stevens, O'Connor and Scalia. Justice William Brennan filed a dissenting opinion that was joined by Justices Marshall and Blackmun.[2]

Justice White began by noting that the rights of students in public schools are not necessarily the same as those of adults in other settings. White also pointed to a student speech decision the Court had handed down two years earlier, *Bethel School District No. 403 v. Fraser*,[3] where it found that even within the school, a student's First Amendment rights could vary depending on the type of expression involved and where and how it took place.

In *Hazelwood*, the Court found that the *Spectrum*, the student newspaper at Hazelwood East High School, which was produced as part of a journalism class, was not a "forum for public expression" by students.[4] Therefore, the Court held that the school was not required to follow the standard established in *Tinker v. Des Moines Independent Community School District*,[5] a 1969 Supreme Court case that struck down as unconstitutional a school's suspension of students who had worn black armbands to protest the Vietnam War. In *Tinker*, the Court said school officials could only limit student speech when they could demonstrate that it would cause a material and substantial disruption of school activities or an invasion of the rights of others.

The *Hazelwood* majority noted that unlike the school-sponsored *Spectrum*, however, the armbands worn by the *Tinker* students constituted independent, non-school-sponsored student speech. This distinction between school-sponsored and non-school-sponsored student speech was one that the Court had not directly made before. The *Hazelwood* Court went on to say that a different category of student speech allowed for the application of a different legal standard.

From that point on, the Court said, a new — and less protective — First Amendment test could be used to analyze administrative censorship of school-sponsored speech that occurred in a non-public forum. Henceforth, the Court said, school officials could censor such speech if they could show it was "reasonably related to legitimate pedagogical concerns."[6] In other words, if a school could present a reasonable educational justification for its censorship, it would be allowed.

Applying its new standard, the Court found that the principal at Hazelwood East had acted lawfully in censoring the newspaper. The Court found that it was "not unreasonable" for the principal to have concluded that "frank talk" by students about their sexual history and use of birth control, even though the comments were not graphic, was "inappropriate in a school-sponsored publication distributed to 14-year-old freshmen…."[7]

In his sharp dissent, Justice Brennan said he found the newspaper at Hazelwood East to be a "forum established to give students an opportunity to express their views…."[8] He said the Court should have applied the *Tinker* standard. Brennan said the censorship "aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the 'mere' protection of students from sensitive topics."[9]

"Such unthinking contempt for individual rights is intolerable from any state official," Brennan continued. "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."[10]

Note to students at private schools

Because the First Amendment only protects against the actions of government officials, and the Hazelwood *case only dealt with First Amendment rights, private school students are not legally affected by the decision. They must rely on school policies or state law to protect their free expression rights. For more information, see the SPLC's* Legal Guide for the Private School Press.[47]

What the Decision Means

The *Hazelwood* decision struck a serious blow to scholastic journalism. The Court significantly cut back the First Amendment protections public high school students had been afforded for years. At some schools, censorship has become standard operating procedure; at any school it remains an ever-present threat.

In 1974, the report of the Commission of Inquiry into High School Journalism, titled *Captive Voices*, made some significant findings.

"Censorship is the fundamental cause of the triviality, innocuousness and uniformity that characterize the high school press," the report said. "Where a free, vigorous student press does exist, there is a healthy ferment of ideas and opinions with no indication of disruption or negative side effects on the educational experience of the school."[11]

If a free student press encourages active learning and civic participation by students, as *Captive Voices* found, *Hazelwood* was clearly a step backward and the decision, which one commentator has described as a potential "censorship tsunami,"[12] has been roundly criticized by journalism education groups.

While it is impossible to sugarcoat the negative impact *Hazelwood* has had on student media, the Court left some important safeguards against censorship intact. The following discussion will address those and other common questions raised by the decision.

Does *Hazelwood* apply only to student news media?

No. Any curricular, non-forum student activity that involves student expression is affected. The Court specifically mentioned theatrical productions, and over the years lower courts have cited *Hazelwood* in cases involving other student activities such as art shows, debates and academic presentations.[13]

Does *Hazelwood* apply to all high school student media?

No. It only applies to: (1) school-sponsored student media that are (2) not public forums for expression by students. Curricular and extracurricular student media that qualify as public forums, as well as independently produced (non-school-sponsored) "underground" student publications — even if distributed on school grounds — still retain much stronger First Amendment protections.[14]

Does *Hazelwood* apply to off-campus, private expression?

No. *Hazelwood* applies only to school-sponsored student expression. Independent student speech that takes place entirely outside of school — such as off-campus e-mail, a private Web site or social networking site, or a flier for a non-school organization published and distributed outside of school — is not subject to *Hazelwood*'s restrictions. Except in extraordinary cases, such expressive activity retains the highest level of First Amendment protection and school administrators will generally have no authority to restrict such content or punish students involved. Of course, as always, students remain responsible for everything they publish and can be held liable if they commit libel, invade another's legal right to privacy or engage in some other unlawful speech or activity.[15]

What is "school-sponsored"?

The Court's opinion mentions three different criteria that it might look to in determining if a publication is school-sponsored and thus covered by the *Hazelwood* decision: (1) Is it supervised by a faculty member? (2) Was the publication designed to impart particular knowledge or skills to student participants or audiences? and (3) Does the publication use the school's name or resources?[16] Even a student media organization that receives no direct funding from the school could be "school-sponsored" if it has a faculty adviser, uses school equipment or facilities or is produced in relationship to a class.

Are all school-sponsored student media covered by *Hazelwood*?

No. At least one federal court has found that school-sponsored student publications produced as part of a class can still be public forums where student editors have been allowed control over the publication's content.[17]

Does the decision apply to student media produced in an extracurricular activity?

It is unclear. In at least two federal court cases, judges have said that extracurricular student media may be beyond *Hazelwood* 's reach.[18] However, at least one other court has said that even an extracurricular publication can be covered by *Hazelwood* if under faculty supervision and intended to impart particular skills to the student participants.[19]

What is forum analysis?

In weighing the authority of the government to regulate expressive activity that occurs on government property or that uses government resources, courts have turned to what is commonly known as "forum analysis."[20] The idea is that the government's authority to regulate such speech varies according to the type of forum in which the speech takes place. Some places, it recognizes, are more appropriate for speech activities than others. For example, the government's interest in regulating speech that takes place in a town's public square, where speakers have traditionally been allowed to host gatherings and share their message, is much less than on a tightly guarded military base or in the private office of a government employee where the government can demonstrate a reasonable need to restrict free speech activities.

What is the difference between an "open public forum," a "designated public forum" and a "non-public forum"?

Courts analyzing the constitutionality of administrative censorship of public high school student media first look to determine whether the media at issue is: (1) a traditional, open public forum, (2) a "designated" or "limited" public forum or (3) a non-public forum.[21]

In open public forums, such as streets, sidewalks or a town square, the government must accommodate virtually all speakers. "Designated" public forums (also called "limited" public forums), meanwhile, have not historically been open to the general public but are considered to occupy a middle ground because the government has opened the forum for a specific expressive purpose or for free speech use by a specific group of people (such as student journalists working on a public high school newspaper). Speakers using such forums in their designated manner are entitled to the same strong First Amendment protections as speakers in a traditional, open public forum.

Non-public forums have not been opened to the public, and speakers in such forums receive the least First Amendment protection. Because non-student members of the general public are generally not permitted to use a student publication to publish anything they choose, student media will generally be categorized as either a "designated" (or "limited") public forum or a non-public forum.

Why is it important to determine whether a student outlet qualifies as a public forum for student expression?

Even curricular, school-sponsored student media may still be entitled to strong First Amendment protection and exempt from *Hazelwood*'s limitations if they qualify as "designated public forums for student expression." Thus the key question for most student media in determining the impact of *Hazelwood* is whether they operate as such a forum.

Indeed, at least a half-dozen post-*Hazelwood* cases have emphasized the importance of forum analysis. As one court has said, "Whether a school newspaper is a 'public forum' can be determinative of whether attempts to limit or control the expressional activities undertaken by the newspaper violate constitutional rights."[22]

What are the factors used to determine the forum status of student media?

A designated or limited public forum is created when school officials have "by policy

or practice" opened student media for students to express themselves freely.[23] In *Hazelwood*, the Court majority said it believed the adviser to the newspaper had acted as "the final authority with respect to almost every aspect of the production and publication... including its content."[24] (The dissenting justices said they thought the facts indicated otherwise.) That finding by the majority, combined with the fact that the school never explicitly labeled the student newspaper as a "forum" in its written policies or gave other explicit evidence of an intent to designate the newspaper as a forum, prompted the Court to say a forum did not exist.

In fact, *Hazelwood* was the first case to find that a particular student newspaper did not constitute a forum for student expression, and the Court indicated that had student editors been given final authority over content or had the school explicitly designated *Spectrum* as a public forum for student expression, the result in the case would likely have been different.[25]

As most Courts have agreed, the school's intent is a critical factor in the forum calculus.[26] That can be determined by written school policy, if one exists, or by how the publication has operated over time. "'Actual practice speaks louder than words' in determining whether the government intended to create a limited public forum."[27]

In two recent cases, federal district courts found that high school-sponsored student newspapers were not subject to *Hazelwood* because they were operating as public forums.[28] In both cases, the courts noted that the publications had been operating free from censorship and that school officials were well aware of that fact. The advisers to these student publications also testified that neither they nor school administrators were telling the students what they could publish.

In cases where the publication is a public forum for student expression, school officials will only be allowed to censor when they can demonstrate a compelling reason, meeting the broader protections of the *Tinker* standard.

When is censorship by school officials allowed?

Hazelwood expanded the authority of school officials to censor student media that is school-sponsored and not a public forum. School officials will be allowed to censor non-forum student media when they can show that their censorship is "reasonably related to legitimate pedagogical [educational] concerns."[29] When the censorship has "no valid educational purpose," it will still be prohibited.[30]

Despite what many seem to believe, school officials were not given limitless authority under *Hazelwood*. Even where a student publication is a non-public forum, administrators still have the burden of showing that their censorship has a valid educational purpose. If they cannot, the censorship will be struck down as unconstitutional.[31]

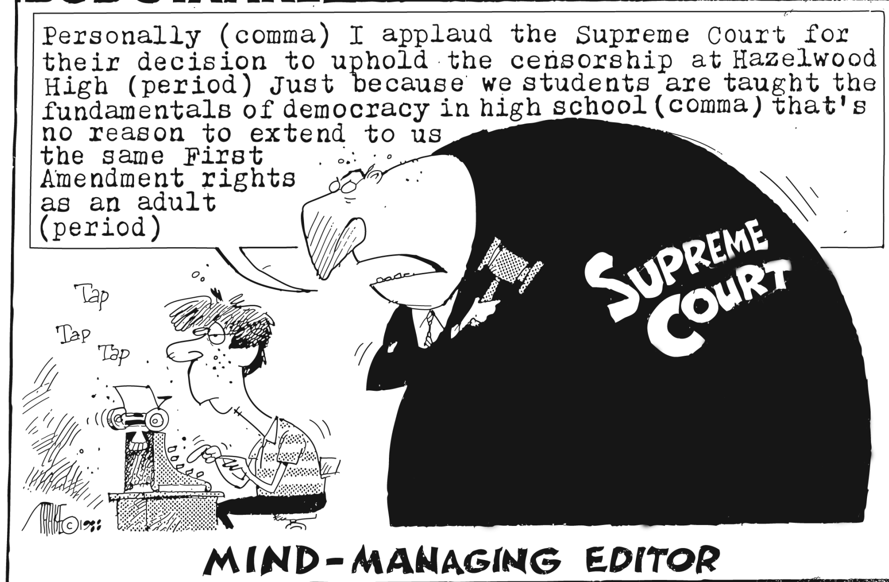
What is a "legitimate pedagogical [educational] concern" that justifies censorship under *Hazelwood*?

That is a question that student journalists, school officials and courts have struggled with since *Hazelwood* was handed down. Considering that every major national organization of journalism educators in the country has said that censorship in and of itself is an educationally unsound practice, one might think that schools could never get away with censorship. However, the Supreme Court indicated otherwise.

The Court gave several examples in its decision of what might be censorable: material that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." Potentially sensitive topics, such as "the existence of Santa Claus in an elementary school setting" or "the particulars of teenage sexual activity in a high school setting" can also be banned. And "speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the 'shared values of a civilized social order'" may also be censored. In addition, the Court said school officials could censor material that would "associate the school with anything other than neutrality on matters of political controversy."[32]

These examples — frightening in their breadth and vagueness — suggest that school officials might be allowed to censor a great number of things simply because they disapprove of them. In fact, the Court said schools could demand of their student publications standards "higher than those demanded by some newspaper publishers ... in the 'real' world."[33]

Fortunately, a growing number of lower court decisions decided since *Hazelwood* have indicated that this standard still imposes significant limitations on school officials' authority. For example, in *Desilets v. Clearview Regional Board of Education* the New Jersey Supreme Court rejected school officials' justifications for censoring reviews of R-rated movies from a student newspaper under the *Hazelwood* standard as "equivocal and inconsistent."[34] The court noted that there was nothing offensive in the reviews, that R-rated



movies were discussed in class by teachers, that such reviews were available in the school library and that the student newspaper had, in fact, reviewed such movies in the past.

In *Dean v. Utica*[35], a federal district court in Michigan rejected a school's censorship of a student newspaper story about a lawsuit filed against the school by community members who claimed they were suffering health problems from breathing diesel exhaust from idling school buses.

The court found the student paper to be a public forum, but said even if it had not been, the school's actions were unconstitutional under *Hazelwood*. Assessing the story on criteria including fairness, accuracy, writing quality and bias, the court said the school had presented no legitimate justification for censoring. Good, solid journalism, the judge found, can trump *Hazelwood*-based censorship.

Are there any other limitations on school officials' authority to censor?

Most courts will also require that school officials be able to show that their censorship is "viewpoint neutral,"[36] that is, that they did not censor simply because they disagreed with a particular view students were expressing. For example, a principal who censored a pro-life editorial, but allowed the publication of a pro-choice editorial, would be engaging in viewpoint discrimination. However, there is some disagreement among lower courts about whether *Hazelwood* imposes a viewpoint-neutral requirement.[37] Until the Supreme Court clarifies the issue, most courts continue to conclude that censorship of student speech based on viewpoint is constitutionally impermissible.

Is prior review allowed after *Hazelwood*?

The *Hazelwood* Court indicated that school officials can review non-forum, curricular student publications before they go to press, and probably can do so without specific written regulations.[38] Prior review by school administrators has long been one of the most problematic and insidious forms of censorship. Where mandatory administrative prior review exists, it will likely be a rebuttable indicator that the publication is not operating as a public forum. For those publications that have been designated as public forums, prior review may require that written policies with procedural safeguards be present.

Did the Supreme Court overrule its decision in the *Tinker* case?

No. The *Hazelwood* Court reaffirmed the *Tinker* decision and the notion that neither students nor teachers lose their free expression rights at the schoolhouse gate. But it did seriously cut back on *Tinker*'s application. By refusing to apply that decision to any situation in a public high school involving a non-forum, school-sponsored student expression, the justices made *Tinker* a shadow of the protective shield for student journalists it had once been.

For all public forum and underground publications, the *Tinker* standard is still the law. School officials can only censor those publications when they can demonstrate that their content will result in a material and substantial disruption of school activities, invades the rights of other students, or falls into another area of unprotected speech, such as copyright infringement.[39]

Are there any other legal protections students might have to fight censorship?

Yes. It is important to remember that *Hazelwood* only addressed the protections available under the First Amendment. The Court left open the possibility that other avenues of protection, including everything from state constitutional provisions or state laws to school board regulations, might still prevent school officials from censoring.

Arkansas, California, Colorado, Iowa, Kansas, Massachusetts and Oregon have state laws that protect the free expression rights of their high school students.[40] Other states across the country have considered — and continue to pursue — enacting similar legislation. In addition, some states, such as Pennsylvania and Washington, have state regulations that may protect student rights. And dozens of individual school districts across the country, such as Dade County in Florida, Fairfax County in Virginia and Auburn School District in Washington State, have enacted student expression policies that provide significant protections to their student media programs.

Courts in New Jersey[41] and Washington[42] have specifically said their state constitutions may provide additional free speech protection to student media. Additionally, the free speech provisions of other state constitutions include language that could be interpreted as providing broader legal protections than the federal First Amendment.

Does *Hazelwood* apply to college student media?

In a footnote, the *Hazelwood* majority said, "We need not now decide whether the same degree of deference [to school censorship] is appropriate with respect to school-sponsored expressive activities at the college and university level."[43] For nearly twenty years — up until a 2005 decision by the 7th U.S. Circuit Court of Appeals in *Hosty v. Carter* — courts had consistently rejected the application of *Hazelwood* to college student media. In *Hosty*, however, a divided court found that *Hazelwood* provided the "starting point" for analyzing college censorship cases.

For students attending a public college or university in Illinois, Indiana and Wisconsin (the states covered by the 7th Circuit), *Hosty* is now the law. As a practical matter, most college student newspapers will still be considered designated public forums and entitled to the strongest First Amendment protection because that is the way they have been operating for decades. (Moreover, in 2007 Illinois lawmakers passed a law protecting college student media from administrative censorship that should effectively negate *Hosty*'s impact for college students in that state.[44])

Most importantly, however, the *Hosty* decision has no legal impact outside the boundaries of the 7th Circuit, and the law prohibiting virtually all forms of administrative college censorship remains unchanged. In fact, the *Hosty* decision is in direct conflict with court rulings dating back nearly four decades. Moreover, the U.S. Supreme Court, which has still not ruled on the question, has consistently noted in other cases the important role of free speech on American college and university campuses. Unfortunately, some misguided or opportunistic college officials outside the 7th Circuit have pointed to *Hosty* to justify more administrative control over student media. College student media must challenge such interpretations immediately.[45]

What the Decision Has Done

Requests for legal assistance to the SPLC from high school students and advisers around the country indicate that the *Hazelwood* decision has had at least one significant effect: a dramatic increase in the amount of censorship.

From 1988 to 2003, calls for help received by the Center increased by about 350 percent, a nearly constant rise that shows no sign of decline. Student media continue to report censorship of articles, editorials and advertisements that are perceived as "controversial" or that school officials feel might cast the school in a negative light. Disturbingly, professional student media advisers are also reporting a growing number of threats to their jobs if they refuse to follow school officials' orders to censor. And almost all student journalists and advisers have said that they attributed the censorship at least in part to the *Hazelwood* decision.

Some Final Words

The *Hazelwood* decision is now more than two decades old. An entire generation has lived its entire academic life — and is now moving into the professional ranks — under *Hazelwood*'s influence. Far too many of our future journalists, citizens and leaders unquestioningly accept that school administrators — government officials — should have the authority to dictate what they read, write and talk about.[46] What this means for the future of press freedom in America remains unknown, but we hope that no student or adviser is resigned to give up the battle against censorship.

Since 1974, the Student Press Law Center has been a source of free legal help and information for students and journalism advisers who are facing administrative censorship. You can contact our legal staff through our Web site (www.splc.org) or by telephone at (703) 807-1904. In addition, the Center remains the only national clearinghouse devoted solely to collecting information about the cases and controversies affecting America's student press, and we rely on you to help us track student media censorship. If you are involved in — or simply aware of — student media censorship in your area, please contact us. ■

Endnotes

1) 484 U.S. 260 (1988).
2) Because of the retirement of Justice Lewis Powell, Jr. in 1987, there were only eight sitting justices at the time *Hazelwood* was argued instead of the usual nine.
3) 478 U.S. 675 (1986).
4) *Hazelwood*, 484 U.S. at 270.
5) 393 U.S. 503 (1969).
6) *Hazelwood*, 484 U.S. at 273.
7) *Id.* at 274-75.
8) *Id.* at 277.
9) *Id.* at 288.
10) *Id.* at 289.
11) *Captive Voices*, The Report of the Commission of Inquiry into High School Journalism (J. Nelson ed. 1974).
12) Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College* Hazelwood*" Case*, 68 Tenn. L. Rev. 481 (2001).
13) *See e.g., Hansen v. Ann Arbor Public Schools*, 293 F.Supp.2d 780 (E.D.Mich. 2003); *Curry ex rel. Curry v. School Dist. of the City of Saginaw*, 452 F.Supp.2d 723 (E.D.Mich. 2006).
14) More information about the rights of underground newspaper publishers — and suggestions for avoiding trouble — are available in the SPLC guide *Surviving Underground*: http://www.splc.org/legalresearch.asp?id=40
15) More information for student publishers of private, off-campus print and online media is available on the SPLC Web site at: http://www.splc.org/legalresearch.asp?subcat=5
16) *Hazelwood*, 484 U.S. at 272-73.
17) *Dean v. Utica Community Schools*, 345 F.Supp.2d 799, 806 (E.D.Mich. 2001).
18) *Romano v. Harrington*, 725 F. Supp. 687 (E.D.N.Y. 1989)(finding that rights of student journalists who produced newspaper after school and not for class credit were "less limitable" than those of the students on the *Hazelwood* newspaper, even though both publications received school funding); *Lodestar v. Board of Education*, No. B-88-257 (D. Conn. March 10, 1989)(holding that school-sponsored publication might not be "characterized as part of the school's curriculum" and censored under the *Hazelwood* standard if its history and method of operation show it was an independent student voice).
19) *Desilets v. Clearview Regional Board of Education*, 137 N.J. 585, 590 (N.J. 1994).
20) *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).
21) While some courts debate whether there is a distinction between a "limited" and a "designated" public forum, we use the terms interchangeably here. *See, e.g., Roberts v. Haragan*, 2004 WL 2203130 (N.D. Tex. Sept. 30, 2004).
22) *Desilets*, 137 N.J. at 589. See also *Lodestar*, No. B-88-257 at 10 ("fair ground for litigation exists as to [the student publication's] status ... as a 'public forum' never validly closed by school authorities"); *Planned Parenthood of Southern Nevada v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991)(upholding the authority of school officials to limit pregnancy-related advertising in student publications, but only after it had determined that the publications in question had not been opened as public forums).
23) *Hazelwood*, 484 U.S. at 267.
24) *Id.* at 268.
25) *Id.* at 267-271
26) *See, e.g., Lueneburg v. Everett School District*, 2007 WL 2069859 (W.D.Wash. July 13, 2007).
27) *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001).
28) *Draudt v. Wooster City School District*, 246 F.Supp.2d 820 (N.D. Ohio 2003); *Dean*, 345 F.Supp.2d at 806.
29) *Hazelwood*, 484 U.S. at 273.
30) *Id.*
31) *See., e.g., Dean*, 345 F.Supp.2d at 810.
32) *Hazelwood*, 484 U.S. at 272.
33) *Id.*
34) *Desilets*, 137 N.J. at 593.
35) 345 F.Supp.2d 799 (E.D.Mich. 2004).
36) *See e.g., Planned Parenthood*, 941 F.2d at 829; *Dean*, 345 F.Supp. at 813; *Hansen*, 293 F.Supp.2d at 780.
37) *Compare*, *Fleming v. Jefferson County School District*, 298 F.3d 918, 926-928 (10th Cir. 2002), *cert denied*, 537 U.S. 1110 (2003), with *Peck v. Baldwinsville Central School District*, 426 F.3d 617, 631-632 (2nd Cir. 2005), *cert. denied,* 547 U.S. 1097 (2006). *See also, Busch v. Marple Newtown School Dist.*, 2007 WL 1589507, *8 n. 15 (E.D.Pa. May 31, 2007)(discussing conflicts among circuits).
38) *Hazelwood*, 484 U.S. at 273 n. 6.
39) The Supreme Court's recent decision in *Morse v. Frederick*, 127 S.Ct. 2618, 2625-26 (2007) held that student expression that advocates illegal drug use can be penalized without violating the First Amendment.
40) The text and citations for these laws can all be found at: http://www.splc.org/law_library.asp
41) *Desilets v. Clearview Regional Board of Education*, 266 N.J.Super. 531 (N.J. Super A.D. 1993); *affirmed on other grounds*, 137 N.J. 585, 590 (N.J. 1994).
42) *Lueneburg*, 2007 WL 2069859 at *9.
43) *Hazelwood*, 484 U.S. at 273 n. 7.
44) 110 ILCS 13/1 - 13/97. (Effective June 1, 2008). As of January 2008, Oregon and California had also passed laws protecting college student media as a result of the *Hosty* decision. The text and citations for these laws can all be found at: http://www.splc.org/law_library.asp
45) More information about the *Hosty* case and *Hazelwood*'s application to college student media can be found at: http://www.splc.org/legalresearch.asp?subcat=4
46) A 2004 national study sponsored by the Knight Foundations revealed, among other sobering statistics, that more than a third of all high school students surveyed believed the First Amendment went "too far" in guaranteeing freedom of speech and freedom of the press. More information from the "Future of the First Amendment" study is available at: http://www.firstamendmentfuture.org/
47) http://www.splc.org/legalresearch.asp?id=52

First Amendment Rights of Public High School Student Journalists After *Hazelwood School District v. Kuhlmeier*

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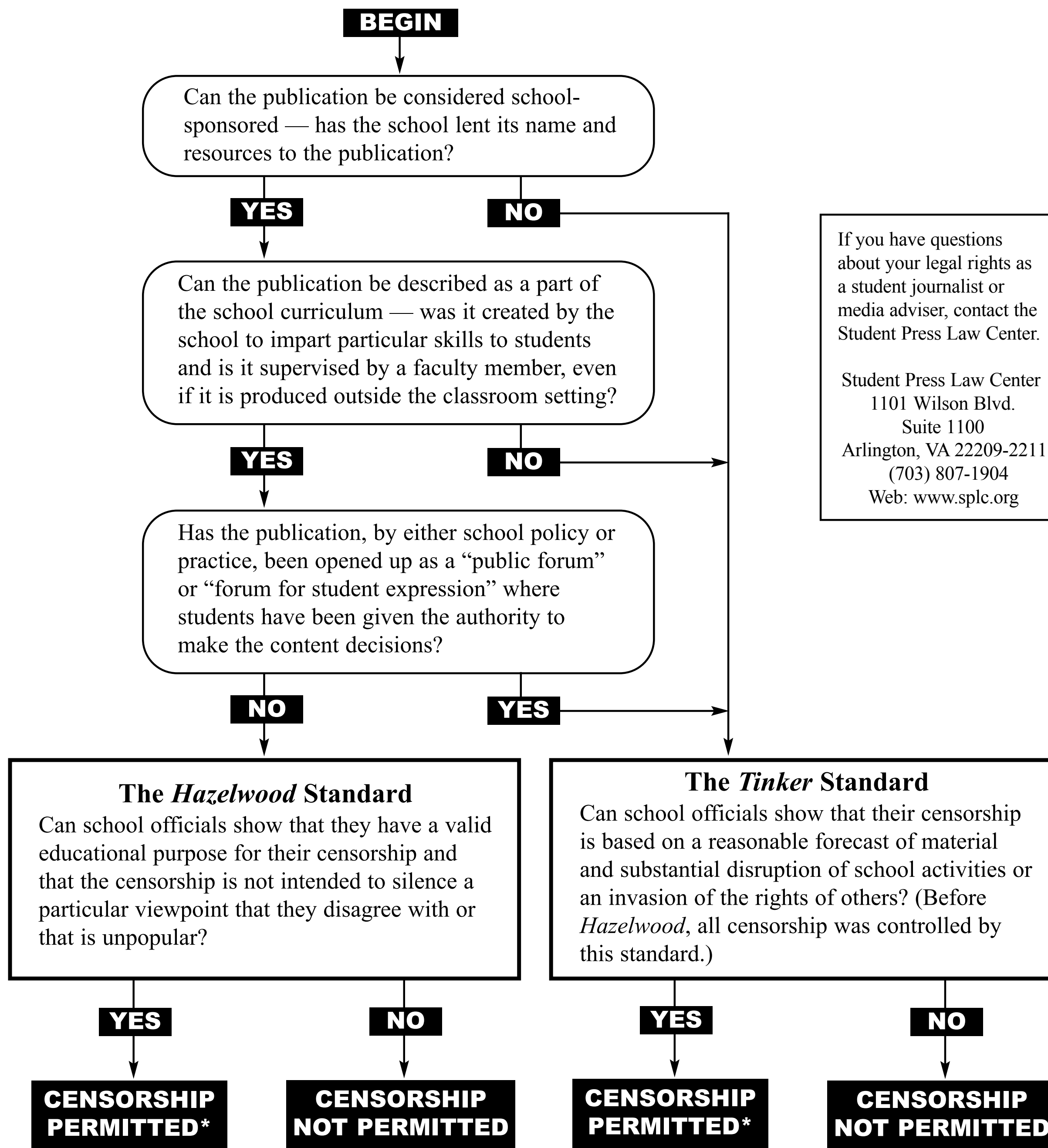
This diagram describes how a court would determine if a particular act of censorship by school officials is legally permissible.



*As of February 2008, if your state is Arkansas, California, Colorado, Iowa, Kansas, Massachusetts, Oregon, Pennsylvania or Washington, the censorship may not be permitted under your state law or regulations.

Fighting censorship: A checklist

By Mike Hiestand

√ Practice sound journalism

Nothing can help you more in your censorship fight than a well-researched, well-written, fair and accurate story. Conversely, nothing can sink you faster than a sloppy, mean-spirited, error-filled article. Write something you would be proud to stand and defend publicly — because that is likely what you are going to be called upon to do. Before publishing a story that you know might provoke a censor's pen, make it "censor-resistant": triple-check all facts, confirm quotes, make sure you have talked to all sides. In short, be a good journalist. Do not give censors an easy target.

√ Pick your battles wisely

Fighting for a free student press is a worthy endeavor. But the truth is, some censorship fights are worthier than others. Do you really want to go to battle over the right to publish a four-letter word or a raunchy, rumor-filled gossip column? Is it worth pulling out all the First Amendment stops when the principal objects to an editorial's description of a curriculum change as "idiotic," but would be okay with your calling it "unwise"? There are no hard rules for determining when a fight is worth the time and effort involved, but the question should always be asked.

√ Do your homework

Take the time to understand your rights. Every case has its strengths and weaknesses and it is important that you're able to accurately assess where you stand. Sadly, few administrators know — or sometimes, even care about — the law related to student free speech rights. Too often they act without taking the time to figure out what they lawfully can and cannot do. You may need to help educate them.

√ Meet the censor — with a smile

As soon as the threat of censorship emerges, set up a meeting with the censor. The purpose of this meeting is to air all sides' concerns and to resolve the situation before it heats up. Confront the threat, but avoid being confrontational. Immediately threatening a First Amendment lawsuit seldom encourages productive discussion. Rather, hear the administrator's objections. Be open to small changes or creative compromises. At all times, be courteous and show the appropriate respect. Offer to answer the censor's questions regarding factual statements made in the story. If he has questions about the legality of piece you want to publish, offer to consult with a media law attorney to address his concerns.

Take time to explain your role as a student journalist. Remind him that the press's goal is not to publish good news or bad news — just the news. You may want to share articles, a number of which are available on the SPLC's Web site, that offer an administrator's perspective on the benefits of encouraging a strong and independent student press.

Failing to reach a compromise, let the administrator know — in no uncertain terms — that the student staff considers censorship a very serious matter. Make it clear that you hope to avoid a fight, but also leave no doubt that you are prepared to take a stand.

√ Make it student-only

The student staff, preferably a small group of student editors, should initiate all meetings and contact with the censors and other outsiders. The student media adviser should act merely as an observer. Remember, it is a student publication being censored and it is up to students — not the adviser — to take the lead in any censorship battle. Students have much more freedom — and in many ways, more credibility — to fight a censorship battle than their adviser, who is a school employee. It is essential that school officials immediately understand that if a censorship battle is to be fought, it will be waged with students, acting on their own.

√ Gather the troops

If it appears a censorship battle is unavoidable it is time to begin identifying your supporters. First, gather the student staff together. Make sure all staffers are briefed on the facts of the conflict. Discuss your strategy and your reasons for contesting the censorship. Reach a consensus about the main message that you wish to convey in any battle that ensues. Appoint a primary spokesperson to handle future media queries or so that you speak with one, consistent voice.

Contact the Student Press Law Center or a local media law attorney to notify them of your possible censorship battle and to have any additional questions answered. At this stage, it is usually best to refrain from officially publicizing the censorship. This allows school officials to quietly change their minds or pursue an acceptable compromise.

√ Meet the censor — with a deadline

If, after a reasonable period, the censor has refused to back down, it is time to initiate a formal, administrative appeal. Even if you are sure such appeals will be denied, a judge hearing your case will generally insist that all internal appeals first be exhausted. Moreover, your willingness to work with school officials to resolve the matter will be viewed positively should it become necessary to publicize your case. Once again, when meeting with the censor, be courteous, but firm. Be very clear that you intend to contest and publicize the censorship both in and outside of school and enlist the help of others in doing so.

This is the time to start a paper trail, which will be crucial should the matter eventually result in legal action. All meetings regarding the matter should be summarized and recorded and copies of all documents preserved. Student staff members should store copies of the censored material at a safe and secure location.

Present the censor with a letter formally objecting to the censorship and asking that she reconsider her decision. If the administrator has previously provided reasons for the censorship, recount them in your letter and explain why you believe they do not justify the action taken. Ask that the censor provide her response in writing with a reasonable deadline stipulated. If the censor refuses to provide a written response, follow up with your own confirmation memo to the censor. State your understanding of the facts and request that the censor clear up any misunderstandings in writing. (For example, "As we have not heard from you by our requested deadline, we will assume that you have decided not to allow publication of the March 20 article, 'Class Sizes at CHS Continue to Grow,' because, as you told us during our meeting on March 25, you believe the article 'reflects negatively' on the school. If this is incorrect, please notify us

in writing by April 5.")

√ Meet with the superintendent

Assuming that the original censor was your principal, your next step will be to appeal the decision to her boss, in most cases the district superintendent. If possible, set up another in-person meeting to present your case and to give the superintendent an opportunity to meet you and your staff and ask questions. Again, courtesy and "professionalism" pays. At this meeting you will once again want to present the superintendent with a formal, written letter of appeal outlining what has occurred thus far and explaining why you believe the censorship is wrong.

√ Go public

If the superintendent turns down your appeal, it is now time to kick your publicity campaign into high gear. Unlike the principal and superintendent, school board members are usually elected officials. Public pressure can be very effective.

A good first step is to draft a press release about the censorship. A press release briefly and accurately summarizes the facts surrounding the censorship, includes a quote about the censorship from your staff spokesperson and perhaps from an expert on censorship or journalism (such as someone from the Student Press Law Center or your state scholastic press association), provides information regarding any upcoming developments (for example, a student protest, a school board meeting, etc.) and includes contact information for those wanting additional information. Send the press release to your local news media (including local high school and college student media) and follow up with a phone call to the editor or news director. Also send your release to civil rights groups, to your state press associations and to alumni, parent and civic groups. The Student Press Law Center can help you reach a national audience, so be sure to send its reporters a copy. You may also want to peacefully distribute the press release among fellow students outside of class and to others in your community. Consider creating an off-campus, private Web site where people can go for current news and information about the controversy. You may want to post a copy of the censored material to the Web site so that people can judge the censorship for themselves — or so that other media can publish it, as often happens.

In some cases, students have found that creative, peaceful protests (for instance, wearing black armbands, symbolically covering their mouths with tape during lunchtime, passing out copies of the First Amendment after school, circulating a student petition, etc.) have generated favorable attention. Letters to the editor or guest columns in local newspapers can also be effective.

√ Meet with the school board

If the superintendent turns down your appeal, your next and final stop in most administrative chains of command is the school board. Once again, you will need to file a formal written appeal. You will also need to find out what is required to put your appeal on the board's public agenda. School boards often have specific rules for how their public hearings are conducted (notice provisions, filing requirements, time limits, speaker limits, etc.). Read them carefully.

Hopefully, your publicity campaign is now in full swing. Encourage supporters to make calls or send e-mail or letters of protest to the school board and local news media. Support from parents and community members can be key. Encourage the news media and your supporters to attend the school board meeting.

Plan your school board presentation carefully. Your goal is to show that your staff capably performed its job as journalists and has acted reasonably throughout the controversy. Briefly explain the editorial process for story selection and reporting. The board may have little familiarity with student journalism and the hard work and long hours involved. Mention any awards that your publication has received. Explain what has happened since the censorship occurred and your early efforts to quietly and reasonably work with school officials to resolve the matter. Finally, tell them — in your own words — why you believe a free press is important, why you believe censorship is wrong and why you are taking the stand that you have.

√ Consider alternative media

Unfortunately, some school administrators choose not to listen. If they consistently censor your school-sponsored student media and refuse to even consider allowing more editorial freedom, you may — in addition to fighting the censorship — want to consider an alternative means of getting your message out. Underground, or independently published, student publications or off-campus Web sites are entitled to significant First Amendment protection. In fact, as long as an independent publication contains no disruptive or otherwise unlawful speech, public school officials must allow for its reasonable, in-school distribution. Most courts have found public school officials have even less authority to regulate (or punish) students' private Web sites that are created and viewed outside of school. For more information on publishing an independent student publication or Web site, see the SPLC's "Surviving Underground" guide, available on the SPLC Web site.

√ Consider your legal options

If school officials still refuse to budge, your next step may be a courtroom. Unfortunately, cases that are worth challenging in an administrative and public opinion forum are not always appropriate for a legal challenge. The facts of a case, the quality of evidence, the availability of witnesses and the history of court cases in a particular jurisdiction are among the factors that must be considered. An experienced media law or civil rights attorney can help you weigh the pros and cons of filing a lawsuit. Fortunately, where it is determined their legal case is solid, student media have a number of allies. Groups such as the American Civil Liberties Union, the Foundation for Individual Rights in Education and the Student Press Law Center are among those that operate referral services that can put student journalists in touch with local, volunteer lawyers that have offered to provide legal help free of charge.

In the end, however, a positive court ruling is not the only measure of victory. In fact, many successful censorship battles have ended with the censored material never published. The victory in such cases is achieved in the battle itself — in having the courage to stand up for what is right. While a completely free and independent student press may not always be achievable, the very act of reminding others why it is important and worth defending — fighting the good fight — is always an honorable accomplishment.

Mike Hiestand is an attorney and legal consultant to the Student Press Law Center. Since 1991, Mr. Hiestand has provided legal assistance to more than 14,000 high school and college student journalists and their advisers nationwide.

A model publications policy

Of all the information the SPLC provides, our Model Guidelines for Student Publications continue to be among the most requested. First published in the Winter 1978-79 issue of the Student Press Law Center Report*, the guidelines have been updated several times over the years with input from attorneys on our staff and elsewhere. They have been endorsed by various scholastic press organizations, including the national Journalism Education Association.*

I. STATEMENT OF POLICY

Freedom of expression and press freedom are fundamental values in a democratic society. The mission of any institution committed to preparing productive citizens must include teaching students these values, both by lesson and by example.

As determined by the courts, student exercise of freedom of expression and press freedom is protected by both state and federal law, especially by the First Amendment to the United States Constitution. Accordingly, school officials are responsible for encouraging and ensuring freedom of expression and press freedom for all students.

It is the policy of the ______________ ______________ Board of Education that (newspaper), (yearbook), (literary magazine) and (electronic or on-line media), the official, school-sponsored student media of _______ _______________ High School have been established as forums for student expression and as voices in the uninhibited, robust, free and open discussion of issues. Each medium should provide a full opportunity for students to inquire, question and exchange ideas. Content should reflect all areas of student interest, including topics about which there may be dissent or controversy.

It is the policy of the _____________ _____________ Board of Education that student journalists shall have the right to determine the content of student media. Accordingly, the following guidelines relate only to establishing grounds for disciplinary actions subsequent to publication.

II. OFFICIAL STUDENT MEDIA

A. Responsibilities of Student Journalists

Students who work on official, school-sponsored student publications or electronic media determine the content of their respective publications and are responsible for that content. These students should:

1. Determine the content of the student media;

2. Strive to produce media based upon professional standards of accuracy, objectivity and fairness;

3. Review material to improve sentence structure, grammar, spelling and punctuation;

4. Check and verify all facts and verify the accuracy of all quotations; and

5. In the case of editorials or letters to the editor concerning controversial issues, determine the need for rebuttal comments and opinions, and provide space therefor if appropriate.

B. Unprotected Expression

The following types of student expression will not be protected:

1. Material that is "obscene as to minors." "Obscene as to minors" is defined as material that meets all three of the following requirements:

(a) the average person, applying contemporary community standards, would find that the publication, taken as a whole, appeals to a minor's prurient interest in sex; and

(b) the publication depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts (normal or perverted), masturbation and lewd exhibition of the genitals; and;

(c) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Indecent or vulgar language is not obscene.

[Note: Most states have statutes defining what is "obscene as to minors." If such a statute is in force in your state, it should be substituted in place of section II(B)(1).]

2. Libelous material. Libelous statements are provably false and unprivileged statements of fact that do demonstrated injury to an individual's or business's reputation in the community. If the allegedly libeled party is a "public figure" or "public official" as defined below, then school officials must show that the false statement was published "with actual malice," i.e., that the student journalists knew that the statement was false or that they published it with reckless disregard for the truth — without trying to verify the truthfulness of the statement.

(a) A public official is a person who holds an elected or appointed public office and exercises a significant amount of governmental authority.

(b) A public figure is a person who either has sought the public's attention or is well known because of personal achievements or actions.

(c) School employees will be considered public officials or public figures in relationship to articles concerning their school-related activities.

(d) When an allegedly libelous statement concerns an individual who is not a public official or a public figure, school officials must show that the false statement was published willfully or negligently, i.e., the student journalist who wrote or published the statement has failed to exercise reasonably prudent care.

(e) Students are free to express opinions. Specifically, a student may criticize school policy or the performance of teachers, administrators, school officials and other school employees.

3. Material that will cause "a material and substantial disruption of school activities."

(a) Disruption is defined as student riot-

ing, unlawful seizures of property, destruction of property, or substantial student participation in a school boycott, sit-in, walk-out or other related form of activity. Material such as racial, religious or ethnic slurs, however distasteful, is not in and of itself disruptive under these guidelines. Threats of violence are not materially disruptive without some act in furtherance of that threat or a reasonable belief and expectation that the author of the threat has the capability and intent of carrying through on that threat in a manner that does not allow acts other than suppression of speech to mitigate the threat in a timely manner. Material that stimulates heated discussion or debate does not constitute the type of disruption prohibited.

(b) For student media to be considered disruptive, specific facts must exist upon which one could reasonably forecast that a likelihood of immediate, substantial material disruption to normal school activity would occur if the material were further distributed or has occurred as a result of the material's distribution or dissemination. Mere undifferentiated fear or apprehension of disturbance is not enough; school administrators must be able affirmatively to show substantial facts that reasonably support a forecast of likely disruption.

(c) In determining whether student media is disruptive, consideration must be given to the context of the distribution as well as the content of the material. In this regard, consideration should be given to past experience in the school with similar material, past experience in the school in dealing with and supervising the students in the school, current events influencing student attitudes and behavior and whether there have been any instances of actual or threatened disruption prior to or contemporaneously with the dissemination of the student publication in question.

(d) School officials must protect advocates of unpopular viewpoints.

(e) "School activity" means educational student activity sponsored by the school and includes, by way of example and not by way of limitation, classroom work, official assemblies and other similar gatherings, school athletic contests, band concerts, school plays and scheduled in-school lunch periods.

C. Legal Advice

1. If, in the opinion of a student editor, student editorial staff or faculty adviser, material proposed for publication may be "obscene," "libelous" or would cause an "immediate, material and substantial disruption of school activities," the legal opinion of a practicing attorney should be sought. The services of the attorney for the local newspaper or the free legal services of the Student Press Law Center (703/807-1904) are recommended.

2. Any legal fees charged in connection with the consultation will be paid by the board of education.

3. The final decision of whether the material is to be published will be left to the student editor or student editorial staff.

D. Protected Speech

1. School officials cannot:

(a) Ban student expression solely because it is controversial, takes extreme, "fringe" or minority opinions, or is distasteful, unpopular or unpleasant;

(b) Ban the publication or distribution of material relating to sexual issues including, but not limited to, virginity, birth control and sexually-transmitted diseases (including AIDS);

(c) Censor or punish the occasional use of indecent, vulgar or so called "four-letter" words in student publications;

(d) Prohibit criticism of the policies, practices or performance of teachers, school officials, the school itself or of any public officials;

(e) Cut off funds to official student media because of disagreement over editorial policy;

(f) Ban student expression that merely advocates illegal conduct without proving that such speech is directed toward and will actually cause imminent unlawful action.

(g) Ban the publication or distribution by students of material written by non-students;

(h) Prohibit the endorsement of candidates for student office or for public office at any level.

2. Commercial Speech

Advertising is constitutionally protected expression. Student media may accept advertising. Acceptance or rejection of advertising is within the purview of the publication staff, which may accept any ads except those for products or services that are illegal for all students. Ads for political candidates and ballot issues may be accepted; however publication staffs are encouraged to solicit ads from all sides on such issues.

E. Online Student Media and Use of Electronic Information Resources

1. Online Student Media

Online media, including Internet Web sites, e-mail, listserves and Usenet and Bitnet discussion groups, may be used by students like any other communications media to reach both those within the school and those beyond it. All official, school-sponsored online student publications are entitled to the same protections and are subject to no greater limitations than other student media, as described in this policy.

2. Electronic Information Resources

Student journalists may use electronic information resources, including Internet Web sites, e-mail, listserves and Usenet and Bitnet discussion groups, to gather news and information, to communicate with other students and individuals and to ask questions of and consult with sources. School officials will apply the same criteria used in determining the suitability of other educational and information resources to attempts to remove or restrict student media access to online and electronic material. Just as the purchase, availability and use of media materials in a classroom or library does not indicate endorsement of their contents by school officials, neither does making electronic information available to students imply endorsement of that content.

Although faculty advisers to student media are encouraged to help students develop the intellectual skills needed to evaluate and appropriately use electronically available information to meet their newsgathering purposes, advisers are not responsible for approving the online resources used or created by their students.

3. Acceptable Use Policies

The Board recognizes that the technical and networking environment necessary for on-line communication may require that school officials define guidelines for student exploration and use of electronic information resources. The purpose of such guidelines will be to provide for the orderly, efficient and fair operation of the school's on-line resources. The guidelines may not be used to

unreasonably restrict student use of or communication on the online media.

Such guidelines may address the following issues: file size limits, password management, system security, data downloading protocol, use of domain names, use of copyrighted software, access to computer facilities, computer hacking, computer etiquette and data privacy.

III. ADVISER JOB SECURITY

The student media adviser is not a censor. No person who advises a student publication will be fired, transferred or removed from the advisership by reason of his or her refusal to exercise editorial control over student media or to otherwise suppress the protected free expression of student journalists.

IV. NON-SCHOOL-SPONSORED MEDIA

A. Protections

Non-school-sponsored student media and the students who produce them are entitled to the protections provided in section II(D) of this policy. In addition, school officials may not ban the distribution of non-school-sponsored student media on school grounds. However, students who distribute material describe in section II(B) of this policy may be subject to reasonable discipline after distribution at school has occurred.

1. School officials may reasonably regulate the time, place and manner of distribution.

(a) Non-school-sponsored media will have the same rights of distribution as official student media;

(b) "Distribution" means dissemination of media to students at a time and place of normal school activity, or immediately prior or subsequent thereto, by means of handing out free copies, selling or offering copies for sale, accepting donations for copies of the media or displaying the media in areas of the school which are generally frequented by students.

2. School officials cannot:

(a) Prohibit the distribution of anonymous literature or other student media or require that it bear the name of the sponsoring organization or author;

(b) Ban the distribution of student media because it contains advertising;

(c) Ban the sale of student media; or

(d) Create regulations that discriminate against non-school-sponsored media or interfere with the effective distribution of sponsored or non-sponsored media.

B. Independent Media

These regulations do not apply to media independently produced or obtained and distributed by students off school grounds and without school resources. Such material is fully protected by the First Amendment and is not subject to regulation by school authorities. Reference to or minimal contact with a school will not subject otherwise independent media, such as an independent, student-produced Web site, to school regulation.

V. PRIOR RESTRAINT

No student media, whether non-school-sponsored or official, will be reviewed by school administrators prior to distribution or withheld from distribution. The school assumes no liability for the content of any student publication, and urges all student journalists to recognize that with editorial control comes responsibility, including the responsibility to follow professional journalism standards each school year.

VI. CIRCULATION

These guidelines will be included in the handbook on student rights and responsibilities and circulated to all students.

SPLC

STUDENT PRESS LAW CENTER

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