

# Statement in support of an open forum for student expression at Fond du Lac High School

On Monday, March 10, Principal Jon Wiltzius presented the student staff of the Cardinal Columns with “School Guidelines Determined by the Principal regarding Student Publications,” establishing a policy of prior review under which all future materials students create for school publications shall be subject to review and possible refusal by the principal. Such guidelines are not only a clear path toward censorship of student expression but also drastically alter the relationship between school publications and the administration and break sharply with roughly 100 years of district precedent regarding such publications.

In meetings with the advisor and staff of the Cardinal Columns, the Superintendent said he had the new guidelines drawn up as a direct response to concerns he had with two stories in the most recent issue of the Cardinal Columns: “The Rape Joke,” an investigation into aspects of rape culture at the school, and “I Pledge My Allegiance,” an editorial advising students of their right not to stand for the pledge. The Superintendent and principal, in statements to the advisor, students, staff, and the press, have given a variety of possible, specific concerns. These have included the possibility that the subject matter might not be appropriate for immature audiences, that the photos inside might be too suggestive or edgy, that some students (in particular, the survivors of sexual abuse who agreed to speak on condition of anonymity) may have had their rights violated, that the statistic on the cover couldn’t be correct because every single student was not polled, that the cover (for those who do not read the full title or inside story) could reflect poorly on the school, and that the issue may not include enough of a positive focus on the school, in general.

Setting aside the facts that the incidents of sexual abuse outlined in the story significantly impact the high-school age group intended as the audience or that the photos featured a fully clothed female student holding up a sheet of paper or that the reporter took great care and sought expert guidance in compiling her statistics or that the sexual abuse survivors have released statements in support of their inclusion in the feature, we believe that the story, itself, stands as an exemplar of high-quality, responsible journalism that has helped countless readers feel supported, speak up, seek help, and come together in a way that has undoubtedly resulted in a more positive environment in our school. We need more stories like this one, not fewer.

The Superintendent and principal have told the students that they will work with them to make sure high-quality, powerful stories can still be published. However, the fact that the new guidelines were drawn up so quickly, in defiance of past precedent, without warning or consultation with the school newspaper advisor or staff or other interested parties, and in the most restrictive form possible has the students worried that such stories, while powerful and community-building, may be controversial or not be “positive” enough to gain future approval. And they are not alone.

As the restrictive new guidelines quickly made regional, state, and national headlines, many thousands of people around the country had a chance to read the story and comment on the new guidelines. Since the story broke, the students have received letters of support from other students, former students, staff, parents, community members, therapists, sexual abuse organizations, college professors, students and newspaper advisors from other schools, college newspapers, professional journalists, nearly every major relevant scholastic journalism organization (including the Kettle Moraine Press Association, the Northeastern Wisconsin Scholastic Press Association, the Journalism Education Association, the Student Press Law Center, etc.), and a long list of other individuals, experts, and concerned citizens. The overwhelming response has been one of amazement that a high school publication could produce such well-researched and insightful journalism and fear that any guidelines produced so swiftly as a reaction to such quality reporting will almost surely lead to censorship of such stories in the future.

If anything, then, the attention this controversy has stirred up has confirmed one thing: our students, allowed some freedom to work together to think critically and make informed choices on their own along with the guidance of a highly qualified instructor, are capable of truly amazing things. Such work should be celebrated, not censored.

#### **LET IT BE RESOLVED, THEN, THAT:**

**WHEREAS** the existence of a free and independent press is vital to the preservation of the informed and engaged citizenry necessary for the effective functioning of our democracy, as evidenced by inclusion of freedom of the press in the First Amendment to the Constitution; and,

**WHEREAS** such journalism can only exist when its first loyalty is to the people rather than to those in authority, allowing it to help communities respond to the needs of neglected, marginalized, or otherwise ignored groups or issues, as evidenced by the Pew Research Center's Principles of Journalism (*See Exhibit A*); and,

**WHEREAS** maintaining student publications as open forums for student expression is essential for the development of responsible journalists and the exposure of issues, stories, groups, or abuses that might otherwise fester and hide; and,

**WHEREAS** numerous professional organizations and experts in scholastic journalism have spoken out against the pedagogical and educational value of prior review (*See Exhibit B*); and,

**WHEREAS** Fond du Lac High School has a long and proud tradition of an independent student press serving as an open forum for student expression, as evidenced by the hundreds of past issues of the school paper in the newsroom archives going back to 1914 that were often used to explore controversial topics, shed light on important issues, and serve as an independent monitor of power in such a way as to help the school and community grow together; and,

**WHEREAS** the Fond du Lac School District has clearly and repeatedly affirmed its commitment to providing the highest-quality journalism education, as evidenced by the funds spent constructing a separate newsroom and a state-of-the-art broadcast studio within the high school as well as the hiring of a certified and highly qualified journalism instructor to advise the student publications; and,

**WHEREAS** the experience of working for an independent student publication helps students meet the School District's Educational Philosophy and Goals, among them the need to "incite a thirst for knowledge" and the overall need to help the students "to think and act in an independent, creative, and constructive manner"; and,

**WHEREAS** the experience of working for an independent student publication helps students develop the skills identified as the school goals, including critical thinking, collaboration, communication, and creativity as well as meet the needs of the English Language Arts Common Core State Standards, including the need to write "informative/explanatory texts" and the need to use technology to publish their work; and,

**WHEREAS** other options exist for balancing any needs of the district to protect student rights and avoid disruption of the learning environment with the needs of an independent press, as evidenced by the policies and guidelines adopted by other districts and/or offered by experts in the field (*See Exhibit C*); and,

**WHEREAS** the existence of a policy of prior review has been found to increase the possibility of a school district being found legally liable for articles that are libelous or invade privacy, as evidenced by a report by the Student Press Law Center (*See Exhibit D*); and,

**WHEREAS** the new guidelines could harm the school culture and student engagement by making students feel less empowered as learners, community members, and citizens; and,

**WHEREAS** School Board Policy stresses the importance of community involvement in decision-making; and,

**WHEREAS** overwhelming community, state, and national response has confirmed the quality and positive effect of the journalism produced by our students prior to creation of the new guidelines; and,

**WHEREAS** the spectre of possible censorship of powerful, responsible journalism of the sort exemplified by "The Rape Joke" could lead the School District to lose prestige and reputation on a national level; and,

**WHEREAS** the practice of prior review raises concerns within the Fond du Lac High School English Department regarding course content and the selection and use of modern texts and media, as well as subsequent class discussion of said content as encouraged by the English Language Arts Common Core State Standards; and,

**WHEREAS** the existing board policy on student publications authorizes the creation of school-sponsored publications to provide opportunities for students to “express student points of view”;

**We strongly urge the Superintendent and School Board to strengthen their support of independent student publications at Fond du Lac High School that may serve as open forums for student expression by either abandoning the new guidelines or by putting them on hold until new guidelines or a new policy may be drafted in collaboration with the students, community, and experts in the field.** The Fond du Lac School District has proven itself to be a powerful force in developing the leaders of tomorrow. If anything must change, let us at least take the time and seek the dialogue necessary to get it right.

Signed:

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## Exhibit A

### Principles of Journalism

The first three years of the Project's work involved listening and talking with journalists and others around the country about what defines the work. What emerged out of those conversations are the following nine core principles of journalism:

#### 1. Journalism's first obligation is to the truth

Democracy depends on citizens having reliable, accurate facts put in a meaningful context. Journalism does not pursue truth in an absolute or philosophical sense, but it can—and must—pursue it in a practical sense. This “journalistic truth” is a process that begins with the professional discipline of assembling and verifying facts. Then journalists try to convey a fair and reliable account of their meaning, valid for now, subject to further investigation. Journalists should be as transparent as possible about sources and methods so audiences can make their own assessment of the information. Even in a world of expanding voices, accuracy is the foundation upon which everything else is built—context, interpretation, comment, criticism, analysis and debate. The truth, over time, emerges from this forum. As citizens encounter an ever greater flow of data, they have more need—not less—for identifiable sources dedicated to verifying that information and putting it in context.

#### 2. Its first loyalty is to citizens

While news organizations answer to many constituencies, including advertisers and shareholders, the journalists in those organizations must maintain allegiance to citizens and the larger public interest above any other if they are to provide the news without fear or favor. This commitment to citizens first is the basis of a news organization's credibility, the implied covenant that tells the audience the coverage is not slanted for friends or advertisers. Commitment to citizens also means journalism should present a representative picture of all constituent groups in society. Ignoring certain citizens has the effect of disenfranchising them. The theory underlying the modern news industry has been the belief that credibility builds a broad and loyal audience, and that economic success follows in turn. In that regard, the business people in a news organization also must nurture—not exploit—their allegiance to the audience ahead of other considerations.

#### 3. Its essence is a discipline of verification

Journalists rely on a professional discipline for verifying information. When the concept of objectivity originally evolved, it did not imply that journalists are free of bias. It called, rather, for a consistent method of testing information—a transparent approach to evidence—precisely so that personal and cultural biases would not undermine the accuracy of their work. The method is objective, not the journalist. Seeking out multiple witnesses, disclosing as much as possible about sources, or asking various sides for comment, all signal such standards. This discipline of verification is what separates journalism from other modes of communication, such as propaganda, fiction or entertainment. But the need for professional method is not always fully recognized or refined. While journalism has developed various techniques for determining facts, for instance, it has done less to develop a system for testing the reliability of journalistic interpretation.

#### **4. Its practitioners must maintain an independence from those they cover**

Independence is an underlying requirement of journalism, a cornerstone of its reliability. Independence of spirit and mind, rather than neutrality, is the principle journalists must keep in focus. While editorialists and commentators are not neutral, the source of their credibility is still their accuracy, intellectual fairness and ability to inform—not their devotion to a certain group or outcome. In our independence, however, we must avoid any tendency to stray into arrogance, elitism, isolation or nihilism.

#### **5. It must serve as an independent monitor of power**

Journalism has an unusual capacity to serve as watchdog over those whose power and position most affect citizens. The Founders recognized this to be a rampart against despotism when they ensured an independent press; courts have affirmed it; citizens rely on it. As journalists, we have an obligation to protect this watchdog freedom by not demeaning it in frivolous use or exploiting it for commercial gain.

#### **6. It must provide a forum for public criticism and compromise**

The news media are the common carriers of public discussion, and this responsibility forms a basis for our special privileges. This discussion serves society best when it is informed by facts rather than prejudice and supposition. It also should strive to fairly represent the varied viewpoints and interests in society, and to place them in context rather than highlight only the conflicting fringes of debate. Accuracy and truthfulness require that as framers of the public discussion we not neglect the points of common ground where problem solving occurs.

#### **7. It must strive to make the significant interesting and relevant**

Journalism is storytelling with a purpose. It should do more than gather an audience or catalogue the important. For its own survival, it must balance what readers know they want with what they cannot anticipate but need. In short, it must strive to make the significant interesting and relevant. The effectiveness of a piece of journalism is measured both by how much a work engages its audience and enlightens it. This means journalists must continually ask what information has most value to citizens and in what form. While journalism should reach beyond such topics as government and public safety, a journalism overwhelmed by trivia and false significance ultimately engenders a trivial society.

#### **8. It must keep the news comprehensive and proportional**

Keeping news in proportion and not leaving important things out are also cornerstones of truthfulness. Journalism is a form of cartography: it creates a map for citizens to navigate society. Inflating events for sensation, neglecting others, stereotyping or being disproportionately negative all make a less reliable map. The map also should include news of all our communities, not just those with attractive demographics. This is best achieved by newsrooms with a diversity of backgrounds and perspectives. The map is only an analogy; proportion and comprehensiveness are subjective, yet their elusiveness does not lessen their significance.

#### **9. Its practitioners must be allowed to exercise their personal conscience**

Every journalist must have a personal sense of ethics and responsibility—a moral compass. Each of us must be willing, if fairness and accuracy require, to voice differences with our colleagues, whether in the newsroom or the executive suite. News organizations do well to nurture this independence by encouraging individuals to speak their minds. This stimulates the intellectual diversity necessary to understand and accurately cover an increasingly diverse society. It is this diversity of minds and voices, not just numbers, that matters.

## The McCormick Foundation's Protocol for Free & Responsible Student News Media

This document was created in February 2010 following a convention of scholastic journalism stakeholders dedicated to creating recommendations to help schools and scholastic journalism programs find the proper mix of freedom and structure. Participants included more than 50 high-profile journalism educators, administrators, school board members, professional journalists, and others.

*(Below is a section on Forum and Prior Review taken from pages 45, 47, 48, and 49)*

### Part Two: Examples of Ethical Protocol

#### I. Principles of Forum

1. Although there is no requirement that any government agency establish a forum of any kind, it is essential to civic engagement that students be provided with robust forums at school from which they may exercise their First Amendment rights.
2. Once a government does establish a forum, it cannot dictate the content of that forum.
3. Of the three types of forums—traditional, limited, closed (see “X. Forum & Protocol”)—closed public forums minimize the First Amendment rights of students.
4. The limited public forum status for student news media provides a more authentic training ground than a closed public forum for students to learn responsible application of First Amendment freedoms.
5. The right of school officials to prohibit unprotected student expression is not diminished by recognizing student media as limited public forums.
6. Since the *Hazelwood School District v. Kuhlmeier* (1988) U.S. Supreme Court decision, public school boards have a choice of recognizing whether their student news media is a limited public forum (*Tinker*) or a closed public forum (*Hazelwood*).
7. A limited public forum enables students to make decisions on content, thus empowering them to practice critical thinking and civic engagement roles.

8. The educational value of the limited public forum is reflected by the democratic learning opportunities afforded by such a forum.

9. A school's intent is critical in determining the forum status of student media. The school's intent may be revealed 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 school intended to create a limited public forum.

10. Studies, such as the annual State of the First Amendment survey conducted by the First Amendment Center, have clearly shown that students, and communities in general, do not understand the substance and spirit of the First Amendment and how it impacts citizens. One reason may be that students are not allowed to practice what they are taught while in schools, and thus they do not believe the theories of the democratic system.

## **II. Principles of Prior Review**

1. The arguments for a policy of prior review diminish when responsible journalism occurs—when a qualified faculty adviser, clear publications policies and professionally oriented journalism curriculum exist.

2. Authority to read content before it goes to press or air is not the same as the authority to demand changes, to punish for content decisions, or otherwise censor disfavored material. The former is prior review. The latter, censorship, is prior restraint.

3. A student news medium cannot remain an independent source of news or serve as a watchdog for the school community when a school administrator is shaping its content before it goes to press or air.

4. Rights, more than authority and discipline, prepare students for roles in a democracy as thinking, discerning, contributing citizens.

5. Prior review creates the possibility of viewpoint discrimination, undermining the marketplace of ideas and all pretext of responsible journalism.

6. Prior review can enable public school authorities, who are government officials, to decide in advance what people will read or know. Such officials are potential newsmakers, and their involvement with the news dissemination process can interfere with the public's right to know.



7. Prior review can negate the educational value of a trained, professionally active adviser and teacher working with students in a counseling, educational environment. Prior review simply can make the teacher an accessory, as if what is taught really doesn't matter.
8. Prior review can lead toward self-censorship, the most chilling and pervasive form of censorship. Such fear eliminates any chance of critical thinking, decision-making or respect for the opinions of others.
9. School authorities can achieve the school's educational mission without implementing a policy of prior review.
10. Prior review is not illegal in most judicial circuits; however, no court ruling justifies it or encourages it for educational reasons. This makes prior review primarily an educational issue, and most scholastic journalism educators have stated it has no legitimate pedagogical value. Prior review and a lack of trust in students to produce quality journalism undermines the very missions school officials say are among their most important.

### **Questions about Prior Review**

1. Are school authorities who participate in prior review influenced to censor expression that may displease their supervisors?
2. What is the purpose of prior review? To prevent misinformation? To protect the school's image? To enhance student learning? To provide accurate information to the school's communities (including voters)? Which of the reasons given for review are educationally valid, fitting within Hazelwood's framework?
3. What journalism skills and motives do administrators bring to their review? How does review affect the school's curriculum, especially student learning? Does review provide the lessons that the curriculum intends?
4. If we can agree that prior review has no legitimate educational value, what can we design that can take its place and still provide appropriate oversight and leave a reality of protection for all the stakeholders in the educational process?
5. How has prior review improved the educational process or safety of schools where it exists? What case studies, provable educational studies/research/standards exist to show the effectiveness of prior review?
6. Does administrator review, since the reviewers are agents of the state, reflect our democratic traditions and heritage?

7. What case studies can we show where prior review does not exist, and how can we use these models to build a process of achieving oversight without prior review?
8. What happens after prior review? Deletion of all or part of a story? If deletion or telling students to remove copy or change it occurs, how does this affect the truthful and accurate reporting a school's community should expect from its media?
9. What does a cross section of professional media personnel have to say about prior review? What would they recommend as the best process for students to learn journalism and both the freedoms and responsibilities that go with it?
10. What checks do student journalists have that school officials will not use prior review as a vehicle for prior restraint and for serving self-interests?

## **Berlin Area School District Guidelines for High School Student Media**

### **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 Berlin Area School District Board of Education that the print and electronic versions of the Red 'n' Green, and other official school-sponsored student media have been established as public open forums for student expression and as voices in the uninhibited, robust, free and open discussion of issues. Each medium should provide 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 Berlin Area School District 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 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 as appropriate

6. Be consulted, along with an advisor, prior to changing any content of an online or electronic publication prior to the change being made by any entity including Berlin Area School District administration, or any other entity with access.

No publication will be released to the student body or community without the review and approval of the advisor, and the advisor only.

## B. Unprotected Expression

The following types of student expression will not be protected:

1. Material that is “obscene to minors.”

“Obscene 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 to minors.” If such statute exists in Wisconsin, the administration shall substitute that definition in place of 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’ reputation in the community. If the allegedly libeled party is a “public official” or “public figure” 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 and 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 and 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 who 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 school-related activities.
- d. When an allegedly libelous statement concerns an individual who is not a public official or 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 failed to exercise reasonably prudent care.
  - e. Students are free to express opinions. Specifically, a student may satirize or criticize school policy or the performance of teachers, administrators, school officials and other school officials.
3. Material that will cause “a material and substantial disruption of school activities.”
- a. Disruption is defined as student rioting, unlawful seizures of property, destruction of property, substantial student participation in a school boycott, sit-in, walk-out or other related form of disruptive activity. Materials such as racial, religious or ethnic slurs, however distasteful, are not in and of themselves disruptive under these guidelines. Threats of violence are 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 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 writer or faculty advisor, 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 a 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 and faculty advisor.

### 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 illnesses (AIDS included),
  - c. Censor or punish the occasional use of indecent, vulgar, or so-called "four-letter" words in student publications when required to tell the truth of the story,
  - d. Prohibit criticism of the policies, practices or performances of teachers, school officials, the school itself or of any public figures or 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,
2. Commercial Speech
  - a. School officials cannot prohibit the endorsement of candidates for student office or for public office at any level.
  - b. Advertising is also a 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. Prices for advertising will be set by the advisor and will be commensurate with size, color, run time, etc.

## E. Online Student Media and the Use of Electronic Information Resources

### 1. Online Student Media

Online student media, including internet web sites, email, listserves and online discussion sites like My Big Campus may be used by students like any other communications media to reach those within the school and those beyond it. All official, school-sponsored on-line 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, email, listserves and online discussion sites like My Big Campus to gather news and information, to communicate with other students and individuals and to ask questions of and to 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 to 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 advisors 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, advisors 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 online 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 online resources. The guidelines may not be used to unreasonably restrict student use of or communication on the online media.

### 4. No changes may be made to student electronic publications by any

administrator, consultant or other entity without the express consent of the publication advisor.

### **III. Advisor Job Security**

The student media advisor is not a censor. No person who advises a student publication will be fired, transferred or removed from the advisorship 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. 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 on non-school-sponsored student media on school grounds. However, students who distribute material described 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.
2. Non-school-sponsored media will have the same rights of distribution as official student media.
  - a. 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.
3. School officials may not:
  - 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 media or interfere with the effective distribution of sponsored or non-sponsored media.

B. 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 website, 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 the editorial control comes responsibility, including the responsibility to follow professional journalism standards each school year.

## **VI. Circulation**

These guidelines will be included in the student handbook, and will be posted on the school's website.

## Exhibit D

### Liability for Student Media

Who's responsible in the event of a lawsuit

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One of the most common excuses school administrators employ to justify censorship of student publications is that in order to protect the school from liability for articles that are libelous, invade privacy or are otherwise illegal, they need to closely supervise the actions of the students. But this excuse makes little legal sense, as a growing body of law indicates that censorship is more likely to create, rather than counteract, a school's potential for liability.

In reality, the best advice for most schools that want to protect their pocketbooks and stay out of court is to refrain from editorial decision-making and content control of student publications.

The general theory of legal liability is that any person who could have and should have prevented an injury can be held responsible for it. Thus, in order to not be held liable, a school should not put itself in a position where it could have or should have prevented an injury. This general liability principle is applicable to any context, but the specifics of liability for the actions of the student media will depend on the type of school involved -- whether it is a college or a high school, whether it is public or private -- because courts may afford different protection to each.

#### Public Colleges

While libel suits against college publications are relatively rare, college administrators may still be concerned about their potential for liability. Libel plaintiffs would like to make the school responsible for the actions of the student media in order to reach the "deep pockets" of the school for paying damage awards.

The positive news for administrators is that courts have consistently said you cannot hold a public college liable for the acts of its student publications as long as the school is not censoring or exercising some other form of content control. The First Amendment does not permit public colleges to exercise the type of control necessary to be held liable. Thus, as long as a school follows the constraints of the First Amendment, it should be protected from liability.

Those who have sued public colleges for the actions of their student media have attempted several theories of liability; however, none of these theories has been successful.

The first theory is vicarious liability, or *respondet superior*. In an agency relationship, one party acts as "principal" and the other as "agent." The principal has the right to control the agent in the performance of his duties. Thus, the principal is vicariously liable for the actions of its agent. Applying this relationship to a public college and its student publications simply does not work. A public university is constitutionally prohibited from exercising content control, court decisions indicate.

Thus if a public college uses censoring a student newspaper as a justification for protecting itself from liability, the school is setting itself up for two potential lawsuits: a First Amendment infringement claim by student editors as well as any libel or invasion of privacy suits.

A vicarious liability claim was rejected in *Mazart v. New York*,<sup>[1]</sup> a case involving an allegedly libelous letter printed in the State University of New York at Binghamton student newspaper. The New York Court of Claims ruled that a public university was unable to control the content of its student publications because of the First Amendment; therefore, no agency relationship could be established.

Further, the court held that funding provided by the school did not establish an agency relationship. In *Mazart*, the university partially funded the newspaper through a student activities fee and provided office space, desks and janitorial services at no cost to the newspaper. Students could also receive school credit for work on the newspaper.

None of these factors were sufficient, however, "to overcome the university's lack of control over the newspaper.... Such accoutrements are nothing more than a form of financial aid to the newspaper which cannot be traded off in

return for editorial control.[2]

The reasoning of *Mazart* was more recently reaffirmed in a case against Clemson University in South Carolina.[3] The university was not held responsible for an allegedly defamatory article printed in its student newspaper because the paper was not subject to prior review by the university.

The court stated that "[t]here is overwhelming authority across the country in support of the position that a public university which does not censor or otherwise control the content of a school-sponsored newspaper is not liable for what is published by the students in the student-run newspaper." [4]

A similar ruling rejecting the agency theory of liability was issued by the Appellate Division of the New York Supreme Court in *McEvaddy v. City University of New York*. [5] As in *Mazart*, the fact that the university provided the newspaper with a faculty adviser and funding was irrelevant in the eyes of the court; the university could not exercise control over the newspaper that would justify liability.

Libel plaintiffs have also attempted to argue that the university is the publisher of a student publication and thus is liable for its actions as a commercial publisher would be. However, as one federal appellate court noted, "[t]he university is clearly an arm of the state and this single fact will always distinguish it from the purely private publisher as far as censorship rights are concerned." [6]

The university as publisher analogy was advanced in a 1983 Louisiana case against the student newspaper at Southern University of New Orleans. [7] The court held that because the First Amendment bars state universities from exercising anything but advisory control over student publications, the university could not be held liable for defamatory articles printed in the paper. [8]

The issue of vicarious liability was recently confronted by a Minnesota state appellate court when a professor sued St. Cloud University for an allegedly defamatory article published in the student newspaper. [9] The court acknowledged the "plethora of connections" [10] between the student newspaper and the university, which the professor pointed out, but rejected his claim that the university could be held liable based on either a "university as publisher" or agency theory. Of particular relevance to the Minnesota court in shielding the university from liability was a university system policy that prohibited school officials from exercising any control over student-funded publications. [11]

Another possible theory for university liability is negligence. To prevail, the person bringing suit would have to establish that the university had a duty to exercise due care to protect the individual and failed to exercise that care.

This theory was also advanced by the plaintiffs in *Mazart*, but the court rejected it. The court explained that college students are legally adults, not children; therefore, the university had no duty to provide students with editing guidelines because as adults, they were presumed to already know the guidelines. [12] Since there was no duty, there could be no negligence on the part of the university.

In summary, because public colleges lack the critical requirement of the ability to control content because of First Amendment prohibitions, those schools should not be held liable for the actions of the student media.

However, if school officials do ignore the First Amendment and engage in censorship or require prior review of content by an adviser or administrator, protection from liability would be lost. A public university that wants protection must allow editorial independence for student media.

### **Private Schools**

The situation *may* be different at private universities and high schools. While a school policy, state constitution or state law may offer some free expression protection, the First Amendment does not prohibit private schools from censoring or regulating the content of their student publications.

For example, the vicarious liability theory may be successful in the context of a private school. Where it is presumed that the school has the ability to regulate content, there are three major elements needed to demonstrate the existence of an agency relationship.

First, consent must be given to the agent newspaper to act on behalf of the principal university. The necessary consent may be evident in the university's establishment and funding of a student newspaper. [13] Next, the university must be shown to benefit from the presence of the newspaper. Finally, student editors must be acting

within their granted scope of authority when they select content for publication.[14] If these factors can be met, it would be possible for a private university to be found liable under a vicarious liability theory.

That assumption was recently challenged in a case involving Princeton University, where a court, for the first time, said a private university was protected from liability for material published by a student newspaper.[15] The potential significance of this case is unclear, however, because unlike most student publications, *The Daily Princetonian* is an independent, separately incorporated newspaper. The court never noted that fact in its decision, so it is difficult to determine how this holding might shield other private universities from liability for student publications that are not so independent.

The analogy to the private university as publisher might also be successful for school-sponsored publications. There is no First Amendment bar to a private university exercising prior review or censorship, so there may be greater authority for the school to control the newspaper, which translates into greater potential for liability.

This argument was advanced in a case against the University of Rochester, where the court expressly stated that a private school is not limited by the First Amendment like a public school.[16] While the case was ultimately settled out of court, the decision suggests the burden would be on the university to demonstrate that it had no power to exercise control over the newspaper. In some places, state law limiting censorship of expression by non-government agencies could provide this protection.

Because private schools are not constitutionally prohibited from controlling the content of student media, their potential for liability will likely depend on the amount of control they choose to exercise. Private schools can still take steps to limit their potential for legal liability that avoid a need to censor.

The best way for a private school to protect itself is to limit its direct interference with content decisions. If a private school adopts a written policy that prevents school officials from exercising content control over student publications, the policy might work to protect the school from liability. The school should draft a strong and clear statement affirming the rights of student editors to make all content decisions and assume all responsibility for student media. If faced with a suit, the school could then point to the policy and argue that the student journalists are not like employees in an agency relationship, but more like independent contractors exempt from vicarious liability theory.

Other precautions that can be taken to limit potential liability include: printing a disclaimer in every edition emphasizing the paper's separate operation from the university and stating that all views expressed are not necessarily those of the university; administering funds separately from those of the university in a separate bank account; obtaining libel insurance; or becoming separately incorporated like in the Princeton case.

Above all, students and administrators at private schools should learn the law and employ good journalism and ethics. The more the school refrains from interfering with content decisions made by student publication staffs, the more likely it will remain free from liability.

### **Public High Schools**

After the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*, [17] public high schools have greater authority to legally exercise control over many school-sponsored student publications. However, those schools that censor probably put themselves at a greater risk of legal liability. If public schools establish written policies similar to those recommended for private schools, the schools are more likely to be shielded from liability.

Additionally, California, Massachusetts, Iowa, Colorado, Kansas, Arkansas, Oregon, and Pennsylvania, have adopted laws or administrative agency regulations that limit the amount of control school officials have over the content of their student media.[18] Like public college administrators, officials at schools in these states are legally prohibited from interfering with editorial content except in narrow circumstances specified by law. In such cases -- again, just like at a public college -- it will be more difficult to show that student journalists act as "agents" for the school so as to justify imposing institutional liability.[19] The issue is clearer in Massachusetts, Iowa, Kansas, and Colorado, where the states' laws explicitly limit liability of school officials for material printed in student publications unless the school has interfered with content decisions of student editors.

High school administrators in particular may attempt to use the potential for liability as an excuse to control content, but that justification is not supported by court decisions. Despite the millions (perhaps billions) of pages published by American student newspapers, yearbooks, literary magazines and other student media over the last

century-plus, the Student Press Law Center is aware of no reported court decision where a high school has been found liable for the content of its student media. The best protection a school can take is not to censor but to hire competent publication advisers who can teach students about their legal responsibilities and to distance itself as much as possible from the content decisions made by student editors.

## Libel Insurance

Another route that some newspapers have taken to protect themselves against paying damages in a lawsuit is to obtain libel insurance. Even a value-priced policy can be an expensive undertaking for cash-strapped student media, so often only publications with large circulations and substantial assets will consider purchasing insurance.

In choosing an insurance plan, there are several things publication should consider. One of the most important is who decides on retractions or corrections. Many editors believe that the newspaper itself, not the insurance company's lawyer, should make that type of decision.

Other factors to consider include: whether to buy errors and omissions coverage, whether there are discounts for no losses in a five-year period, whether the policy covers intentional or malicious acts, whether the insurers will pay attorney's fees in addition to the policy limit on judgment costs, and whether the policy covers punitive damages.

Probably the largest factor affecting the cost of an insurance policy is circulation. Another important factor may be location. Colleges in Philadelphia, for example, may have to endure higher than average insurance premiums because Philadelphia is an area where courts have been unfavorable to libel defendants.

Another factor is whether the newspaper has been involved in past lawsuits. If the paper has been sued in the past, it will likely have higher than average premiums or deductibles. Insurers may also examine the newspaper's procedures on topics such as dealing with letters to the editor and verifying sources. Finally, some companies provide lower insurance rates to newspapers that have faculty advisers.

If you are interested in exploring the possibility of libel insurance for your publication, contact a local insurance agent. The Student Press Law Center also maintains a [list of companies](#) that have offered libel insurance to student media.

Although it does depend mainly on circulation, libel insurance may be a costly proposition and out of reach for many schools. Additionally, some believe it may invite lawsuits that would otherwise not be filed against poor students. But, for those that can afford insurance, it is a protection worth looking into. The question of legal responsibility ultimately turns on who has control over the printed material. The general test is that when a school exercises control over the content of the paper, it takes on a greatly increased potential for liability. Schools should then not employ the misguided excuse that content review of a paper will reduce the likelihood of liability. Obviously the best protection against being sued is to engage in careful, accurate reporting. Everyone involved, from the administrators to the student journalists, wants to avoid liability. The first step in doing so is promoting awareness of the law and the legal constraints that apply to student media.

## ENDNOTES

<sup>1</sup> 441 N.Y.S.2d. 600 (1981).

<sup>2</sup> Id. at 606.

<sup>3</sup> *Lentz v. Clemson University*, No. 95-CP-39-66 (S. Car. Ct. of Common Pleas, 1995).

<sup>4</sup> Id. at 6.

<sup>5</sup> 663 N.Y.S.2d. 4 (1995).

<sup>6</sup> *Bazaar v. Fortune*, 476 F.2d. 570, 574, aff'd en banc with modification, 489 F.2d 225 (5th Cir. 1973)(per curiam), cert. denied, 416 U.S. 995 (1974).

<sup>7</sup> *Milliner v. Turner*, 436 So.2d. 1300 (La. App. 1983).

<sup>8</sup> Id. at 1302.

<sup>9</sup> *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466 (Minn. App. 2005).

<sup>10</sup> The court noted: "[I]t is undisputed that SCSU plays a role in selection of the Chronicle's editor, business manager, and faculty advisor; provides start-up operating funds at the beginning of each year; requires the Chronicle to undergo a certification process each year; allows the use of SCSU's trademarked logo; provides equipment, services, and facilities free of charge; provides a full-time faculty advisor employed by SCSU whose role is to represent and protect the interests of SCSU; requires the Chronicle to have a constitution and bylaws, which state that it exists for the benefit of, and concerning, the students, faculty, staff, administration, and St. Cloud community; and requires the Chronicle to submit an annual recognition form listing officers and pledging its compliance with all SCSU policies and procedures in the code of conduct and student organization manual." Id. at 472, n.1.

<sup>11</sup> The policy read, in part: "[s]tudent-funded publications shall be free of censorship and advance approval of copy, and their editors and managers shall be free to develop their own editorial and news coverage policies." Id. at 469.

<sup>12</sup> *Mazart* at 607.

**13** *Wallace v. Weiss*, 372 N.Y.S.2d. 416 (Sup. Ct. 1975).

**14** Ruth Walden, *The University's Liability for Libel and Privacy Invasion by Student Press*, 2 in *Journalism Quarterly* 702, 707 (Fall 1988).

**15** *Gallo v. Princeton University*, 656 A.2d. 1267 (N.J. Super. A.D. 1995).

**16** *Wallace* at 422.

**17** 484 U.S. 260 (1988).

**18** Ark. Stat. Ann. §§ 6-18-1201-1204 (Supp. 1995); Cal. Educ. Code § 48907 (Deering Supp. 1991); Colo. Rev. Stat. § 22-1-120 (1990); Iowa Code § 28022 (Supp. 1996); Kan. Stat. Ann. §§ 72.1504-72.1506 (1992); Mass. Gen. Laws Ann. ch. 71, § 82 (1991).

**19** See, e.g., *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2000) (finding that high school students do not "act for" teachers or other school officials when grading classmate's work); *Yeo v. Town of Lexington*, 131 F.3d 241 (1st Cir. 1997) (finding that high school student journalists, unlike publication advisers and other school officials, were not "state actors" when they rejected advertisement submitted to student yearbook).