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# A Survey of Existing and Proposed State Legislation Protecting High School Students' Rights to Free Expression and a Free Press, and a Proposal for such Legislation in West Virginia

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A SURVEY OF EXISTING AND PROPOSED STATE LEGISLATION  
PROTECTING HIGH SCHOOL STUDENTS' RIGHTS TO FREE  
EXPRESSION AND A FREE PRESS, AND A PROPOSAL FOR SUCH  
LEGISLATION IN WEST VIRGINIA

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Vaughn Gibson Rhudy  
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A Survey of Existing and Proposed State Legislation Protecting High School Students' Rights to Free Expression and A Free Press, and A Proposal for Such Legislation in West Virginia

CHAPTER 1

Introduction

Since the U.S. Supreme Court's controversial and historic 1988 Hazelwood School District v. Kuhlmeier decision, the debate over whether high school newspapers should have First Amendment protection and rights has been waged from one end of the country to the other. Many principals hailed the decision as giving school administrators the responsibility they should have by putting "the high school press in its proper relationship with principals" (Dickson, "How Advisers View" 2). Conversely, many advisers, students, and journalists criticized the ruling for limiting constitutional rights of student publications to remain free from censorship as guaranteed by the First Amendment (Garneau 12; Goodman 34+; Heath 15+; Hentoff 114+). Ed Sullivan, director of the Columbia Scholastic Press Association, said, "Hazelwood is a bad law and bad educational practice. It gives schools the power to legally create a 'pabulum press' that caters to the rosy, public relations image often sought by today's harried school administrators" (qtd. in Heath 17). The National Association of Secondary School Principals, however, has never issued an official statement regarding the Hazelwood decision, according to



Caroline Glascock, secretary to Tom Koerner, the group's associate executive director.

Before Hazelwood, courts throughout the country had ruled that school officials could censor student publications only if the printing of certain material would disrupt school activities (Goodman 35; Palermo 160; Trager and Dickerson 135; Walden 616+) or if the material was obscene, libelous, an invasion of privacy, or created a clear and present danger that students might be incited to perform illegal activities (Palermo 153+). However, since the ruling, providing free expression and free press protection to school publications has fallen to individual states, several of which have now established their own laws to protect those rights. California's law actually has been in existence since the mid 1970s; Massachusetts, Iowa, and Colorado have added laws since the 1988 decision, and similar legislation is being or has been considered in Indiana, Illinois, Montana, Washington, Michigan, Wisconsin, Kansas, Ohio, Kentucky, New Jersey, Hawaii, Wyoming, Idaho, Rhode Island, Nevada, Oregon, and New Hampshire. In all, 21 states have drafted or considered some type of law to protect student free press rights (Goodman 34).

#### Problem Statement and Goals

This paper will review the Hazelwood decision, analyze its effects on scholastic journalism throughout the country, examine the history of high school press freedom before the landmark decision, and review studies that reveal the attitudes of both principals and advisers concerning a free scholastic press. Additionally, it will review

existing and proposed state legislation that offers high school publications protection from censorship and will present a proposed law for West Virginia, which does not have such legislation. Finally, this paper will outline a plan to be used on a statewide basis to garner support for the proposed law. The goal is to establish legislation that will protect the rights of high school journalists in the Mountain State to report freely on important and sometimes controversial issues of interest to their students. Such a law also would allow students to comment and express their views on such matters without fear of administrative reprisals.

Hazelwood v. Kuhlmeier

A Review of the Case

In January of 1983, Dr. Robert Eugene Reynolds, principal of Hazelwood East High School in suburban St. Louis County, Mo., received a telephone call from the school district business office notifying him that his school's newspaper account had a deficit of several hundred dollars. He had not been aware of the deficit and soon learned that the newspaper, the Spectrum, which was budgeted to publish only four pages, had been printing six pages instead. He told the adviser to cut back future issues and instructed the adviser to present page proofs before publication to ensure that the paper stayed within budget. Previously, Reynolds had never previewed any issue. In April, the adviser resigned his position to work for a public relations company. Reynolds assigned a substitute, Howard Emerson, who was not certified in journalism, to assume duties as publications adviser.

On May 10, Emerson telephoned Reynolds from the printers to ask if the principal had reviewed the page proofs left on his desk. He had not but promised to do so immediately.

Reynolds said, "I first noticed the paper contained six pages instead of four for which we had budgeted. Secondly, the centerfold section contained stories about teenage pregnancy and divorce that did not reflect balanced reporting" (qtd. in Heath 16). The pregnancy story used fictitious names to refer to three pregnant Hazelwood students, but Reynolds still believed the students could be identified. He also said the description of promiscuity and birth control in the article was not suitable for younger students. The principal thought the divorce story was unfair because the father of one of the students had not been given an opportunity to respond to his daughter's charges that he was inattentive and abusive. Reynolds told Emerson to delete the two pages containing the stories. He later told the newspaper staff, "As the instructional leader of the school I was acting in the absence of their former teacher and exercised the prerogative of 'editorship' " (qtd. in Heath 16). He told students they could rewrite the articles for the final issue of their paper. Staff members rejected the idea because their final issue had always been dedicated to the school's seniors and including the articles would have forced deletion of other material students considered important.

On August 19, 1983, three students and the American Civil Liberties Union filed suit in U.S. District Court, asking the court to declare Reynolds' actions a violation of the students' First Amendment

rights and seeking monetary damages and an injunction preventing the principal from further censorship. A year later, the District Court ruled that Reynolds did not violate the Constitution and that the students were not entitled to monetary damages. Author Christopher J. Palermo writes:

The court reviewed federal cases deciding free speech issues in the high school arena and divided them into two groups: those striking down restrictions on extracurricular, non-school-sponsored speech, and those upholding administrative regulation of school-sponsored speech integral to the educational program of the school (158).

In that ruling, the Court said the Spectrum was part of the school curriculum and could not be considered a public forum. Although the court noted that administrators must have "reasonable basis ... based on the facts before them at the time of the conduct in question" before censoring, it said Reynolds' decision to delete the articles was "permissible administrative regulation of school-sponsored speech" (Palermo 158), a factor that allows administrative prior restraint under the U.S. Supreme Court's previous landmark decision, Tinker v. Des Moines Independent School District. Also, because the court considered the Spectrum part of the school's curriculum, it said the principal was within his rights to pull the article on divorce because of his concern about journalistic fairness (Palermo 158).

After Reynolds and the school district had won in District Court, the ACLU dropped out of the suit, but the students' attorney offered to appeal (Heath 17). The Eighth Circuit Court of Appeals then reversed the lower court's ruling, saying that the school newspaper was "a

public forum for the expression of student opinion" and therefore was entitled to First Amendment protection (qtd. in Heath 17). The court held that Reynolds had not met the Tinker test for prior restraint. The court said the Spectrum "operated as a conduit for student viewpoint" and that the "paper's editorial policy statement, opinions expressed in the paper, and school board policy manifested intent to create a public forum" (qtd. in Palermo 159). Inasmuch as school officials did not say that they censored the articles because they believed the stories would disrupt the school or interfere with discipline, the court had to consider whether the stories were an "invasion of rights of others" (Palermo 159). Because the court believed no tort action could have resulted from publication of the articles, the censorship was not justified.

Circuit Judge Wollman dissented. As cited in Palermo, he said that calling a school-sponsored publication controlled by faculty a public forum "pits students against school officials in battle for control over what is rightfully within the province of school officials" (159). Hazelwood administrators appealed. The U.S. Supreme Court agreed to hear the case and in 1988 delivered its controversial and historic decision.

#### A Review of the Ruling

Essentially the ruling said that principals may censor school-sponsored publications that had not been established as open public forums for student expression if the censorship was related to "legitimate pedagogical concerns" (qtd. in Goodman 34). The court

noted that students have never had rights equal to those of adults and that school officials do not have to "tolerate expression inconsistent with the basic educational mission and structure of the school" (qtd. in Palermo 159). Writing for the majority, Justice Byron White said the only time courts should step in to protect the free speech of students is when the censorship "has no valid educational purpose" (qtd. in Hentoff 115). In the Hazelwood case, the court said it wasn't clear that the administration intended to open the Spectrum as a public forum, and that "a decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity" (qtd. in Palermo 159).

Because the Spectrum was not considered a public forum, the court said that Tinker did not apply to school-sponsored activities (Palermo 159). The Hazelwood decision made a distinction between school-sponsored speech and non-school-sponsored speech, the latter of which is protected under Tinker. Palermo wrote:

The Hazelwood Court distinguished school-sponsored activities as creating an impression that the school endorses the views expressed. The court found that schools have a right to dissociate themselves from objectionable speech which "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" (60).

The court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (qtd. in Palermo 160). Thus, the court said Reynolds'

actions could be justified by his concern over the inappropriateness of the pregnancy article in the high school environment and by his belief that the divorce article was not fair under journalistic standards. The court likened the school to that of a newspaper publisher that may control material published in its facilities with its resources (Palermo 160). The ruling also allows schools to "set higher standards for student publications than those that exist in the 'real world' because of its educational mission," and that schools must be able to decide when "... published material is inappropriate for immature students" (qtd. in Palermo 160).

On the other hand, Justice William Brennan, in writing the dissenting opinion, said:

The educator's undeniable mandate to inculcate moral and political values is not a general warrant to act as 'thought police' stifling discussion of all but state-approved topics, and advocacy of all but the official position.... Instead of teaching children to respect the diversity of ideas that is fundamental to the American system, the Court today teaches youth to discount important principles of our government as mere platitudes. (qtd. in Hentoff 115).

Brennan's fear was that the majority opinion could allow administrators to censor any expression without reason. He also said schools could have other avenues to show that they are not associated with the views expressed in the student newspaper. These avenues, as cited in Palermo, could include "printing a disclaimer, publishing an opposing viewpoint, or limiting a paper's content to certain educational topics" (161). The majority added a footnote to this point,

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explaining that schools could also choose not to publish a paper at all, thereby creating a chilling effect on all student expression.



## CHAPTER 2

## Scholastic Press Freedom Before Hazelwood

Court Cases

Between the U.S. Supreme Court's 1969 Tinker v. Des Moines Independent School District and its 1988 Hazelwood decision, courts generally held that prior restraint of high school newspapers and other forms of student expression violated the First Amendment (Adams 19; Palermo 153+; Trager and Dickerson 135; Goodman 34+). However, there were two court cases before Tinker that bear mentioning. A 1966 Fifth Circuit Court decision in Burnside v. Byars said that school officials could not enforce a rule that forbade students from wearing freedom buttons. The court ruled that school authorities could not censor student expression unless it could show that such expression would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" ( qtd. in Gillmor and Barron 635). A federal district court, in deciding Dickey v. Alabama State Board of Education, relied on the "material and substantial interference" rule a year later when it reversed the suspension of a student editor who had written an editorial critical of Alabama's governor (Gillmor and Barron 635).

Tinker, however, was considered a landmark case because it was the first time the U.S. Supreme Court had taken up the matter. It became the basis of numerous court decisions regarding student expression until Hazelwood was handed down. At first, the court "did

not initially acknowledge that students possessed rights. The court instead supported parents' rights to educate their children as they wished" (Palermo 154). Before Tinker, students "were presumed to have few constitutional rights of any kind. They were regarded as junior or second-class people and were told it was better to be seen and not heard" (Pember 73). The Tinker decision, however, "opened the floodgates" (Palermo 154).

Tinker involved five Iowa high school students, including Mary Beth Tinker, who were suspended for wearing black armbands to protest the country's involvement in Vietnam. The school board passed a ruling that prevented students from wearing armbands. A district court, as quoted in Gillmor and Barron, held "that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands" (103). The Supreme Court, however, ruled that the board policy was unconstitutional. It said that school administrators could not restrict this free expression without showing the action would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" (Palermo 154; Gillmor and Barron 103).

Writing for the majority in Tinker, Justice Abe Fortas said, as also quoted in Gillmor and Barron:

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to

freedom of speech or expression at the schoolhouse gate.... In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views" (102-104).

After Tinker was decided, the California Legislature in 1971 adopted Education Code section 10611, which granted broad free press protection to students. In Bright v. Los Angeles Unified School District, the California Supreme Court upheld Section 10611 "as applied to a non-school-sponsored newspaper" (Palermo 154). California later adopted Section 48907, thus further establishing free press protection for all high school publications.

Whereas the Hazelwood decision makes a distinction between school-sponsored publications and non-school-sponsored publications, previous court decisions generally protected both types of publications. In Wesolek v. The Board of Trustees, South Bend Community School Corporation, U.S. District Court Judge George Beamer, as quoted in Jack Nelson's 1974 book Captive Voices, said, "The School Corporation shall not prohibit publication of articles in official school newspapers on the basis of the subject matter or terminology used unless the article or terminology used is obscene,

libelous, or disrupts school activities" (6-7). This case involved Jann Wesolek, editor-in-chief of her North Liberty (Indiana) High School newspaper, Liberty Link. Wesolek had written an article about Planned Parenthood, but her adviser said the article was unsuitable for printing. Wesolek rewrote the article, toning it down, but the adviser and principal still refused to allow the article to run. Wesolek's attorney then filed suit. Nelson, however, does not say whether the article was ever printed.

Before Hazelwood some administrators argued that they should have the right to censor school publications that are printed in school facilities or paid for with school funds. Though most of the court cases on this issue deal with college publications, the premise also can be applied to high school newspapers. In Antonelli v. Hammond, a U.S. District Court in New York said, "the state is not necessarily the unrestrained master of that which it creates and fosters" (Gillmor and Barron 637). Furthermore, Gillmor and Barron wrote: "On occasion a school or its administrators have asserted the rights of a private or commercial publisher and have been rebuked" (638).

Also before Hazelwood, school officials had argued that student publications are "part of the curriculum, mere instructional tools, and therefore exempt from constitutional scrutiny" (Gillmor and Barron 639). However, in the 1971 Trujillo v. Love, a federal district court defined the school newspaper as a forum for student expression. In the 1977 case Gambino v. Fairfax County School Board, a principal and other school board officials unsuccessfully argued that they were

within their rights to prohibit publication of an article on contraception because the newspaper was not a public forum, but an "in-house" organ of the school system (Gillmor and Barron 638).

With regard to underground newspapers, the Fourth Circuit Court took up the issue in the 1973 case Baughman v. Freienmuth. That case involved a regulation that required students to submit underground publications to the principal for prior review and authorized the principal to prevent distribution of the paper if he felt it contained libelous language. The court said the regulation was unconstitutional. A California court, taking up a similar matter in which an off-campus newspaper that had taken issue with a principal's comment about the school's dress code was not allowed to be distributed, said, as quoted in Gillmor and Barron:

[W]hile school authorities may ban obscenity and unprivileged libelous material, there is an intolerable danger, in the context of prior restraint, that under the guise of such vague labels they may unconstitutionally choke off criticism, either of themselves, or of school policies, which they find disrespectful, tasteless, or offensive. (639).

In the 1972 Fujishima v. the Board of Education case, the Seventh Circuit Court ruled that a Chicago Board of Education policy requiring prior approval of any publication before being distributed on campus was unconstitutional (Nelson 9; Gillmor and Barron 635). In that case, two students, Demetrius Hopkins and David Rabkin, were suspended for publishing and distributing an underground newspaper called The Oppressed at Chicago's Lane Technical School. They later discovered a similar incident had occurred the year before when three

students from a Chicago public school had been suspended; thus, a class action suit was brought against the board of education. A district judge had ordered the students' records cleared of their suspensions but dismissed the class action. The Seventh Circuit Court, however, extended the ruling to apply to all Chicago high schools (Nelson 9).

In its Fujishima decision, the Seventh Circuit Court, which includes Illinois, Wisconsin, and Indiana, essentially said that prior review of student publications violates the First Amendment (Adams 19). Although the court did say school boards could establish rules governing the time, place, and manner of distribution, it could not require students to obtain permission before distributing their publications (Trager and Dickerson 135). "That is, neither public school administrators nor government officials can insist that permission be obtained before printed materials can be distributed in the absence of substantial interference with educational activities on campuses or a clear and present danger to governmental and public interests in the general community" (Trager and Dickerson 135). However, outside of the Seventh Circuit, "courts that have considered the matter have usually permitted some administrative review, but only to avoid publication of obscene, libelous, or disruptive writing" (Adams 19). Federal courts have been divided into three areas regarding prior restraint:

- 1) those which hold that prior restraint is acceptable if there are precise guidelines concerning the review procedures, 2) those which insist on explicit guidelines, and 3) a single court [Seventh Circuit in Fujishima] which

has specifically rejected these two approaches and held that prior restraint is no more permissible in public high schools than in the community at large (Trager and Dickerson 135).

Some school officials had argued "that if students were not restrained in some manner, either by review or outright censorship, they would begin unauthorized publications, would abuse their privileges and would cause disruptions in the school" (Trager and Dickerson 136). However, a 1976 study conducted by journalism professors Robert Trager and Donna L. Dickerson showed no significant increases in underground papers or school disruptions in the three states in the Seventh Circuit after the Fujishima decision (136).

#### Commission of Inquiry

Although courts generally have afforded high school newspapers and student journalists First Amendment protection before Hazelwood, many instances of censorship had been documented even though they were never decided in court cases. Concern over censorship of student expression prompted the Robert F. Kennedy Memorial Foundation in 1974 to establish the Commission of Inquiry into High School Journalism. The 22 members of the commission conducted a detailed study into four areas: censorship, minority participation, journalism and journalism education, and established media. The commission's findings were:

1. Censorship and the systematic lack of freedom to engage in open, responsible journalism characterize high school journalism. Unconstitutional and arbitrary restraints

are so deeply embedded in high school journalism so as to overshadow its achievements.

2. Censorship of journalism is a matter of school policy — stated or implied — in all areas of the country, although in isolated schools students enjoy a relatively free press.

3. Censorship persists even where litigation or administrative action has destroyed the legal foundation of censorship; such decisions are either ignored or interpreted in such a way as to continue the censorship policy.

4. Repressive policies are used against school-oriented media published off campus as well as within schools; many of the several hundred alternate or "underground" papers that have sprung up in recent years have been actively opposed by school officials.

5. Although substantive and investigative journalism and controversial or image-damaging information are most severely censored, policies of censorship apply regardless of whether the material is substantive or controversial.

6. Even advisers or journalism teachers who in private favor a free student press often succumb to bureaucratic and community pressures to censor school newspapers.

7. As part of the day-to-day operation of high school journalism, censorship generally is accepted by students, teachers, and administrators as a routine part of the school process. This has developed into the most pervasive kind of censorship, that imposed by students upon themselves.

8. Self-censorship, the result of years of unconstitutional administrative and faculty censorship, has created passivity among students and made them cynical about the guarantees of a free press under the First Amendment.

9. Fear of reprisals and unpleasantness, as well as the lack of a tradition of an independent high school press, remain the basic forces behind self-censorship.

10. Censorship is the fundamental cause of the triviality, innocuousness, and uniformity that characterize the high school press. It has created a high school press that in most places is no more than a house organ for the school administration.

11. 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.

12. The professional news media does [sic] not take seriously the First Amendment problems of high school



journalists and does [six] little to help protect the free press rights of students. (Nelson 47-48).

One case that did not make it to court is discussed in Nelson's book Captive Voices, which details the results of the Commission of Inquiry into High School Journalism. The case involved Janice Fuhrman, editor of the Hornets Buzz, the official paper of Novato (California) High School. Fuhrman wrote a column criticizing principal Stanley Onderdonk for banning an issue of an underground newspaper called Free Youth. The principal said Fuhrman's column libeled him, and he ordered her to leave the campus. Instead of filing suit, the editor, with advice from her attorney, contacted the San Francisco Chronicle, which published a story about the incident the next day. Onderdonk apologized and reinstated Fuhrman (Nelson 14).

#### Studies of Attitudes

In light of the court cases and other incidents of censorship mentioned, it is no wonder that several studies have shown student journalists and advisers hesitant to deal with controversial topics (Bowen "Captive Voices" 14+; Click and Kopenhaver). One nationwide survey, conducted by journalism educator John Bowen in 1985, found that even before Hazelwood and 10 years after the Commission on Inquiry's report, student editors were not as willing to deal with sensitive issues as they once were and were more conservative, that principals may say they support students' First Amendment rights until a controversial issue arises, and that advisers were strong supporters of a free scholastic press, at least in theory ("Captive

Voices" 14). In another pre-Hazelwood survey in 1986, journalism researchers William Click and Lillian Kopenhaver found principals and advisers in some agreement in the following areas: role of student newspaper, censorship, responsibilities of advisers, and overall attitudes about free expression in general. However, principals and advisers differed significantly on some statements (cited later) in those areas as well as in the areas of control and disruption, role of administrators, and controversial issues.

Several other studies before the Hazelwood decision sought to gauge the value of high school journalism and identify the factors that influence how much a program is valued (Atwood and MacLean 71+; Click and Kopenhaver; Peterson). In 1967 researchers Erwin L. Atwood and Malcolm S. MacLean studied attitudes of principals, advisers, and student journalists in Iowa, dividing the principals and parents into three types — opponents, public relations, and proponents. The public relations type refers to those principals and parents who viewed scholastic journalism only as a way to promote the positive aspects of the school. Students and advisers were divided into opponents and proponents. The study showed conflicts in attitudes among the groups and among the types in each group.

Another Iowa study prior to Hazelwood showed that the number of years a person had served as principal could not be used to predict a principal's responses to issues about a free student press. The study also showed that if the principal had worked on a high school publication, that fact could help predict his or her responses 20

percent of the time. Additionally, according to the study, how principals rate their own publication experience can help show how much they value scholastic journalism 16 percent of the time (Peterson).

## CHAPTER 3

## Scholastic Press Freedom After Hazelwood

Studies of Attitudes

Although censorship of high school publications was a problem before the Supreme Court's Hazelwood decision, it became worse afterward. In Washington, D.C., The Student Press Law Center, a national agency devoted exclusively to protecting free press rights of student journalists, has reported a dramatic increase in the number of calls for legal advice since the Hazelwood decision ("Calls to SPLC" 3; Eveslage 39; Bowen "Fighting Prior Review" 2; Hoppert 19).

Several studies conducted since Hazelwood also have shown some trends frightening to those interested in promoting student press rights (Dickson "How Advisers View"; "First National Survey" 3). One 1988 study found that 28 percent of advisers believed they should be censors, 75 percent said they should read student newspaper content before publication, and 68 percent said they should always read page proofs (Dickson "How Advisers View" 169). Click and Kopenhaver's post-Hazelwood study, conducted in the spring and summer of 1989, was the first nationwide study of high school principals and student newspaper advisers since the 1988 decision. As cited in "First National Survey," that study showed that censorship of high school student newspapers "seems to be an accepted fact of life at high schools across the United States" (3). The results suggested that censorship of high school newspapers already was very high and

increased after Hazelwood. The survey also showed that many advisers and principals agreed that after student journalists had been trained to be responsible, the students still should not control all editorial content. Advisers and principals also agreed that the faculty adviser, not student editors, is responsible for the content of student newspapers.

However, responses from advisers and principals on two issues differed significantly, as cited in "First National Survey." One issue concerned whether a student newspaper should be allowed to print a true story even if it hurts the school's reputation. The other issue was whether school administrators should be allowed to prevent publications of articles they consider inappropriate and damaging "even though the articles may not be legally libelous, obscene or disruptive" ("First National Survey" 3). A majority of the advisers agreed with the first issue but disagreed with the second.

This nationwide survey also showed that principals supported some student press issues. A majority (81 percent) disagreed that the student paper should report only about school matters; 74 percent disagreed that "high school students are too immature to practice responsibly freedom of the press"; and 84 percent disagreed that "controversial issues have no place in a student newspaper" ("First National Survey" 3).

Studies regarding free press issues for high school newspapers also have been conducted in Tennessee, Missouri, and North Carolina (Bowles; Dickson "Attitudes" and "How Advisers View"; Phillips). The

Tennessee survey showed there was no immediate effect on scholastic publications in the state after Hazelwood and that a third of the state's high school newspapers already were subject to prior review (Bowles). Likewise, the two Missouri studies showed that Hazelwood was not likely to have any significant changes in procedures concerning student newspaper content (Dickson "Attitudes" and "How Advisers View"). In 1989 University of North Carolina journalism professor Kay Phillips studied the free scholastic press in North Carolina, a state that does not have certification requirements for secondary journalism teachers. Her survey showed that only a few of the advisers there are well-informed about journalistic issues although they are better informed than the average adviser nationwide. She suggested that every high school should establish specific guidelines regarding the student press and that advisers should be required to be well-trained.

#### Court Cases

In California, where the broad free press protection of section 48907 had already been in existence, two court cases came about immediately following the Hazelwood decision (Palermo 163).

In one of those cases, David Leeb, editor of the Rancho Alamitos High School newspaper, prepared an article for the school's April Fool's issue that said Playboy magazine planned to publish nude photographs of female Rancho students. The accompanying headline read: "Nude Photos: Girls of Rancho." A photo accompanying the article showed five female students in line outside the school's darkroom supposedly waiting to sign up for the Playboy photo shoot. Although

the girls were not named, they were identifiable in the photo. Principal James DeLong spoke with a girl's father who was shocked by the matter. DeLong also spoke with each of the girls and found that although they had agreed to be photographed, they had not known about the April Fool article or headline. The principal halted distribution of the paper (Palermo 163).

Although California's law provides greater free press protection, section 48907 (See Appendix A) does allow for prior restraint if expression "is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school" (qtd. in Palermo 162). Rather than exploring avenues of appeal within the school, Leeb filed suit claiming that DeLong's action was unconstitutional and that the prior restraint allowed under section 48907 violated the California Constitution. Leeb lost his suit at that level and appealed.

The appellate court ruled that Hazelwood was not applicable in this case because California affords greater constitutional protection to students than the First Amendment. The court relied on an earlier California Supreme Court case, Bailey v. Loggins, in which restrictions of content in state prison newspapers were held to be a violation of the state's Constitution. Palermo writes:

The Bailey court had rejected the argument that the state, acting as publisher of the prison paper, could exercise

regulation as stringent as a private publisher. The Bailey court found the prison's regulations indicated an intent to open the paper as a limited public forum which could not be subjected to arbitrary censorship. (164).

As in Bailey, the Leeb court held that the high school paper was a limited public forum. It held that censorship could only occur if the material actually exposed the school to tort liability. "No prior restraint may occur, the court held, unless the plaintiff would have a clear chance of prevailing in an action against the school" (qtd. in Palermo 164). The court said that before censoring, school officials should make sure that the publication would be "likely to harm the reputation of another or hold that person up to shame, ridicule, or humiliation" (qtd. in Palermo 164). Palermo does not indicate whether the newspaper was distributed after the court had handed down its decision.

In the second California case, Perumal v. Saddleback Valley Unified School District, a state appellate court upheld a lower court's decision to deny a petition by a school religious group seeking an order that the school district allow distribution of religious flyers at school and permit publication of a yearbook ad. The case came about when El Toro High School student Alexander Perumal, who had organized a student group called New Life, asked permission to distribute a flyer announcing the group's meetings. At the same time, Mission Viejo High School student Frederick Read, the leader of a New Life chapter at his school, asked his principal for permission to



publish a paid advertisement for his group in the school yearbook. Both requests were denied, and the lawsuit was filed.

In its Perumal decision, the court basically said that although section 48907 gives broad free speech rights to students, administrators may regulate that speech in some instances. One of the instances, according to this court's ruling, is when the separation of church and state is at issue. Palermo writes:

Perumal indicates that although section 48907 assures students greater freedom than the First Amendment, it does not confer an absolute right to expression. Leeb stands for the same proposition. However, for rules restraining speech to stand under this section, they must serve some important state purpose, such as preventing tort liability or entanglement with religion. Merely restricting dialogue on controversial topics violates the section. (165).

Therefore, the ads were never published.

#### Other Instances

In another instance after the Hazelwood decision, California's section 48907 was used to prevent censorship without the student editor having to go to court ("California law" 8). In November 1987 The Epitaph, Homestead High School's award-winning student newspaper, began researching an article on AIDS. An unidentified Homestead student who had tested positive for AIDS was interviewed as part of the research. The article was to be printed December 11. Out of courtesy, Epitaph adviser Nick Ferentinos told Principal Jim Warren about the story. School officials concerned over the sensitivity of the issue quickly asked Ferentinos, student editor Mike Calcagno, and the reporter working on the story to postpone the article.

Ironically, the officials admitted the article was well written and would not disrupt the school. After discussing the officials' concerns, The Epitaph's editorial board decided not to print the story for a month and to double check the research. The story was to be printed January 15, two days after the historic Hazelwood decision.

On the day Hazelwood was handed down, the principal told the adviser and newspaper staff that the Supreme Court's ruling had changed his role. He said that the story would have to be held until he had time to consider his new role. Calcagno threatened to resign, and professional news media already had heard of the censorship and were in the school working on a story. The student editor then learned that the legal division of the California State Department of Education had put out a bulletin that informed schools that Hazelwood did not apply to California because of its broad state law. Calcagno telephoned the American Civil Liberties Union and the state department of education, and the editorial staff of The Epitaph decided to go ahead and print the AIDS story. On the morning of January 14, on advice from the state department of education, the principal told the paper's adviser that the ban was being lifted. The story was published as scheduled on January 15 ("California law" 9).

Similar instances have occurred in other states. Although New Jersey has yet to pass its freedom of expression bill (See Appendix A), its state constitution already affords greater protection than the federal Bill of Rights and was used successfully in a Gloucester County Superior Court last May ("State Constitution" 5). In that case, Brian

Desilets, a student at Clearview Regional Junior High, sued school administrators for censoring two movie reviews that were to be published in the school paper in January 1989. The reviews were of two R-rated films, "Mississippi Burning" and "Rain Man," and the administrators believed the reviews were inappropriate for young readers because of the films' ratings. Judge Robert E. Francis, however, ruled that the school had violated Desilets' rights under New Jersey's constitution, which says, as cited in "State Constitution" that every citizen has the right to "freely speak, write and publish his sentiments on all subjects" (5). Desilets' lawyer, William Buckman, successfully argued that the reviews were "innocuous, posed no threat to discipline, and that students had access to information about the same movies published in magazines available in the school library" (qtd. in "State Constitution" 5).

Iowa's free press law was used this year (1991) to prevent school administrators from disciplining three student journalists who distributed copies of a censored editorial during a basketball game. Lewis Central High School Principal Harold Condra pulled from the school paper an editorial that criticized the school's head basketball coach. The principal said the article "presented the school in a bad light. I think our school newspaper should present a positive picture of the school" ("Free Press Law" 23). After the three students distributed copies of the editorial, the principal threatened to suspend them. However, school superintendent Lee Wise reversed the principal's decision because of Iowa's 1988 state law protecting

student journalists. Wise said school administrators were not aware of the Iowa law when threatening the students with suspension.

In another post-Hazelwood case, a U.S. District Judge in New York, which does not have a free expression law, denied a request from a school district to dismiss a lawsuit filed by a student newspaper adviser who had been removed from his position by his principal. Although the case went to court after the 1988 Hazelwood decision, the incident occurred in 1984. Port Richmond High School teacher Michael Romano was removed as the newspaper adviser by Principal Margaret Harrington after the school paper had published a student-written editorial that denounced the creation of a federal holiday on Martin Luther King Jr.'s birthday. As quoted in "Court ruling," the principal said the newspaper had not shown "balanced reporting" because it did not publish opposing editorials (12). Claiming that his removal violated his students' free press rights, the adviser sued. Judge Raymond J. Dearie ruled twice that The Crow's Nest, which was published outside of class, was an extra curricular activity and, therefore, Hazelwood did not apply. He said Hazelwood allows school officials to censor only newspapers that are part of the curriculum ("Court ruling" 12). Romano, however, settled out of court in 1990 for an undisclosed amount of money. His attorney said the out-of-court settlement was the best course of action because he feared that U.S. District Judge Arthur Spatt, who would have presided over the case, would have relied on Hazelwood and his client would not have prevailed in a trial ("Six-Year Court Case" 37).

In states that do not have laws offering greater protection to student journalists, incidents of censorship continue. For example, in Manchester, New Hampshire, Central High School Principal William Burns shut down production of The Little Green because student editors refused to repeat a public apology for a critical editorial ("Editorial Lands Students" 25). The editorial criticized the school's freshman adviser for not disclosing numerical results of the freshman class officer elections. The newspaper was operating without an adviser at that time because the teacher who previously held that position had resigned for personal reasons. The principal ordered the editors to "placate" the teacher and the faculty. The students wrote a letter apologizing "for any displeasure that this incident may have caused you" (qtd. in "Editorial Lands Students" 25). They also apologized over the public address system and agreed to publish a clarification in the next issue. However, when the principal ordered that they repeat the apology over the public address system a second time because some students who leave early may not have heard it, the editors refused. The paper began functioning again after a business teacher agreed to step in as adviser. After this incident, a free expression bill was introduced in the New Hampshire Legislature in the spring of 1991. Although the bill was passed by the Senate, it was later voted down by the House Judiciary Committee ("It's (Almost) The Law" 18).

In Madison, Wisconsin, the entire staff of Madison Memorial High School's newspaper resigned in June 1991 after they were

prevented from publishing a story about the off-campus shooting of a 16-year-old student ("Principal Censors" 8). The victim's mother had requested her son's name be withheld because she was afraid any publicity might affect his recovery. Principal Carolyn Taylor refused to allow the newspaper to print a story in which the victim's name was used. The editors had obtained the name from a memorandum issued by Taylor to the faculty. Staff members and adviser Art Camosy argued that using the name would lend credibility to the story and perhaps put to rest rumors that already had been widely circulated at the school. Instead of running a story without the victim's name, the staff opted to publish a black box saying, "Principal Carolyn Taylor would not allow this story to be printed as written." (qtd. in "Principal Censors" 8). The principal, however, said she wanted to print her own reasons for not allowing the story to be printed. That decision prompted the entire staff's resignation.

The adviser told the Student Press Law Center that Taylor's control over the student newspaper had increased recently. Such control included a 1990 decision to delay for a few hours an issue covering a lunchtime racial riot because she feared further disruption and a decision earlier this spring to begin reviewing all articles before publication after the newspaper printed a controversial piece comparing grade point averages by race. The adviser said the school board in Madison has a policy tantamount to establishing school newspapers as public forums because it allows school officials to censor only material that is obscene, libelous, or substantially

disruptive. Although Wisconsin does not have a student free expression law, Camosy believes the students would have a strong legal case. However, because his term as adviser already was scheduled to end this fall and because the student journalists are no longer interested in fighting the school administration, the matter will not be taken to court. Instead, the editors plan to start an underground publication ("Principal Censors" 9).

Another incident of censorship and prior review occurred last April in Tucson, Arizona, where Principal Mary Jeanne Munroe announced plans to institute a policy of prior review. Her decision came after the March issue of Amphitheater High School's Desert Gazette printed an article that "questioned the effectiveness of the school's Drug Free Zone, a program designed to reduce drug trafficking on school property by increasing police patrols and stiffening penalties for violators" ("Principal Gives In" 9). The principal also objected to an unrelated photo in the same issue that showed a teacher apparently violating a school policy by having a cup of coffee in a school corridor. The principal went so far as to cancel the students' trip to a national journalism conference.

However, after the incident drew attention from the local news media and support for the students from the Student Press Law Center, parents, and other members of the community, the school board asked the principal to reconsider her decision. The board issued the following statement:

Based on further analysis of the situation, she [Munroe] has rescinded that directive immediately. At no time has there been an intent to restrict the ability of student journalists to investigate and report on issues of controversy, interest or importance. ("Principal Gives In" 9).

The incident also prompted Munroe to reprimand the newspaper's adviser, saying, "If the March 22nd issue represents journalism, then we must redefine what that will mean at Amphi High School" (Principal Gives In" 9). The adviser, Tony Gomez, said the potential for future problems exists because of tense relations between the principal and the newspaper.

The above cases illustrate the problem of censorship of high school publications is widespread. Somewhere in America, school officials either censor or attempt to censor student expression every year. However, some schools are fortunate to have principals who understand the importance of free expression. For example, in Indiana, Marion High School Principal Marjorie Record withstood death threats, angry phone calls, and letters in refusing to censor the school newspaper, the Survey, after it published a column supporting abortion rights. Record told the Student Press Law Center that she wants student journalists to:

understand the ramifications and be ready to defend why they did what they did; that's what I consider responsible journalism. I do believe in censorship because ultimately I take the heat. I got the death threats, [but] I try to educate, not censor. ("Principal Stands" 26).



## CHAPTER 4

## Summary of Research, Reports, Court Cases

The review of previous research, reports, and court cases indicates that the First Amendment rights of high school newspapers are constantly being debated. In general, principals and advisers agree that high school students should not have absolute control over student newspaper content, but they disagree significantly on other free press issues.

Prior to the 1988 U.S. Supreme Court decision in Hazelwood v. Kuhlmeier, courts generally held that school principals and other administrators could not censor student expression unless that expression would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" (qtd. in Gillmor and Barron 635), that expression is "obscene, libelous, or disrupts school activities" (qtd. in Nelson 6-7), or that expression presents "a clear and present danger to governmental and public interests in the general community" (qtd. in Trager and Dickerson 135).

However, the Hazelwood decision gave principals the power of publisher and said school officials may censor student publications that are part of the curriculum and have not been established as open public forums; nevertheless, censorship can occur only if it fits the school's "basic educational mission" and is related to "legitimate

pedagogical concerns." The ruling does not apply to underground or unofficial newspapers not produced as part of the school curriculum.

Despite the prior restraint and censorship allowed under Hazelwood, four states — California, Massachusetts, Iowa, and Colorado (See Figure 1) — have passed laws that provide greater protection to student journalists and, in essence, counteract the effects of the Hazelwood decision. Two states, Michigan and New Jersey, have active legislation pending. Legislatures in other states — Indiana, Illinois, Montana, Washington, Wisconsin, Kansas, Ohio, Kentucky, Hawaii, Wyoming, Idaho, Rhode Island, Nevada, Oregon, and Rhode Island — have considered proposed bills but failed to act on them or defeated them. In an October 4, 1991, telephone interview, Mark Goodman, executive director of the Student Press Law Center, said he expects sponsors of the bills in many of the states that have not passed scholastic free press laws to reintroduce those bills in 1992. West Virginia does not have such a state law that would afford specific free expression protection to its high school students.

Having explained the Hazelwood case and its effect, having reviewed the history of the scholastic press' free press battles before and after the Hazelwood ruling, and having examined the various court cases and incidents that have framed that history, this paper now will address the various pieces of model legislation that afford greater protection of high school students' rights to free expression. As mentioned previously, the main purpose of this study is to analyze the content and wording of the state laws that already are in existence as

well as several proposed state laws and then to draft proposed legislation for West Virginia. The various state laws and proposed laws have similar wording, and thus, offer several models for the Mountain State.

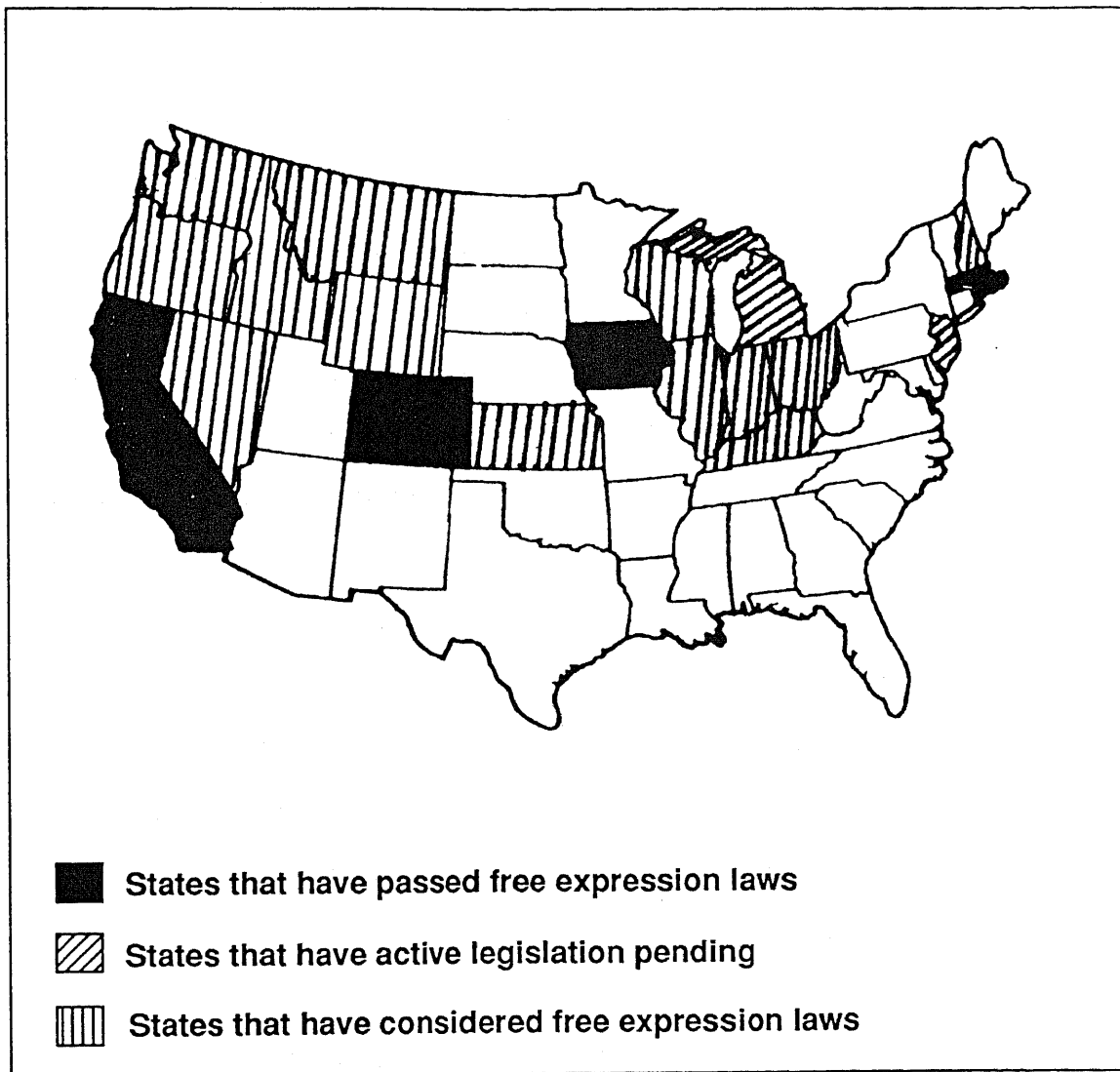


Figure 1. The map above shows states within the Continental United States that have passed student free expression laws, that are considering such laws, and that have considered such laws at some point. Hawaii, which had considered a free expression law at one time, is not shown, and Alaska has not considered such a law.

## CHAPTER 5

## Methods

In May 1991, copies of established freedom of expression laws from California, Massachusetts, Iowa, and Colorado, as well as proposed legislation from Ohio, Indiana, Michigan, Montana, Kansas, and New Jersey, were obtained from the Student Press Law Center in Washington, D.C. Bills that had been proposed in Washington, Hawaii, Illinois, Kentucky, Rhode Island, Wyoming, Idaho, Nevada, Oregon, New Hampshire, and Wisconsin have been introduced several times and usually died or did not make it out of committee. These proposed laws were not available from the Student Press Law Center, and because they were never passed, they were not obtained from those states.

A follow-up telephone call was made to the SPLC in October to determine if any of the proposed legislation had been approved since they were first obtained in May. SPLC Executive Director Mark Goodman said no other action had taken place.

Using previous court cases and the California code, which has been discussed previously and which has been in existence since the mid-1970s, a list of specific provisions that have been or could be included in a state's student media free expression law was prepared for comparison. These provisions:

1. Include various forms of expression, such as bulletin boards, printed materials, petitions, buttons, badges, insignia,

- official publications, and performance of theatrical and musical events;
2. Protect official publications and other means of expression regardless of whether they are supported financially by the school;
  3. Protect publications and other means of expression regardless of whether they are produced using school facilities;
  4. Prohibit expression that is obscene;
  5. Prohibit expression that is libelous;
  6. Prohibit expression that is slanderous;
  7. Prohibit material that incites students so as to create a clear and present danger of the commission of unlawful acts on school premises or to violate lawful school regulations;
  8. Prohibit material that would result in a substantial disruption of the orderly operation of the school;
  9. Direct the governing board of a school district and each county board of education to adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction;
  10. Give student editors of official school publications responsibility for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this law;

11. Give journalism advisers responsibility to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this law;
12. Prohibit prior restraint of material prepared for official school publications except where the material violates this law;
13. Require school officials to show justification without undue delay prior to any limitation of student expression;
14. Define "official school publications" as material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee;
15. Prohibit invasion of privacy;
16. Protect the journalism adviser from being fired, transferred, or removed from his or her position for refusing to suppress the protected free expression rights of student journalists;
17. Establish that student expression made under the responsibility of student editors shall not be considered an expression of school policy;
18. Protect a board of education, school district, or school official from being liable in a civil action for injury, death, or loss to a person or property, or in a criminal action, that allegedly arises from a student publication with which they have not interfered;

19. Establish a publication written substantially by students and made generally available throughout a public school as a public forum for the students.

Using the above list, a chart was made comparing the provisions of each existing state law and each proposed state law. Further analysis of specific wording in each of the laws and bills was made. Finally, proposed legislation was drafted for introduction into the West Virginia Legislature once a sponsor has been located.

## CHAPTER 6

## Results

Analysis of State Laws and Bills

Most of the student media free expression laws contain some variation of the "material and substantial interference" standard cited in the Tinker decision. Close examination of these laws shows some differences in wording and in specific provisions (See Figure 2). The comparison chart included here shows whether the state laws, existing or proposed, include specific wording. Simply because the word "No" may appear does not mean that the law would not afford such protection; it merely means that the law did not include specific wording of or reference to that provision. For example, Iowa's, Colorado's, and Kansas's laws (See Appendixes C, D, and I) do not state specifically that various forms of expression protected under the law include bulletin boards, printed materials, petitions, buttons, badges, insignia, official publications, and performance of theatrical and musical events. That does not mean, however, that such expression is not protected under those laws.

Likewise, none of the laws contain specific wording to protect high school radio and television broadcasting, but such programs might be protected under the statement "other means of expression." Palermo explains that Hazelwood appears to have little effect on school broadcasting because the Federal Communications Commission governs broadcast media. However, because most high school



Comparison Chart of Provisions of States' Free Expression Laws										
	Calif.	Mass.	Iowa	Colo.	Ohio	Indiana	Mich.	Mont.	Kansas	N.J.
Includes various forms of expression, such as bulletin boards, printed materials, petitions, the wearing of buttons, badges, insignia, or performance of theatrical and musical events.	Yes	Yes	No	No	Yes	Yes	Yes	Yes	No	Yes
Protects official publications and other expression regardless of whether they are supported financially by the school.	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Protects publications and other means of expression regardless of whether they are produced using school facilities.	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Prohibits expression that is obscene.	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Prohibits expression that is libelous.	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Prohibits expression that is slanderous.	Yes	No	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Prohibits material that incites students to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations.	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Prohibits material that would result in a substantial disruption of the orderly operation of the school.	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Directs school boards to adopt written publications code.	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Gives student editors responsibility over content of student publications subject to limitations of this section.	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Gives journalism advisers responsibility to supervise production and maintain professional standards of journalism and English.	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Prohibits prior restraint of material prepared for official publications except where the material violates the section.	Yes	No	Yes	Yes	No	Yes	No	Yes	No	No
Requires school officials to show justification without undue delay prior to any limitation of student expression.	Yes	No	No	No	No	No	No	Yes	No	No
Defines "official school publications" as material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.	Yes	No	Yes	No	No	Yes	No	No	Yes	Yes
Prohibits invasion of privacy.	No	No	No	Yes	Yes	Yes	No	No	No	Yes
Protects the journalism adviser from being fired or transferred for refusing to suppress the protected free expression.	No	No	No	No	Yes	No	Yes	Yes	No	No
Establishes that student expression made under the responsibility of student editors shall not be considered an expression of school policy.	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Protects a board of education, school district, or school official from being liable in a civil action that arises from a student publication with which they have not interfered.	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Establishes student publications as public forums for students.	No	No	No	Yes	No	No	No	No	No	No

Figure 2. Comparison of specific provisions of existing and proposed state

broadcast programs are limited to the high school in a closed circuit fashion, FCC rules would not apply. In addition to the "material and substantial interference" standard, most of the state laws also prohibit expression that is obscene, libelous, slanderous, incites students to commit crimes or unlawful acts on school premises, or is an invasion of privacy. Massachusetts's brief law (See Appendix B), however, does not refer specifically to such material. It merely states, "The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school." Indiana's bill (See Appendix F) does not mention specifically "slanderous" material, and New Jersey's bill (See Appendix J) does not mention specifically prohibiting material that "incites students to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations." Colorado's law and the bills in Ohio (See Appendix E), Indiana, and New Jersey add to the previously mentioned list of prohibited expression, material that would constitute an invasion of privacy.

These laws and bills offer students protection of their right to freedom of expression unless the expression violates those provisions mentioned above. However, only the laws of California (See Appendix A), Iowa, and Colorado, and the bills from Indiana and Montana mention specifically that prior restraint is prohibited unless the material violates the items prohibited under each section. Of those states, only California's law and Montana's bill (See Appendix H)

require school officials to show justification without undue delay before prior restraint. Indiana's bill states that a decision to withhold material must be made at least 24 hours before the publication is printed.

All but the laws in Massachusetts and Iowa state specifically that official publications are protected regardless of whether they are supported financially by the school or produced using school facilities. All but Massachusetts's law and Kansas's bill direct school boards and school districts to adopt a written publications code and specifically give student editors the responsibility over content and journalism advisers the responsibility of supervising production, maintaining the provisions of the law, and maintaining professional standards of journalism and English. Only the bills in Ohio, Michigan (See Appendix G), and Montana contain provisions that protect journalism advisers from being fired, transferred, or removed from their positions for refusing to suppress the protected free expression.

In all but California and New Jersey, the laws or bills also include a provision that dissociates school policies from student expression and removes school officials' liability in a civil or criminal action that arises from a student publication with which they have not interfered. What this means is that if a libel suit or other civil or criminal action resulted from material published in the student newspaper, school administrators and board officials could not be held liable unless they had interfered with the publication. The Student Press Law Center's Mark Goodman explained that, "If they don't interfere with what students are doing, they will be protected. The responsibility will fall

with the students who are making the content decisions for the publications" (Goodman 35).

Colorado is the only state to include a provision in its law that specifically establishes student publications as "public forums." This is important because Hazelwood itself does not apply to student newspapers established as "public forums."

### Summary

A state law that incorporates all of the provisions discussed above would be ideal from the perspective of student free press advocates. Such a law would afford freedom of expression for students, whether such expression would be in a student newspaper or some other media. At the same time, it offers protection to school officials. It also would give student editors responsibility for content and prevent prior restraint except in certain special instances. Such a law also would protect journalism advisers from being fired or transferred and would direct school boards to adopt a written publications code that would comply with the provisions of the code. And finally, an ideal state law would establish the fact that school publications are public forums or forums for student expression. Such a law would help to eliminate gray areas that have resulted from various court opinions including Hazelwood.

Additionally, although none of the existing or proposed state laws include provisions protecting student broadcasting, that protection should be part of such a law even though FCC rules already govern broadcasting and the Hazelwood case apparently did not affect

broadcasting. As previously mentioned, broadcasting in most high schools occurs on a closed circuit basis and not over public airways. Therefore, including broadcasting in a free expression law merely would help to eliminate any possibility of administrative censorship.

CHAPTER 7

Proposed Law for West Virginia

Below is a proposed freedom of expression law for the state of West Virginia.

STATEMENT

Recognizing that "students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (Tinker v. Des Moines Independent School District, 89 S. Ct. 733, 1969), the state of West Virginia hereby enacts the following legislation to protect the right of students to freedom of expression:

1. Students of the public schools of this state shall have the right to exercise freedom of speech, of the press, and of broadcasting including, but not limited to, the following:
  - a. the use of bulletin boards,
  - b. the distribution of printed materials or petitions,
  - c. the wearing of buttons, badges, and other insignia,
  - d. the performance of theatrical and musical events,
  - e. and the right of expression in official publications and broadcast activities, whether or not such publications, broadcast activities, or other means of expression are supported financially by the school or by use of school facilities or are produced in conjunction with a class.

2. No student enrolled in a public school shall express, publish, broadcast, or distribute material that:

- a. is obscene under state law,
- b. is libelous, slanderous, or defamatory under state law,
- c. is an invasion of privacy under state law,
- d. so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or to violate lawful school regulations,
- e. or materially and substantially disrupts the orderly operation of the school.

3. Each county board of education shall adopt rules and regulations in the form of a written code with respect to student expression that is consistent with the terms of this law. This code shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction.

4. Student editors of official school publications and student leaders or managers of official school broadcast activities shall be responsible for assigning and editing the news, editorial, advertising, and feature content of their publications or broadcast programs subject to the limitations of this law and, in the case of broadcasting, the rules of the Federal Communications Commission.

5. The journalism adviser of student publications or broadcast activities within each school shall supervise the production of official publications or broadcast programs, teach professional standards of journalism and English to the student staff, and maintain the

provisions of this law, and in the case of broadcasting, the provisions of the Federal Communications Commission rules.

6. A journalism adviser shall not be fired, transferred, or removed from his or her position for refusing to suppress the protected free expression rights of student journalists as described in this law.

7. There shall be no prior restraint of material prepared for official school publications except insofar as it violates this law. School officials shall have the burden of showing justification within 24 hours prior to any limitation of student expression under this law.

8. "Official school publications and broadcast programs" are hereby established as open public forums for student expression and are defined as material produced by students in the journalism, newspaper, yearbook, broadcasting, or writing classes and distributed or broadcast to the student body either free or for a fee.

9. No expression made by students in the exercise of their right to freedom of expression shall be deemed to be an expression of school policy, and no board of education or school official shall be held responsible or liable in any civil or allegedly criminal action that arises from any expression made, published, or broadcast by students providing that said officials have not interfered with the expression.



## CHAPTER 8

## Conclusion

Discussion

Clearly, the Supreme Court's 1988 Hazelwood v. Kuhlmeier decision struck a devastating blow to student journalists' First Amendment rights of free speech and a free press despite its previous 1969 landmark ruling in Tinker v. Des Moines Independent School District that said students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Although numerous examples of censorship and prior restraint of the high school press were documented long before Hazelwood, various courts generally afforded some protection to student journalists. Over the years, these various court rulings helped to delineate what is ultimately at the heart of Hazelwood: the duties and responsibilities of school officials to educate students versus the students' rights to be able to express their opinion freely without fear of reprisal or prior restraint. The question is: Can the two co-exist?

The Hazelwood ruling does not give school principals absolute power over student publications although it does liken them to that of publisher. Unofficial and underground student papers or those produced as an extra curricular activity outside the classroom may not be censored under Hazelwood. Official school newspapers established as open public forums also apparently cannot be restrained under Hazelwood, although that area still appears to be gray. Even official

school papers not established as open public forums cannot be censored unless such censorship fits the school's "basic educational mission" and is related to "legitimate pedagogical concerns." But who is to say what a school's "basic educational mission" is or what "legitimate pedagogical concerns" are? Author Nat Hentoff makes this comment about the U.S. Supreme Court's term "basic educational mission":

There is no further definition of that term, and so there can be as many definitions as there are principals and boards of education. Moreover, each definition can change by the day. In the 'real world,' for which students presumably are being educated, there can be no punishment unless it is clear, in advance, what the crime is. (115).

To many, part of the school's "basic educational mission" is to teach students to think for themselves, to express themselves clearly and responsibly, to listen to and explore a variety of opinions as they seek to develop individually as a part of the American system. One high school editor in Dayton, Ohio, put it this way the day after Hazelwood was handed down:

I go into my government class, and I'm told that, as an American, I'm guaranteed certain basic rights. Now I go into my journalism class and I'm told that the most important of those rights has been taken away from me. (qtd. in Hentoff 115).

Additionally, if schools are to fulfill their responsibility of training future journalists in journalism class, then obviously censorship cannot be tolerated or the result will be what John Dewey, one of America's greatest philosophers and educators, would consider

as unrealistic school systems. To teach future journalists properly necessitates teaching them how to report and comment on controversial and unpopular issues responsibly. Dewey said:

Neglect of these issues can easily lead to a school system in which we turn out narrowly trained specialists who do not have a sense of responsibility and commitment for applying scientific intelligence to the problems of life. (qtd. in Bowen "Fighting Prior Review" 2).

Ben Bagdikian added that to teach journalism students about journalism's proper role in society without allowing them to report and comment on such controversial and unpopular issues "... merely makes propagation of ignorant journalism more efficient. The charade of 'journalism education' in places that teach mostly technique and typing will simply perpetuate the curse of what Walter Lippmann called 'untrained accidental witnesses.' " (qtd. in Bowen "Fighting Prior Review" 3)

As illustrated by Dewey's and Bagdikian's words, the idea of free expression is entrenched in history. John Milton in Areopagitica and Thomas Jefferson in his writings called for a "free marketplace of ideas" (qtd. in Bowen "Fighting Prior Review" 2). Bowen writes, "Milton's and Jefferson's ideas became a part of our concept of free expression and a way to ensure a free flow of ideas for the common good of society" ("Fighting Prior Review" 2). In "On Liberty," John Stuart Mill stressed "the need for diversity of opinion because an opinion might be false and some other opinion true, which would cause conflict bringing clarity to truth" (qtd. in Bowen "Fighting Prior Review" 2). Bowen quoted Mills as saying:

If society lets any considerable number of its members grow up mere children, incapable of being acted on by rational consideration of distant motives, society has itself to blame for the consequences. ("Fighting Prior Review" 2).

In the Hazelwood decision, the U.S. Supreme Court told students that they do not have the same broad protection given to individuals outside the school context. However, Goodman points out:

What the Supreme Court didn't say, and in fact what it couldn't say, is that individual school districts or states couldn't create their own protections — greater than those in the First Amendment. It is possible — through statutes or state constitutions — for Congress or the states to create their own laws that are *more* protective than the Bill of Rights. You can't go beneath that minimum level of protection stated in the Bill of Rights of the Constitution, but you can enlarge it.... (34). (Emphasis mine.)

Many states have done just that. California, Massachusetts, Iowa, and Colorado have state laws that protect student journalists' rights to free expression and a free press. Seventeen other states at some point have considered similar legislation. In trying to balance the school's mission to educate without disruption and to protect all of its students, these laws generally allow censorship only if the expression made by students in official school publications or by other means is obscene, libelous, slanderous, incites lawbreaking, or invades someone's privacy. These laws also dissociate school officials from what is printed in student publications and offer officials protection from liability that might result from what is published or expressed.

In Iowa, Sen. Richard Varn, one of the sponsors of that state's successful freedom of expression law, said the legislation allows student journalists to cover controversial issues:

Writing controversy and getting heat and flack and creating discussion is educational. If students are taught they can't cover controversial subjects in school because they might offend people, what kind of lesson is that for later in life? ("Iowa Rattles" 4).

Iowa Rep. Michael Connolly, who favored even greater protection for student journalists, agreed with Varn:

Hazelwood gave the administration broad discretion to determine what goes in school papers. If you want student papers to deal with the issues of the day like AIDS and teen pregnancy, you have to let freedom take place. The paper should prepare students for the real world. They have to learn to make their articles meaningful and address real issues. ("Iowa Rattles" 6).

State laws such as Iowa's, California's, and others may not provide what a First Amendment purist would want — absolute freedom for student journalists — but they are necessary to counteract the effects of Hazelwood. Without such protection, school administrators could justify almost any censorship by saying an article doesn't fit the school's "basic educational mission" or "legitimate pedagogical concerns." In essence, what these laws do is ensure that students can express themselves responsibly without fear of a school principal or a school board censoring them under the guise of trying to protect the school's image. In that way, such laws help keep the "schoolhouse gate" open and the ideas and opinions flowing freely.

#### Recommendations for Further Action

Efforts to pass free expression bills in many states have not been easy. In 1989, Hawaii Gov. John Waihee vetoed such a bill despite its passage in both the state's House and Senate ("Governor" 7).

Legislators in Illinois, Ohio, and Wyoming say they will not reintroduce freedom of expression bills there because their previous bills were killed in an earlier session ("Hangin' Tough" 17). Often other groups that believe principals should have control over student publications oppose such legislation. In Indiana, the Northeastern Ohio Learning Association, a private consulting firm that specializes in creating policy handbooks for school districts, has sold highly restrictive student publication guidelines to various districts ("Private Consulting Firm" 7). In Fort Wayne, Indiana, a conservative group, Indiana Policy Review Foundation, helped to defeat a school board policy that would have protected the rights of student journalists. ("Hired Guns" 6). In many states, free expression bills have failed because of a lack of support from students and advisers.

Goodman offers this advice: "For those of you who are interested in getting a bill passed in your own state, the most important thing to remember is that you can't do it alone" (35). Goodman suggests forming a group through the state's scholastic press associations, local chapters of the American Civil Liberties Union, or even commercial press associations such as the West Virginia Press Association. Once some kind of operational structure has been organized, the group must find a legislator or several legislators to introduce the bill. Since the proposed law calls for each county board of education to adopt a written code with respect to student expression, this group also could draft a model code for each county.

In West Virginia, one legislator already has expressed interest in introducing the bill proposed in this paper. Also important is the need for high school students and teachers to be informed about the proposed law at meetings such as the United High School Press convention at Marshall University and the West Virginia High School Journalism Competition at West Virginia University. Groups such as the West Virginia Journalism Education Association, the West Virginia Journalism Teachers' Association, the West Virginia Scholastic Press Association, and the West Virginia Press Association should endorse and promote the legislation within their own groups, and everyone interested in getting the law passed should lobby legislators in an effort to gain support for the bill. A grass roots effort could be instrumental in providing students in the Mountain State with guarantees they should have — the right to express their opinions and to cover responsibly issues of concern to the school community as a whole. Only then will the motto of West Virginia have real meaning for its students: "Mountaineers are always free."

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## Appendix A — California's Law

**§ 48907. Student exercise of freedom of speech and press**

Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.

Each governing board of a school district and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction.

Student editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section.

There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section.

"Official school publications" refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.

Nothing in this section shall prohibit or prevent any governing board of a school district from adopting otherwise valid rules and regulations relating to oral communication by students upon the premises of each school.



Appendix B — Massachusetts's Law

Section 82. Right of Students to Freedom of Expression.

The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions. Any assembly planned by students during regularly scheduled school hours shall be held only at a time and place approved in advance by the school principal or his designee.

No expression made by students in the exercise of such rights shall be deemed to be an expression of school policy and no school officials shall be held responsible in any civil or criminal action for any expression made or published by the students.

For the purposes of this section and sections eighty-three to eighty-five, inclusive, the word student shall mean any person attending a public secondary school in the commonwealth. The word school official shall mean any member or employee of the local school committee.

## Appendix C — Iowa's Law

**280.22. Student exercise of free expression**

1. Except as limited by this section, students of the public schools have the right to exercise freedom of speech, including the right of expression in official school publications.

2. Students shall not express, publish, or distribute any of the following:

- a. Materials which are obscene.
- b. Materials which are libelous or slanderous under chapter 659.
- c. Materials which encourage students to do any of the following:

- (1) Commit unlawful acts.
- (2) Violate lawful school regulations.
- (3) Cause the material and substantial disruption of the orderly operation of the school.

3. There shall be no prior restraint of material prepared for official school publications except when the material violates this section.

4. Each board of directors of a public school shall adopt rules in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its jurisdiction. The board shall make the code available to the students and their parents.

5. Student editors of official school publications shall assign and edit the news, editorial, and feature content of their publications subject to the limitations of this section. Journalism advisers of students producing official school publications shall supervise the production of the student staff, to maintain professional standards of English and journalism, and to comply with this section.

6. Any expression made by students in the exercise of free speech, including student expression in official school publications, shall not be deemed to be an expression of school policy, and the public school district and school employees or officials shall not be liable in any civil or criminal action for any student expression made or published by students, unless the school employees or officials have interfered with or altered the content of the student speech or expression, and then only to the extent of the interference or alteration of the speech or expression.

7. "Official school publications" means material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.

8. This section does not prohibit a board of directors of a public school from adopting otherwise valid rules relating to oral communications by students upon the premises of each school.

Added by Acts 1989 (73 G.A.) ch. 155, § 1.

**Historical and Statutory Notes****Title of Act:**

An Act relating to student exercise of free expression in the public schools. Acts 1989 (73 G.A.) ch. 155.

Appendix D — Colorado's Law

SENATE BILL 90-99.

BY SENATORS Pascoe, Gallagher, R. Groff, McCauley, Mendez, Allison, Hume, Pastore, and Peterson;  
also REPRESENTATIVES Adkins, Thiebaut, Rupert, P. Hernandez, T. Hernandez, Johnson, Kerns, Knox, Mares, Pierson, Romero, Tanner, Tilger, Tucker, Ulvang, Webb, and K. Williams.

CONCERNING FREEDOM OF EXPRESSION FOR STUDENTS IN PUBLIC SCHOOLS, AND PROVIDING FOR FREEDOM OF SPEECH AND OF THE PRESS FOR STUDENTS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Article 1 of title 22, Colorado Revised Statutes, 1988 Repl. Vol., is amended BY THE ADDITION OF A NEW SECTION to read:

22-1-120. Rights of free expression for public school students. (1) The general assembly declares that students of the public schools shall have the right to exercise freedom of speech and of the press and no expression contained in a student publication, whether or not such publication is school-sponsored, shall be subject to prior restraint except for the types of expression described in subsection (3) of this section. This section shall not prevent the advisor from encouraging expression which is consistent with high standards of English and journalism.

(2) If a publication written substantially by students is made generally available throughout a public school, it shall be a public forum for students of such school.

(3) Nothing in this section shall be interpreted to authorize the publication or distribution by students of the following:

(a) Expression which is obscene;

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

Appendix D — Colorado's Law Continued

(b) Expression which is libelous, slanderous, or defamatory under state law;

(c) Expression which is false as to any person who is not a public figure or involved in a matter of public concern; or

(d) Expression which creates a clear and present danger of the commission of unlawful acts, the violation of lawful school regulations, the material and substantial disruption of the orderly operation of the school or which violates the rights of others to privacy.

(4) The board of education of each school district shall adopt a written publications code, which shall be consistent with the terms of this section 22-1-120, C.R.S., and shall include reasonable provisions for the time, place, and manner of conducting free expression within the school district's jurisdiction. Said publications code shall be distributed, posted, or otherwise made available to all students and teachers at the beginning of the 1991-92 school year and at the beginning of each school year thereafter.

(5) (a) Student editors of school-sponsored student publications shall be responsible for determining the news, opinion, and advertising content of their publications subject to the limitations of this section. It shall be the responsibility of the publications advisor of school-sponsored student publications within each school to supervise the production of such publications and to teach and encourage free and responsible expression and professional standards for English and journalism.

(b) For the purposes of this section, "publications advisor" means a person whose duties include the supervision of school-sponsored student publications.

(6) If participation in a school-sponsored publication is part of a school class or activity for which grades or school credits are given, the provisions of this section shall not be interpreted to interfere with the authority of the publications advisor for such school-sponsored publication to establish or limit writing assignments for the students working with the publication and to otherwise direct and control the learning experience that the publication is intended to provide.

(7) No expression made by students in the exercise of freedom of speech or freedom of the press shall be deemed to be an expression of school policy, and no school district or employee, or parent, or legal guardian, or official of such school district shall be held liable in any civil or criminal

Appendix D — Colorado's Law Continued

action for any expression made or published by students.

(8) Nothing in this section shall be construed to limit the promulgation or enforcement of lawful school regulations designed to control gangs. For the purposes of this section, the definition of "gang" shall be the definition found in section 19-2-1111 (2) (d) (II), C.R.S.

SECTION 2. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

*Ted L. Strickland*

Ted L. Strickland  
PRESIDENT OF  
THE SENATE

*Carl B. Bledsoe*

Carl B. Bledsoe  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

*Joan M. Albi*

Joan M. Albi  
SECRETARY OF  
THE SENATE

*Lee C. Bahrych*

Lee C. Bahrych  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

APPROVED

*June 7, 1990 at 4:10 pm*

*Roy Romer*

Roy Romer  
GOVERNOR OF THE STATE OF COLORADO

Appendix E — Ohio's Bill

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 3305.01 and 3305.02 of the Revised Code be enacted to read as follows:

Sec. 3305.01. (A) EXCEPT AS PROVIDED IN DIVISION (B) OF THIS SECTION, STUDENTS ENROLLED IN THE PUBLIC SCHOOLS SHALL HAVE THE RIGHT TO EXERCISE THE FREEDOMS OF SPEECH, PRESS, AND ASSEMBLY THAT ARE GUARANTEED UNDER THE CONSTITUTION OF THE UNITED STATES AND THE OHIO CONSTITUTION. THE EXERCISE OF THESE RIGHTS INCLUDES, BUT IS NOT LIMITED TO, ANY OF THE FOLLOWING:

- (1) DISTRIBUTING PRINTED MATERIALS OR PETITIONS;
- (2) WEARING BUTTONS, BADGES, AND OTHER INSIGNIA;
- (3) PRESENTING OR PERFORMING IN THEATRICAL AND MUSICAL PRODUCTIONS;
- (4) PUBLISHING ARTICLES OF THE STUDENTS' CHOICE AND EXPRESSING STUDENT OPINION IN SCHOOL-SPONSORED PUBLICATIONS OR ON SCHOOL BULLETIN BOARDS, WHETHER OR NOT THE PUBLICATIONS OR EXPRESSION ARE SUPPORTED FINANCIALLY BY THE SCHOOL OR BY USE OF SCHOOL FACILITIES OR ARE PRODUCED IN CONJUNCTION WITH A CLASS.

(B) NO STUDENT ENROLLED IN A PUBLIC SCHOOL SHALL EXPRESS, PUBLISH, OR DISTRIBUTE MATERIAL THAT:

- (1) IS OBSCENE OR HARMFUL TO JUVENILES, AS THOSE TERMS ARE DEFINED IN SECTION 2907.01 OF THE REVISED CODE;
- (2) IS LIBELOUS, SLANDEROUS, OR AN INVASION OF PRIVACY;
- (3) SO INCITES STUDENTS AS TO CREATE A CLEAR AND PRESENT DANGER OF THE COMMISSION OF UNLAWFUL ACTS ON SCHOOL PREMISES, THE

## Appendix E — Ohio's Bill Continued

2

VIOLATION OF LAWFUL SCHOOL REGULATIONS, OR THE SUBSTANTIAL DISRUPTION OF THE ORDERLY OPERATION OF THE SCHOOL. SCHOOL OFFICIALS SHALL BASE ANY FORECAST OF CLEAR AND PRESENT DANGER ON SPECIFIC FACTS, INCLUDING THE PAST EXPERIENCE OF THE PARTICULAR SCHOOL AND CURRENT EVENTS INFLUENCING STUDENT BEHAVIOR. THE FORECAST SHALL NOT BE BASED ON UNSUBSTANTIATED FEAR OR APPREHENSION.

(C) STUDENT EXPRESSION MADE PURSUANT TO THE EXERCISE OF ANY OF THE RIGHTS SET FORTH IN DIVISION (A) OF THIS SECTION SHALL NOT BE CONSIDERED AN EXPRESSION OF SCHOOL POLICY. A BOARD OF EDUCATION, SCHOOL DISTRICT, OR SCHOOL OFFICIAL IS NOT LIABLE IN A CIVIL ACTION FOR INJURY, DEATH, OR LOSS TO PERSON OR PROPERTY, OR IN A CRIMINAL ACTION, THAT ALLEGEDLY ARISES FROM STUDENT EXPRESSION WITH WHICH THEY HAVE NOT INTERFERED.

(D) THE BOARD OF EDUCATION OF EACH CITY, EXEMPTED VILLAGE, LOCAL, AND JOINT VOCATIONAL SCHOOL DISTRICT SHALL ADOPT A WRITTEN CODE WITH RESPECT TO STUDENT EXPRESSION THAT IS CONSISTENT WITH THE TERMS OF THIS SECTION. EACH CODE SHALL INCLUDE REASONABLE PROVISIONS FOR THE TIME, PLACE, AND MANNER OF STUDENT EXPRESSION. A COPY OF THE CODE SHALL BE POSTED IN A CENTRAL LOCATION WITHIN EACH SCHOOL AND SHALL BE DISTRIBUTED TO ALL STUDENTS ENROLLED IN THE SCHOOL AT THE BEGINNING OF EACH SCHOOL YEAR.

Appendix E — Ohio's Bill Continued

Sec. 3305.02. (A) STUDENT EDITORS OF SCHOOL-SPONSORED PUBLICATIONS ARE RESPONSIBLE FOR DETERMINING THE CONTENT OF ALL SCHOOL-SPONSORED STUDENT PUBLICATIONS. EXCEPT AS PROVIDED IN DIVISION (B) OF SECTION 3305.01 OF THE REVISED CODE, THESE PUBLICATIONS SHALL NOT BE SUBJECT TO PRIOR REVIEW BY SCHOOL OFFICIALS.

(B) THE JOURNALISM ADVISER OF STUDENT PUBLICATIONS WITHIN EACH SCHOOL SHALL SUPERVISE THE PRODUCTION OF SCHOOL-SPONSORED PUBLICATIONS AND TEACH PROFESSIONAL STANDARDS OF JOURNALISM TO THE STUDENT PUBLICATIONS STAFF.

(C) A JOURNALISM ADVISER SHALL NOT BE FIRED, TRANSFERRED, OR REMOVED FROM HIS POSITION FOR REFUSING TO SUPPRESS THE PROTECTED FREE EXPRESSION RIGHTS OF STUDENT JOURNALISTS AS DESCRIBED IN SECTION 3305.01 OF THE REVISED CODE.

(D) STUDENT EXPRESSION MADE UNDER THE RESPONSIBILITY OF STUDENT EDITORS AS SET FORTH IN DIVISION (A) OF THIS SECTION SHALL NOT BE CONSIDERED AN EXPRESSION OF SCHOOL POLICY. A BOARD OF EDUCATION, SCHOOL DISTRICT, OR SCHOOL OFFICIAL IS NOT LIABLE IN A CIVIL ACTION FOR INJURY, DEATH, OR LOSS TO PERSON OR PROPERTY, OR IN A CRIMINAL ACTION, THAT ALLEGEDLY ARISES FROM A STUDENT PUBLICATION MADE PURSUANT TO DIVISION (A) OF THIS SECTION WITH WHICH THEY HAVE NOT INTERFERED.



## Appendix F — Indiana's Bill

*Be it enacted by the General Assembly of the State of Indiana:*

1. SECTION 1. IC 20-8.1-2.1 IS ADDED TO THE INDIANA CODE AS A  
 2. CHAPTER TO READ AS FOLLOWS:  
 3. Chapter 2.11 Student Exercise of Free Expression  
 4. Sec. 1. This chapter applies to school corporations (as defined in IC 20-5-1-3).  
 5. Sec. 2. As used in this chapter, "official school publication" refers to material:  
 6. (1) produced by students in a journalism, newspaper, yearbook, magazine, or  
 7. writing class or on an extracurricular basis; and  
 8. (2) distributed to the student body  
 9. Sec. 3 The governing body of a school corporation shall do the following:  
 10. (1) Adopt a publications code which must do the following:  
 11. (A) Include reasonable provisions for the time, place, and manner of  
 12. producing an official school publication  
 13. (B) Incorporate the provisions of this chapter.  
 14. (C) Be published and distributed under IC 20-8. 1-5-3(c).  
 15. (2) For each school within the school corporation which has an official school  
 16. publication, an advisor shall be appointed.  
 17. Sec. 4 (a) Except as provided in subsection (b), the student editors of an official school  
 18. publication are responsible for assigning and editing the news, editorial, and  
 19. feature content of the publication.  
 20. (b) For each school within the school corporation which has an official school  
 21. publication, the student publications advisor shall supervise the production of  
 22. the student staff to maintain the following:  
 23. (1) Professional standards of English and journalism.  
 24. (2) The provisions of this chapter.  
 1. Sec. 5. (a) Except as provided in subsection (b), students may exercise freedom of  
 2. expression, including the following:  
 3. (1) The use of student bulletin boards  
 4. (2) The wearing of buttons, badges and other insignia.  
 5. (3) Exercising the right of expression in an official school publication.  
 6. This right applies whether or not the publication or other means of expression  
 7. is supported financially by the school or by the use of school facilities.  
 8. (b) Expression that:  
 9. (1) is obscene, libelous, or constitutes an unwarranted invasion of privacy  
 10. of an individual  
 11. (2) incites students, creating a clear and present danger of:  
 12. (A) the commission of unlawful acts on school premises;  
 13. (B) the violation of lawful school regulations  
 14. (C) the material and substantial disruption of the orderly  
 15. operation the school;  
 16. is not protected.  
 17. Sec. 6. Material prepared for an official school publication may not be withheld  
 18. from publication unless the following conditions exist:  
 19. (1) The material is not protected under section 5 (b) of this chapter.  
 20. (2) A decision to withhold must be made at least twenty-four (24) hours before  
 21. the publication is printed.  
 22. Sec. 7. No expression made by the students in the exercise of free expression rights  
 23. shall be deemed to be an expression of school policy, and no school officials shall be  
 24. held responsible in any civil or criminal action for any expression made or  
 25. published by students, provided the school officials have not interfered with the  
 26. content decision of the students.

Appendix G — Michigan's Bill

A Bill to amend Act No. 451 of the Public Acts of 1976,  
entitled as amended

"The school code of 1976,"

as amended, being sections 380.1 to 380.1852 of the Michigan  
Compiled Laws, by adding section 1191.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1 Section 1. Act No. 451 of the Public Acts of 1976, as  
2 amended, being sections 380.1 to 380.1852 of the Michigan  
3 Compiled Laws, is amended by adding section 1191 to read as  
4 follows:

5 SEC. 1191. (1) SUBJECT TO THE BALANCE OF THIS SECTION, A  
6 PUPIL IN A PUBLIC SCHOOL HAS THE RIGHT TO EXERCISE FREEDOM OF  
7 SPEECH AND FREEDOM OF THE PRESS WHILE IN ATTENDANCE AT SCHOOL OR  
8 SCHOOL-RELATED FUNCTIONS. THOSE RIGHTS INCLUDE, BUT ARE NOT  
9 LIMITED TO, ALL OF THE FOLLOWING FORMS OF EXPRESSION, WHETHER OR

Appendix G — Michigan's Bill Continued

1 NOT THE FORM OF EXPRESSION IS FINANCIALLY SUPPORTED BY THE  
2 SCHOOL, INVOLVES USE OF SCHOOL FACILITIES, OR IS PRODUCED IN CON-  
3 JUNCTION WITH A COURSE:

4 (A) USE OF BULLETIN BOARDS.

5 (B) DISTRIBUTION OF PRINTED MATERIALS OR PETITIONS, OR  
6 BOTH.

7 (C) WEARING OF BUTTONS, BADGES, OR OTHER INSIGNIA.

8 (D) PERFORMANCE OF THEATRICAL OR MUSICAL EVENTS, OR BOTH.

9 (E) PUBLICATION OF EXPRESSION IN SCHOOL-SPONSORED PUBLICA-  
10 TIONS OR OTHER PUBLICATIONS MADE AVAILABLE TO STUDENTS.

11 (2) A PUPIL SHALL NOT EXPRESS, PUBLISH, OR DISTRIBUTE MATE-  
12 RIAL THAT CONSTITUTES 1 OR MORE OF THE FOLLOWING:

13 (A) IS OBSCENE, UNDER STATE LAW, TO MINORS.

14 (B) IS DEFAMATORY UNDER STATE LAW.

15 (C) SO INCITES PUPILS AS TO CREATE A CLEAR AND PRESENT  
16 DANGER OF THE COMMISSION OF UNLAWFUL ACTS ON SCHOOL PREMISES OR  
17 THE VIOLATION OF LAWFUL SCHOOL REGULATIONS, OR TO CAUSE SCHOOL  
18 ADMINISTRATORS TO REASONABLY BELIEVE THERE IS A CLEAR AND PRESENT  
19 DANGER OF A MATERIAL AND SUBSTANTIAL DISRUPTION OF THE ORDERLY  
20 OPERATION OF THE SCHOOL, BASED ON SPECIFIC FACTS SUCH AS PAST  
21 EXPERIENCE IN THE SCHOOL AND EVENTS INFLUENCING PUPIL BEHAVIOR AT  
22 THE TIME THE EXPRESSION IS MADE AND NOT ON UNDIFFERENTIATED FEAR  
23 OR APPREHENSION.

24 (3) IF A SCHOOL SPONSORS A PUBLICATION THAT IS PUBLISHED BY  
25 PUPILS, THE PUPILS CONSTITUTING THE EDITORIAL STAFF ARE RESPONSI-  
26 BLE FOR DETERMINING THE NEWS, OPINION, AND ADVERTISING CONTENT OF  
27 THE PUBLICATION. THERE SHALL BE A FACULTY ADVISER FOR EACH

## Appendix G — Michigan's Bill Continued

1 PUBLICATION, WHO SHALL SUPERVISE THE PRODUCTION OF THE  
2 PUBLICATION AND TEACH PROFESSIONAL STANDARDS OF ENGLISH AND JOUR-  
3 NALISM TO THE PUPILS INVOLVED IN THE PUBLICATION. A SCHOOL  
4 ADMINISTRATOR, SCHOOL DISTRICT, OR SCHOOL BOARD SHALL NOT DIS-  
5 CHARGE, TRANSFER, OR REMOVE FROM HIS OR HER POSITION A FACULTY  
6 ADVISER FOR REFUSING TO SUPPRESS OR INTERFERE WITH THE FREE  
7 EXPRESSION RIGHTS SPECIFIED IN THIS SECTION OR IN OTHER LAW.

8 (4) A SCHOOL ADMINISTRATOR, SCHOOL DISTRICT, OR SCHOOL BO  
9 SHALL NOT SUBJECT A PUBLICATION PRODUCED BY PUPILS, WHETHER OR  
10 NOT THE PUBLICATION IS SPONSORED OR ENDORSED BY THE SCHOOL, TO  
11 PRIOR REVIEW.

12 (5) AN EXPRESSION MADE BY A PUPIL EXERCISING HIS OR HER FREE  
13 SPEECH OR FREE PRESS RIGHTS IS NOT AN EXPRESSION OF SCHOOL  
14 POLICY, AND A SCHOOL BOARD, SCHOOL DISTRICT, SCHOOL BOARD MEMBER,  
15 OR SCHOOL ADMINISTRATOR IS NOT LIABLE IN ANY CIVIL OR CRIMINAL  
16 ACTION FOR ANY EXPRESSION MADE OR PUBLISHED BY PUPILS UNLESS THE  
17 SCHOOL BOARD, SCHOOL DISTRICT, SCHOOL BOARD MEMBER, OR SCHOOL  
18 ADMINISTRATOR HAS ALTERED OR INTERFERED WITH THE CONTENT OF THE  
19 PUPIL EXPRESSION.

20 (6) THE BOARD OF EACH SCHOOL DISTRICT SHALL MAKE AND ENFORCE  
21 SUITABLE REGULATIONS ESTABLISHING A WRITTEN STUDENT FREE EXPRES-  
22 SION POLICY THAT IS CONSISTENT WITH THIS SECTION. THE POLICY MAY  
23 INCLUDE, BUT IS NOT LIMITED TO, REASONABLE PROVISIONS FOR REGU-  
24 LATING THE TIME, PLACE, AND MANNER OF EXPRESSION BY PUPILS AND A  
25 COPY SHALL BE DISTRIBUTED TO EACH PUPIL AT THE BEGINNING OF EACH  
26 SCHOOL YEAR.

Appendix G — Michigan's Bill Continued

1           (7) A PUPIL, A PARENT OR GUARDIAN ON BEHALF OF A PUPIL, OR A  
2 FACULTY ADVISER MAY BRING AN APPROPRIATE ACTION FOR INJUNCTIVE OR  
3 DECLARATORY RELIEF IN THE CIRCUIT COURT IN A COUNTY IN WHICH THE  
4 SCHOOL DISTRICT IS LOCATED TO ENFORCE THIS SECTION.

## Appendix H — Montana's Bill

4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR FREEDOM  
5 OF EXPRESSION BY STUDENTS; PROVIDING EXCEPTIONS; PROHIBITING  
6 PRIOR REVIEW OR RESTRAINT; PROHIBITING THE FIRING,  
7 TRANSFERRING, OR REMOVAL OF AN ADVISER FOR REFUSAL TO  
8 SUPPRESS PROTECTED STUDENT RIGHTS; PROVIDING IMMUNITY FROM  
9 LIABILITY FOR A SCHOOL OFFICIAL OR SCHOOL DISTRICT;  
10 REQUIRING THE BOARD OF TRUSTEES OF A SCHOOL DISTRICT TO  
11 ADOPT ADMINISTRATIVE RULES ESTABLISHING A FREEDOM OF  
12 EXPRESSION POLICY; AND PROVIDING FOR INJUNCTIVE OR  
13 DECLARATORY RELIEF."

14

15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

16 NEW SECTION. Section 1. Freedom of expression for  
17 students -- exceptions. (1) Except as provided in subsection  
18 (2), a student enrolled in a public school has the right to  
19 exercise freedom of speech and freedom of the press,  
20 including but not limited to the:

- 21 (a) use of bulletin boards;  
22 (b) distribution of printed materials or petitions;  
23 (c) wearing of buttons, badges, and other insignia;  
24 (d) performance of theatrical and musical events; and  
25 (e) publication of news, opinion, or advertising or

## Appendix H — Montana's Bill Continued

1 feature content in school-sponsored publications, regardless  
2 of whether the publications or other means of expression are  
3 supported financially by the school or through the use of  
4 school facilities or whether the publications or expressions  
5 are produced in conjunction with a class.

6 (2) A student may not express, publish, or distribute  
7 material that:

8 (a) is obscene to minors as provided under 45-8-201 or  
9 45-8-206;

10 (b) is libelous or slanderous as provided under  
11 27-1-802 or 27-1-803; or

12 (c) creates a clear and present danger of inciting a  
13 student to commit an unlawful act on school premises,  
14 violate a school regulation, or cause a material and  
15 substantial disruption of the orderly operation of the  
16 school.

17 NEW SECTION. Section 2. Prior review or restraint  
18 prohibited -- adviser protected. (1) A school administrator  
19 may review material for compliance with [section 1] but may  
20 not exercise prior restraint of material prepared for  
21 publication except when the material violates the provisions  
22 of [section 1]. A school official shall provide  
23 justification without delay prior to limiting student  
24 expression.

25 (2) Subject to the limitations provided in [section 1],

## Appendix H — Montana's Bill Continued

1 a student editor of a school-sponsored publication is  
2 responsible for determining the news, opinion, and  
3 advertising and feature content of his publication.

4 (3) A journalism adviser or an adviser of student  
5 publications within each school shall supervise the  
6 production of each school-sponsored publication and teach  
7 professional standards of English and journalism to the  
8 student staff. A journalism adviser may not be fired,  
9 transferred, or removed from his position for refusing to  
10 suppress the protected free expression rights of a student  
11 journalist.

12 NEW SECTION. Section 3. Immunity from liability --  
13 adoption of policy required. (1) An expression made by a  
14 student in the exercise of free speech or free press  
15 pursuant to [section 1] is not considered an expression of  
16 school policy, and a school official or a school district  
17 may not be held liable in a civil or criminal action for an  
18 expression made or published by a student unless the school  
19 official has interfered with or altered the content of the  
20 student expression.

21 (2) The board of trustees of a school district shall  
22 adopt regulations establishing a written policy on student  
23 freedom of expression that includes reasonable provisions  
24 for the time, place, and manner of student expression and  
25 that is distributed to all students at the beginning of the



Appendix H — Montana's Bill Continued

1 school year.

2 NEW SECTION. Section 4. Injunctive or declaratory  
3 relief. A student, individually or through a parent or  
4 guardian, or a publications adviser may seek injunctive or  
5 declaratory relief to enforce the rights provided in  
6 [sections 1 through 3].

## Appendix I — Kansas's Bill

The Student Freedom of Expression Act passed the Kansas House of Representatives, 99-26, in the 1989 legislative session. Our work on the bill in the Senate continues with the 1990 session, which begins in early January.

Words struck were deleted by the House Education Committee before the House vote, and boldface words were added by the committee.

20 AN ACT enacting the student freedom of expression act.

21 *Be it enacted by the Legislature of the State of Kansas:*

22 Section 1. This act shall be known and may be cited as the  
23 student freedom of expression act.

24 Sec. 2. As used in this act:

25 (a) "Student" means any person who is regularly enrolled  
26 in and attending any of the grades nine through 12 maintained  
27 by a school district.

28 (b) (a) "School district" means any public school district organized  
29 and operating under the laws of this state.

30 (c) (b) "Student publications" means any matter published or  
31 otherwise expressed by students in journalism, newspaper, yearbook,  
32 or writing classes, and distributed to the student body either free  
33 of charge or for a fee and which is prepared under the direction  
34 of a certificated employee.

35 Sec. 3. The liberty of the press in student publications, whether  
36 or not such publications are supported financially by a school  
37 district or by use of school district facilities, shall be inviolate,  
38 and all students may freely speak, write or publish their senti-  
39 ments on all subjects, being responsible for the abuse of such  
40 rights. Abuse of the rights conferred on students by the pro-  
41 visions of this act shall include publication shall be protected.  
42 Material shall not be suppressed solely because it involves political  
43 or controversial subject matter. Publication or other expression of  
44 matter that is libelous, slanderous or obscene, or matter that com-  
45 mands, requests, induces, encourages, commends or promotes con-  
46 duct that is defined by law as a crime or conduct that constitutes a  
47 ground or grounds for the suspension or expulsion of students as  
48 enumerated in K.S.A. 72-8901, and amendments thereto, or which  
49 creates a material or substantial disruption of the normal school  
50 activity is not protected by this act. No board of education shall  
51 adopt or approve any policy, rule or regulation that abridges, violates,  
52 or is in derogation of the rights of liberty of the press in student  
53 publications or the rights of students to freely express their senti-  
54 ments on any subject, to the extent that such rights are granted  
55 by this act. No publication or other expression of matter by students  
56 in the exercise of rights under this act shall be deemed to be a  
57 publication or an expression of school district policy. No member of  
58 the board of education of a school district and no employee thereof  
59 shall be held responsible in any civil or criminal action for any  
60 publication or other expression of matter by students in the exercise  
61 of rights under this act.

62 Sec. 4. This act shall take effect and be in force from and after  
63 its publication in the statute book.

Appendix J — New Jersey's Bill

**AN ACT concerning freedom of speech in public schools and supplementing Title 18A of the New Jersey Statutes.**

**BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:**

1. a. Public school pupils shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges and other insignia and the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or by use of school facilities, except that expression which is obscene, libelous or slanderous shall be prohibited. Also prohibited shall be speech which materially disrupts classwork, involves substantial disorder or invades the rights of others.

b. Each board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place and manner of conducting these activities within its respective jurisdiction.

c. Student editors of official school publications shall be responsible for assigning and editing the news, editorials and feature contents of these publications subject to the limitations of this act; provided, however, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism subject to the limitations of this act.

## Appendix J — New Jersey's Bill Continued

d. "Official school publications" means material produced by students in journalism, newspaper, yearbook activities or writing classes and distributed to the student body.

e. Nothing in this act shall prohibit or prevent any board of education from adopting otherwise valid rules and regulations relating to oral communications by students upon the premises of each school.

2. The State Board of Education shall promulgate, pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.), rules and regulations necessary to implement the provisions of the act.

3. This act shall take effect immediately.

## STATEMENT

It has long been the rule of law that "students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Independent Community School Dist., 89 S. Ct. 733 (1969). However, the United States Supreme Court recently held that a public school may exercise editorial control over the style and contents of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate educational concerns. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988).

The purpose of this bill, which is based on a similar California statute, is to give greater protection of individual rights to New Jersey's public school students. The freedom of speech guaranteed by this bill includes, but is not limited to, the use of bulletin boards, the distribution of printed materials or petitions, wearing buttons, badges and other insignia and expression in official publications. Students will be responsible for assigning and editing the publications and their advisers will be responsible for supervising the student staff, maintaining professional standards of English.

School officials will be able to prohibit student speech which is obscene, defamatory or materially disrupts classwork, involves substantial disorder or invades the rights of others.

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