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#### STUDENT PUBLICATIONS 2004-2005: POLICY ISSUES

##### Overview

For more than thirty years, local public school boards and school administrators have been governed by the following principle: “students do not shed their First Amendment expression rights at the schoolhouse gate.” Tinker v Des Moines (1969) However, as the United States Supreme Court has clearly stated, the First Amendment rights of public school students “are not automatically coextensive with the rights of adults in other settings.” Bethel School District v Fraser (1986)

The past three decades have produced numerous student expression issues. More often than not, the precise language and implementation of school system policies, rules, and procedures governing student expression have found their way into a court of law. While past commentaries have focused on issues associated with student attire and verbal speech, this month’s edition will discuss policy issues involving *student publications* (i.e., student freedom of the press).

*Student Publications and School System Control.* Student “freedom of the press-type cases” involve two categories of publications, *school-sponsored* and *non-school-sponsored*. Vacca and Boshier (2003) A distinction can be made between the two types. *School-sponsored publications* are those officially sanctioned and recognized by school authorities (i.e., those that bear the school system’s “official imprimatur”), including but not limited to those directly related to the curriculum. For example, the yearbook and the school newspaper fit this definition. *Non-school publications* (sometimes referred to as “underground publications”) are those that are (a) not sponsored or supported by school authorities and (b) produced off-school grounds.

*Student Freedom of the Press.* As one source reminds us, “[t]he First Amendment gives very little protection to student freedom of the press in school-sponsored, curricular publications.” Fischer, Schimmel, and Kelly (2000) Because the public forum analysis does not apply, and school officials may be held directly accountable for what is said or otherwise depicted in a *school-sponsored publication*, they exercise more control. For example, requiring students to submit written material for review of the content by a teacher and or the principal prior to publication is not necessarily unreasonable or unconstitutional, per se, especially where controversial subjects are involved. DeNooyer v Livonia (E.D. Mich. 1992) However, as Alexander and Alexander caution, “If a school policy requires that students submit materials before distribution, then strong due process procedures must be in place....” Alexander and Alexander (2005)

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Regarding *non-school sponsored publications*, school system control is much less. Where a student newspaper or other publication is non-school sponsored and is intended as a vehicle for student expression, is neither sold nor distributed during instructional hours, and is not a part of the curriculum, school officials must proceed with caution when reacting to the content of such publications. Because the *public forum analysis* applies, courts have consistently held that school authorities do not have the authority to regulate content (generally regarded as *personal speech*), but legally can refuse to grant permission to possess, sell, distribute, or use non-school publications on school grounds.

It must be clarified, however, that where the content of student publications (both school-sponsored and non-school sponsored) advocates something harmful and/or illegal, the authority regulatory authority of school officials increases. In such cases it is necessary to proceed with all deliberate speed. Boshier, Kaminski, and Vacca (2003)

*Time, Place, Manner, and Use.* In situations where students are granted permission to bring non-school publications on school grounds (*i.e.*, a public forum has been opened), school authorities have the authority to regulate time, place, manner of distribution, and use of non-school publications. Such regulations are intended to keep the learning environment safe and free of disruption. Eisner v Stamford School Board (2nd Cir. 1971) Where school officials grant permission to one student for distribution of a non-school sponsored publication on school grounds, the school's forum may be characterized as one open to indiscriminate use. If this happens, the school's forum is open to similar requests from other students. Good News Club v School District (8th Cir. 1994)

### **Emerging Issues and Case Law**

Whatever the issue concerning local school board policies governing student publications (both school-sponsored and non-school sponsored), the courts have made it clear that three features must be present to survive judicial scrutiny. First, the language of the policies must be clear and understandable (*i.e.*, neither overly broad nor vague). Second, the types of prohibited material, objectionable language, and forbidden subjects must be specifically spelled out. Third, procedural safeguards must be in place to implement the policies, including: (a) the person (by position [*e.g.*, school principal] and not by name) responsible for making decisions regarding publications, (b) the criteria used to evaluate the appropriateness of the material in question, and (c) an expeditious review process. As stated above, whether or not a *public forum* has been established is another judicial concern.

In 1977, the United States Court of Appeals for the Fourth Circuit heard a Virginia case involving a high school principal's decision to not allow students to publish portions of a student composed article in the school newspaper. The article was entitled "Sexually Active Students Fail to Use Contraceptives." While the principal was willing to publish data collected from a survey of the high school's student body regarding their attitudes toward birth control, she was not willing to have a discussion of contraceptives included. The student editors wanted the whole article published. In affirming a lower court's ruling in favor of the students, the appellate court stated that under the school board policy covering student publications, the school newspaper had, because of it past use, developed into a "public forum" for student opinions. As such, the school newspaper was no longer an outgrowth of the school curriculum where school authorities can regulate content. Gambino v Fairfax County School Board (4th Cir. 1977)

That same year, the Second Circuit held in a similar case that school officials need only show "a reasonable basis to justify restraints on school publications distributed on school property." More specifically, the court opined that reason to believe that "harmful consequences might result to students" serves as a reasonable basis

to disapprove of a student-initiated sex survey being published in the school newspaper. The court also drew a distinction between grade levels when judging the appropriateness of published material. Trachtman v Anker (2nd Cir. 1977)

In matters involving student-initiated non-school sponsored publications, school officials must establish a connection between a specific publication and a need to: (1) maintain discipline and control on school grounds, or (2) protect the learning environment from harmful activity. Where students directly disregard or show disobedience to the school system's decision, disciplinary action may be taken against student violators. Thomas v School Board (2nd Cir. 1979)

In 1980, the Fourth Circuit held that public school administrators have the authority to ban the distribution of non-school publications on school grounds. In this case the actions of school administrators were based on their belief that the contents of the publication would endanger the health and safety of the students. Williams v Spencer (4th Cir. 1980)

In 1981, a United States District Court heard a case involving students who had been suspended from school for distributing (in school hallways) a leaflet advocating a student walkout. In ruling for the school system, the court was convinced that because there had been a prior walkout of students the school system's actions regarding the leaflet distribution were justified. In the court's opinion, a nexus was established between the distribution of leaflets and possible material disruption of school activities. Thus, the disciplinary measures taken against the students were appropriate. Dodd v Rambis (S.D. Ind. 1981)

*The Supreme Court Speaks: Hazelwood v Kuhlmeier.* In 1988, the United States Supreme Court decided a case involving a school-sponsored newspaper. More specifically, the dispute in the case grew out of a public high school principal's decision to disallow the publication of two student-written articles in an edition of the paper. The principal's decision was based on his reactions to the content of each article.

Subsequently, students filed suit in a federal district court claiming that their First Amendment rights had been violated by the principal's actions. The court denied relief and opined that public school officials may impose restraints on student speech in activities that are an integral part of the school's educational function (*i.e.*, a part of the curriculum). Kuhlmeier v Hazelwood (E.D. Mo. 1985) On appeal to the Eighth Circuit, however, the district court's decision was reversed. In the appellate court's opinion, while the school newspaper in question was a part of the school curriculum, it had, because of past use, become a *public forum* "intended to be operated as a conduit for student viewpoint."

Applying the Tinker standard the court held that school officials could not censor the content of articles except to "avoid material and substantial interference with school work or discipline...or the rights of others." Kuhlmeier v Hazelwood (8th Cir. 1986)

Ultimately, the United States Supreme Court reversed the Eighth Circuit. In reaching a decision, the high court drew a distinction between *symbolic speech* (protected by Tinker) and "speech sponsored by the school and disseminated under its auspicious." In this case, said the majority, the school principal acted in response to "reasonable pedagogical concerns" regarding the possible inclusion of the two articles in a "school-sponsored and school disseminated newspaper." Thus, his exercise of editorial control over the content of the student-composed articles did not offend the First Amendment. Hazelwood v Kuhlmeier (1988)

It must be emphasized that Hazelwood did not grant public school administrators an uncontrolled freedom to censor school-sponsored publications as they please. As Fossey and LeBlanc remind us, “a student’s viewpoint should not be disregarded simply because it is unpopular or makes others feel uncomfortable.” Fossey and LeBlanc (2004)

*Students and Technology: Post-Hazelwood.* One rapidly emerging issue area involving student publications does not deal with newspapers and books. The emerging area concerns the use of computers and other technologies to produce and disseminate student-created endeavors. Should public school officials discipline a student for something he/she has created and disseminated on a Web site? While there has not been enough solid case law to form a definitive answer to the question, the courts have generally held that material produced by students at home, on their own time, using their own computers, that neither substantially disrupts the school’s learning environment nor constitutes an actual threat of harm, and does not interfere with the rights of others is protected under the First Amendment. Killion v Franklin Regional (W.D. Pa. 2001)

In 1998, the Eighth Circuit heard the appeal of a student who had been disciplined for encouraging other students to “hack” into the school’s computer. In upholding the disciplinary actions the court was convinced that the discipline was based on a reasonable forecast of disruption of the school environment. Boucher v School Board (7th Cir. 1998)

### **Policy Implications**

As the above discussion demonstrates, there are many policy implications involving student publications. What follow are some suggestions for consideration as local school boards examine existing policies and consider the creation and implementation of new policies. Policies must make it clear that the school board:

- Recognizes and respects the First Amendment expression rights of all students and intends to balance these rights with the prerogatives of school officials, administrators, and teachers to establish and maintain a safe and disruption-free learning environment.
- Is vested with and intends to carry out legal authority to approve and control the sale, distribution, possession, and use of all school-sponsored publications (including student- initiated publications).
- Is vested with and intends to carry out legal authority to approve and control the sale, distribution, possession, and use of all non-school sponsored publications (including student-initiated publications) brought onto school grounds and/or used in the school buildings of the school district.
- Prohibits and will not tolerate the sale, distribution, possession, and use of any school-sponsored or non-school sponsored publication that advocates or in anyway promotes illegal activities; or includes and discusses harmful behaviors; or advocates school disruption; or constitutes threats to staff and/or students; or contains lewd, profane, and obscene language.
- Requires and enforces a process of prior review and approval of all publications (school-sponsored and non-school sponsored) present on school property.

To successfully implement and carry out the school system’s policies on student publications, the board must: (1) designate persons by official title (not by the person’s name) who will be responsible for screening and otherwise monitoring student school-sponsored and non-school sponsored publications, and (2) specify criteria upon which decisions will be made. Finally, all decisions involving student publications must be based on *reasonable pedagogical concerns* and made without delay.

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