

# HOUSE BILL REPORT

## ESHB 1307

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**As Passed House:**

March 12, 2007

**Title:** An act relating to freedom of student press and speech.

**Brief Description:** Regarding freedom of speech and press for high school and college students.

**Sponsors:** By House Committee on Judiciary (originally sponsored by Representatives Upthegrove, Lantz, Williams, O'Brien, Sells, McCoy, Appleton, Darneille, Lovick, Dunshee, Takko, Pedersen, Simpson, Dickerson, Moeller, McIntire, Schual-Berke, Quall, Springer and Morrell).

**Brief History:**

**Committee Activity:**

Judiciary: 1/26/07, 1/31/07 [DPS].

**Floor Activity:**

Passed House: 3/12/07, 58-37.

**Brief Summary of Engrossed Substitute Bill**

- Provides that high school students have the right to freedom of expression in school-sponsored media and limits the school's ability to control the content of student speech, except in certain circumstances.
- Provides that public college and university student media are public forums for student expression and are not subject to prior review.
- Provides a cause of action for injunctive or declaratory relief for a violation of the act.
- Immunizes public high schools, colleges, and universities from liability for student expression in school-sponsored media.

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**HOUSE COMMITTEE ON JUDICIARY**

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Lantz, Chair; Goodman, Vice Chair; Flannigan, Kirby, Moeller, Pedersen and Williams.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern and Ross.

**Staff:** Edie Adams (786-7180).

**Background:**

It has long been recognized that students retain constitutional rights to freedom of expression in public schools. In the seminal 1969 case, *Tinker v. Des Moines Independent School District*, the Supreme Court stated that neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The *Tinker* court also recognized the duty and authority of schools to prescribe and control conduct in the schools. The Court held that a school may not regulate student expression unless the expression would cause a material and substantial interference with the operation of the school or invade the rights of others.

Subsequent United States Supreme Court cases have reaffirmed the basic notion of *Tinker* that students retain the constitutional right of freedom of expression, while also recognizing that students' First Amendment rights are not automatically coextensive with those of adults and must be evaluated in light of the special characteristics of the school setting.

In 1988, the Supreme Court specifically addressed the issue of the extent to which a public high school could regulate expression in a high school newspaper. In *Hazelwood School District v. Kuhlmeier*, the Court held that school-sponsored student expression that occurs in a non-public forum may be regulated as long as the regulations are "reasonably related to a legitimate pedagogical concern." In determining whether the newspaper at issue was a public or limited public forum, rather than a non-public forum, the Court stated that public schools generally are not open to the public for free speech. Therefore, a school may be considered a public or limited public forum only if the school has opened the facilities, by practice or policy, for use by the general public or some segment of the public, such as student organizations.

The Supreme Court in *Hazelwood* expressly refrained from deciding whether this standard applies to school-sponsored expressive activities at the college and university level. The First Circuit and Sixth Circuit Court of Appeals have found that the *Hazelwood* standard does not apply to school-sponsored student expression at colleges and universities. However, in 2005, the Seventh Circuit Court of Appeals held in *Hosty v. Governors State University* that the analysis in *Hazelwood* does apply to colleges and universities. Thus, *Hosty* provides that if the student expression occurs in a non-public forum, a college or university may exercise control over the content of the expression based on reasonable pedagogical concerns. Under *Hosty*, student media may be considered a public forum or limited public forum if the school, through its policies or practice, has recognized the medium as a designated public forum where students determine the editorial content of the medium.

Six states have adopted laws providing some form of protection to students' free speech rights: Arkansas, California, Colorado, Iowa, Kansas, and Massachusetts. Washington administrative rules generally state that public elementary and secondary students have the constitutional right to freedom of speech and press and that a school district may not limit these rights without good and sufficient cause.

Washington's four-year institutions have express policies providing editorial freedom for their student papers. The State Board for Community and Technical Colleges' regulations require each community college district to adopt rules relating to students' rights and responsibilities regarding freedom of expression and freedom of the press. Some colleges have adopted regulations that expressly provide for freedom of expression in student publications. Others have more general rules that provide that students are free to express their views by orderly means, as long as they don't disrupt the operations of the college.

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### **Summary of Engrossed Substitute Bill:**

Public high school students have the right to exercise freedom of speech and freedom of the press in school-sponsored media. However, students are not authorized to engage in expression that is obscene as to minors; is defamatory; is an invasion of privacy; violates the Federal Communications Act; or creates a clear and present danger of any of the following: (a) commission of unlawful acts on school property; (b) violation of lawful school regulations; or (c) material and substantial disruption of the operation of the school. Each school district that includes a high school must adopt a written student freedom of expression policy that complies with the act.

School-sponsored media at public institutions of higher education are designated public forums for expression by students at the institution. All student media at public institutions of higher education are protected from prior review by school administrators.

"School-sponsored media" means any matter that is prepared, substantially written, published, or broadcast by students, that is distributed or made available to the student body, and that is prepared under the direction of a student media advisor.

Student editors of school-sponsored media in public high schools, colleges, and universities are responsible for determining the content of the media, subject to professional standards of English and journalism taught by the student media adviser. A high school, college, or university may not discipline or terminate a student media advisor for refusing to censor school-sponsored media.

A student of a public high school, college, or university may sue for injunctive or declaratory relief if the school engages in censorship of school-sponsored media or prior review of college or university media. The court may award attorneys' fees to a prevailing party in such an action.

Student expression in school-sponsored media is not the expression of school policy and the school district and school officials may not be held civilly or criminally liable for the student expression unless they have interfered with or altered its content.

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**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:**

(In support) Freedom of the press is a fundamental right that is at the core of democracy and a free society. A recent survey found that 49 percent of high school students agreed with the statement that it is okay for the government to censor the news. This finding is disturbing because a healthy democracy and accountable government depend on informed and engaged citizens.

The First Amendment doesn't say people have freedom of the press unless they are young or unless they are students. The constitution says people have the right to freedom of speech and press. The simple question is: are students people? More and more court decisions are deciding that students aren't people. These cases have left the censorship door wide open with vague standards and unclear language. The result is that a principal who wants to censor a student publication can find a justification for doing so. Students are being denied a part of their democracy and this affects our future leaders of tomorrow.

Censorship does happen in this state for troubling reasons, such as a matter of taste or convenience, or because it would embarrass someone on the faculty or in school administration. Free expression may cause discomfort or embarrassment, but the value of freedom of the press outweighs the administration's desire to avoid uncomfortable situations. School administrators are not the equivalent of editors at private media entities. When an editor of the private media reviews and restricts content, it's editing; when the school as a government entity restricts content, it's censorship.

First Amendment rights for students brings responsibility. Student journalists know they have to earn the credibility and trust of our readers. Having the freedom of an open forum helps students learn that it isn't what we can do, but what we should do. High school should teach students responsibility, but that won't happen if the administration is holding their hands. Prior review is not educationally sound. It only teaches students that someone else will always be there looking over their shoulders and making decisions for them.

Many student publications don't cover controversial topics because of fear of censorship, but these are the very issues that are important to students. This limits the ability of students to think about the world outside. How are students ever going to be able to change the world if they aren't thinking about it?

The opposition to this bill is couched in terms of fear of what students might do wrong if given this freedom. We should think about what they might do right if given this freedom. Where journalism thrives in our state is where the school allows the experienced advisor and well-trained students to exercise their freedom of expression. Free student speech works because the students own their publication, and they get it right because they have their name on it, and they care about it.

The standard developed in the *Hazelwood* case drastically altered the balance between student speech rights and the rights of administrators. That case established the "legitimate pedagogical reason" standard, but it isn't clear what this means. The 2005 *Hosty* decision seeks to impose this unclear standard on colleges and universities. This bill provides a more reasonable and sensible balance to the rights of students and the school's duties.

Under this bill, high schools will still have the right to prior review of student media and nothing in this bill prevents a media adviser from providing advice, guidance, direction, and oversight of student journalists. This bill simply states that the final decision rests with the student editor, not the school administration. Six states already have laws on the books that protect student speech, and there have been no problems or litigation in those states.

(Opposed) All citizens do not have the right to uninhibited discussion of issues in all situations.

Public school newspapers are overseen by school administrators and teachers. These administrators and teachers are given the responsibility to advise, guide, and direct students and determine what will or won't be appropriate and civil in the school context. If you take away the ability of administrators to provide that guidance and direction, they won't have the ability to do the very thing you have hired them to do. School administrators have to be able to use their judgment in exercising the authority and responsibility you have given them.

There is no need for the passage of this bill. It is a solution in search of a problem. The *Hazelwood* and *Tinker* cases provide sufficient protections for student speech. Student media are publicly funded and so a different level of scrutiny applies to student media than to private media. Student media are created by the school with public funds. Journalism is a class and should retain administrative review. The administration must be allowed to have the same standards of review as editors in the private media.

School principals don't want to stifle student speech but rather make it accurate and responsible. The bill places all the responsibility on the journalism adviser, but what if a small school can't find or afford a qualified media adviser? This could result in schools not providing journalism programs and students won't have an opportunity to participate in a school newspaper. The bill will be counterproductive and chilling on student free speech rights.

The provisions of the bill relating to high school student speech should be removed. If you pass this bill it will only lead to more litigation because of the very permissive language in the bill.

**Persons Testifying:** (In support) Logan Aimone, Journalism Teacher, Wenatchee High School; Paul Balcerak, Central Washington University Student; Brian Schraum, Washington State University Journalism Student; Michael Parks, Washington Community College Journalism Association; Leah Pope and, Mount Lake Terrace High School Student; Mike Hiestand, Zenger Consulting; Bill Will, Washington Newspaper Publishers Association; Ken Bunting, Associate Publisher, Seattle Post-Intelligencer; Steve Matson, Journalism Education Association; Summer Yates, Jagwire News Magazine; Matt Anderson and Ashley Thompson, Vanguard Editors; Michele Earl-Hubbard, Davis Wright Tremaine; Emily Rome, Charles Wright Academy; Vincent DeMiero, Mount Lake Terrace High School; Amanda Meyer, Opinions Editor, Walla Walla High School Journal; Bailey Stober, Legislative Youth Advisory Council; Jeffrey Nusser; John Knowlton, Pacific Northwest Association of Journalism Educators; and Greg Overstreet, Attorney General's Office.

(Opposed) Barbara Mertens, Washington Association of School Administrators; Jerry Bender, Association of Washington School Principals; and Arcella Hall, Principal, Grandview High School.

**Persons Signed In To Testify But Not Testifying:** None.