

SENATE BILL REPORT

SB 6233

As of February 2, 2016

Title: An act relating to the freedom of expression rights of students at public schools and institutions of higher education.

Brief Description: Concerning freedom of expression rights of students at public schools and institutions of higher education.

Sponsors: Senators Fain, Liias, Rivers, Rolfes, Litzow, Billig, Carlyle and Mullet.

Brief History:

Committee Activity: Early Learning & K-12 Education: 1/21/16.

SENATE COMMITTEE ON EARLY LEARNING & K-12 EDUCATION

Staff: Alia Kennedy (786-7405)

Background: The courts have recognized that students retain their constitutional rights to freedom of expression in public schools. In the 1969 case, *Tinker v. Des Moines Independent Community School District*, the Supreme Court stated that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The court also recognized the duty and authority of schools to prescribe and control conduct in 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.

In 1988, the Supreme Court 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 nonpublic 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 nonpublic 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 its 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

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.

First 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 used in *Hazelwood* does apply to colleges and universities. Thus, *Hosty* provides that if the student expression occurs in a nonpublic 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 practices, has recognized the medium as a designated public forum where students determine the editorial content of the medium.

Washington's institutions of higher education currently 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 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 do not disrupt the operations of the college.

Summary of Bill: Students at public high schools and institutions of higher education have the right to exercise freedom of speech and of the press in school-sponsored media. However, students are not allowed to engage in expression that is libelous or slanderous; constitutes an unwarranted invasion of privacy; violates the Federal Communications Act or any rule or regulation of the Federal Communications Commission; or incites students to create a clear and present danger of the following: (1) commission of unlawful acts on school premises; (2) violation of lawful school regulations; or (3) material and substantial disruption of the operation of the school.

Student editors of school-sponsored media in public institutions of higher education are responsible for determining the content of the media, subject to professional standards of English and journalism taught by the student media adviser. A student media adviser may not be terminated, transferred, removed, or otherwise disciplined for refusing to censor school-sponsored media. School-sponsored media at public institutions of higher education are public forums for expression by student journalists at the institution. Student media are not subject to prior review by school officials.

School-sponsored media is not the expression of school policy. Neither school officials nor the governing board of a public institution of higher education may be held responsible in a civil or criminal action for expression made or published by students in a school-sponsored media, unless they have interfered with or altered its content.

The only relief that a court may award pursuant to a civil cause of action commenced by a student is injunctive and declaratory relief. If attorney's fees are awarded in the civil cause of action, they must be reasonable fees.

Appropriation: None.

Fiscal Note: Requested on January 18, 2016.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill is modeled after legislation in North Dakota, which is one of nine states with a student freedom-of-expression law. Programs that prepare students to exercise their freedom-of-expression rights are important. This bill encourages students to be more inquisitive. This bill has the potential to make students better journalists and better citizens down the road. Prior restraints limit topics to only those that are acceptable to a higher authority, rather than what is relevant to the audience. Prior review may have good intent but poor consequences. Student journalists are not leaving school with the skills necessary to address topics that are relevant or controversial. Prior review leads to student journalists who are narrow minded, have little passion, and weak vigor. Allowing student journalists to build confidence in their personal judgment abilities prepares them for the workforce. This bill supports media advisors on the front line by preventing them from being punished. This bill is comprehensive by protecting student free speech rights and the privacy rights of the community. This bill raises the standard of protected student speech and aligns with the constitution. This bill holds student editors responsible for the content of their publications by shifting the liability away from the school. Students deserve to have controversial information in a manner that is responsible and multifaceted, and the skills to deliver this information. This bill upholds the American value of freedom of expression. This bill does nothing more than give students back the same free expression rights their parents had prior to 1988.

CON: The school district is the publisher and should have a say over what is published. Principals do not have the time to review newspapers in addition to everything else they have to do.

OTHER: This bill provides a clear foundation for student freedom of expression rights and clarifies issues for schools who may be at risk of lawsuit. This bill protects schools from liability for unauthorized speech but does not specifically include immunity from administrative action, which could be a problem. The bill does not include all relevant sections cited in Supreme Court decisions, such as limits on obscene or unlawful speech. Prior review is necessary insofar as it protects the community.

Persons Testifying: PRO: Senator Fain, prime sponsor; Thomas Kaup, Auburn High School; Diana Kramer; Madison Lucas; Vincent DeMiero, Educator/Adviser; Mike Hiestand, Student Press Law Center; Kylie Charney-Harrington, The Blazer Newspaper.

CON: Jerry Bender, Association of Washington School Principals.

OTHER: Jessica Vavrus, Washington State School Directors' Association.

Persons Signed In To Testify But Not Testifying: No one.