

# HOUSE BILL REPORT

## SSB 5064

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### As Reported by House Committee On: Judiciary

**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:** Senate Committee on Early Learning & K-12 Education (originally sponsored by Senators Fain, Rolfes, Rivers, Pedersen, Ranker, Mullet, Billig, Becker, Braun, King, Darneille, Chase, Carlyle and Palumbo).

#### **Brief History:**

##### **Committee Activity:**

Judiciary: 2/14/18, 2/22/18 [DPA].

#### **Brief Summary of Substitute Bill (As Amended by Committee)**

- Provides that student editors of school-sponsored media are responsible for determining the content of the media and limits a school's ability to control the content of student speech, within certain limitations.
- Protects a student media advisor from disciplinary action for compliance with free expression provisions.
- Provides an appeals process for students at public high schools and a civil cause of action for students at public institutions of higher education who allege a violation of free expression provisions.
- Grants school officials and governing boards immunity from civil or criminal liability resulting from school-sponsored media.
- Requires school districts to adopt a written student freedom of expression policy.

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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:** Do pass as amended. Signed by 7 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Goodman, Hansen, Kirby, Orwall and Valdez.

**Minority Report:** Do not pass. Signed by 6 members: Representatives Rodne, Ranking Minority Member; Graves, Assistant Ranking Minority Member; Haler, Klippert, Muri and Shea.

**Staff:** Ingrid Lewis (786-7289).

### **Background:**

#### Student Expression.

A public school or public institution of higher education may not control the content of student speech, unless the content:

- is libelous or slanderous;
- is an unwarranted invasion of privacy;
- violates federal or state laws, rules, or regulations;
- incites students to violate federal or state laws, rules, or regulations;
- violates school district policy or procedure related to harassment, intimidation, or bullying pursuant to RCW 28A.300.285 or the prohibition on discrimination pursuant to RCW 28A.642.010;
- violates the Federal Communications Act or rules of the Federal Communications Commission; or
- incites other students so as to create a clear and present danger to violate federal or state laws or violate lawful school regulations on school grounds, or is reasonably forecast to cause a material and substantial disruption to the orderly operation of the school.

#### Constitutional Protections for Student Expression.

The First Amendment of the United States (U.S.) Constitution protects student freedom of speech and freedom of the press. The Washington State Constitution provides that every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right. The U.S. Supreme Court (Court) has recognized that the right to freedom of expression applies to students in public schools. In *Tinker v. Des Moines Independent School District*, 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 *Hazelwood School District v. Kuhlmeier*, the Court subsequently narrowed *Tinker*, holding that educators in a public high school setting may exercise editorial control over a school-sponsored newspaper without violating the First Amendment when their actions are reasonably related to legitimate educational concerns. The Court expressly refrained from deciding whether this standard applies to school-sponsored activities at the college and university level, and federal appellate courts have been divided on the issue. The distinction between public and nonpublic forums has been discussed at the appellate level, and courts generally hold that student media may be considered a public forum if the school has a regulation or policy that the paper is open for free expression. In a public forum, the state must show that any regulation on communication is necessary to serve a compelling state

interest and the regulation is narrowly drawn to achieve that end. If the student media is a nonpublic forum, the school may regulate the content based on legitimate educational reasons.

#### Washington Educational Institutions and Schools.

There are no state statutes that require public elementary or secondary schools, or public institutions of higher education, to adopt policies related to student free speech or freedom of the press. However, 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. In addition, 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 policies relating to students' rights and responsibilities regarding freedom of expression and freedom of the press.

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#### **Summary of Bill:**

##### Student Expression.

A public school or public institution of higher education may not control the content of student speech, unless the content:

- is libelous or slanderous;
- is an unwarranted invasion of privacy;
- violates the Federal Communications Act or rules of the Federal Communications Commission; or
- incites other students to violate federal or state laws or violate school regulations, or is reasonably forecast to cause a material and substantial disruption to the orderly operation of the school.

"School-sponsored media" means any material that is prepared, written, published, or broadcast by student journalists that is distributed or made available to members of the student body. Student-sponsored media is prepared under the direction of a student media advisor.

Student editors of school-sponsored media are responsible for determining the news, opinion, feature, and advertising content of the media. A student media advisor may teach student journalists professional standards of English and journalism and may not be terminated or otherwise disciplined for refusing to censor school-sponsored media.

##### Institutions of Higher Education.

Students of public institutions of higher education have the right to exercise freedom of speech and freedom of the press in school-sponsored media. School-sponsored media produced at institutions of higher education are designated public forums and are not subject to prior review by school officials.

##### Common Schools (Kindergarten through Grade 12).

Each school district that includes a public high school must adopt a policy relating to written student freedom of expression which may include reasonable provisions for the time, place, and manner of student expression. Political expression by public high school students in school-sponsored media is not considered a use of public funds for political purposes.

Remedies.

A student of a public high school may appeal an alleged violation of free expression provisions to the local school board. A student of a public institution of higher education may file a cause of action for injunctive or declaratory relief for a violation of free expression provisions by the institution. The court may award reasonable attorney's fees to a prevailing plaintiff.

Liability.

An official or governing board of a public school or institution of higher education is not responsible for expressions made in school-sponsored media and may not be held civilly or criminally liable for content unless the school official or governing board has interfered with or altered the content.

**Amended Bill Compared to Substitute Bill:**

For common schools, the following are prohibited:

- expression that violates or incites students to violate federal or state laws, rules, or regulations;
- expression that violates school district policy or procedure related to harassment, intimidation, or bullying, or discrimination; and
- any expression that violates the Federal Communications Act.

For public institutions of higher education, expression that so incites students as to create a clear and present danger of the violation of lawful school policies and procedures, in addition to lawful school regulations, is prohibited.

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**Appropriation:** None.

**Fiscal Note:** Available.

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

**Staff Summary of Public Testimony:**

(In support) In 1988 the Supreme Court held that school officials can censor speech by determining that material is poorly written, biased, or inconsistent with the shared values of civilized social order.

This bill is timely because freedom of expression is under attack across the globe. International journalists cite the United States as a bastion of free expression and an ideal

environment for unrestricted publishing. In light of the current battles over free speech and the rights and roles of journalists, this is an important piece of legislation so that the next generation of journalists recognizes both the right and the responsibility that they have to bear when it comes to freedoms in this area. Students must learn early and often about the value of truth and the rights and responsibilities of a free and open society. There is no better way to learn about the power of the Constitution than for young people to be solely responsible for uncovering and disseminating news on their campuses.

It is vital to work under an uncensored publication. It prepares a student for real world journalism. Getting into good habits from the start is better than having to correct them later on. High school editorial policies should stress that the publication will not publish anything that the Seattle Times would not publish. If a student journalist is unsure about whether to publish, the student is encouraged to contact professional news publications to receive advice. Prior review is time consuming and unrealistic with the busy schedules of administrators. A student newspaper is place where students can practice and learn from mistakes.

This bill clarifies and protects the existing student expression rights and clarifies responsibilities and accountability measures; it clarifies the role of the advisor; it protects school officials; and it protects tax payers who may find themselves having to support frivolous lawsuits. It is important that advisors do not feel nervous about their jobs or intimidated by administrators.

Passing this bill would send a message that a student's right to publish freely is critical to a democracy.

(Opposed) None.

(Other) An addition to the bill should be considered regarding a more explicit alignment and connection to school's antiharassment, antiintimidation, and bullying procedures.

One primary concern that remains is the emotional safety of students and protecting them from stories that would be hurtful or embarrassing or that can cause significant harm as referenced in the Washington Administrative Code. Principals work hard to help students to build strong emotional-social skills from a young age. Being able to regulate a school newspaper may prevent any unnecessary embarrassment or harm to students, and that duty is taken very seriously. Principals also know that journalism classes offer tremendous learning opportunities and support the production of stories that reflect the integrity of good journalists. Principals should be able to maintain the right of assignment for teaching staff so that he or she may place teachers in the best teaching assignment possible. It is important for principals who are held accountable for assigning staff to teach certain classes to be able to have that freedom without prohibition by statute.

**Persons Testifying:** (In support) Senator Fain, prime sponsor; Joanne Lisosky; Mariah Valles; Jennifer Karchmer; Jacoy Willis, Washington Journalism Education Association; Madison Morgan; Vincent DeMiero; Savannah Perkins; Haley Keizur; Dave Riggs, Washington Journalism Education Association; Mike Heistand, Student Press Law Center; and Andrew Wahl.

(Other) Jessica Vavrus, Washington State School Directors' Association; and Roz Thompson and Gary Kipp, Association of Washington School Principals.

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