

Michigan Senate Judiciary Committee
Testimony of Frank D. LoMonte, media lawyer, Washington, D.C.
Senate Bill 848 (The Student Free Press and Civics Readiness Act)
For committee hearing of March 22, 2016

(1) Introduction and background

I appreciate Senator Jones' invitation to share some information about the workings of "New Voices" statutes with the committee. This testimony is drawn from my 16 years of experience as a practicing attorney, the last eight of which I have spent as executive director of the Student Press Law Center, a nonprofit legal-services organization serving the needs of student journalists and journalism educators nationwide. During my tenure, I have worked directly on a daily basis with student journalists when they encounter obstacles that inhibit their ability to gather information and share ideas. I have published numerous scholarly articles on the subject of First Amendment rights in schools, and am the lead author of the most widely used textbook in the field, *Law of the Student Press* (4th ed. 2008). I am attaching to my testimony a copy of my January 2015 op-ed column published in *Education Week* magazine that explains in greater detail the adversity that young journalists face when they attempt to write about issues of social and political importance. My testimony today will focus on explaining how New Voices statutes work in practice and the successful experience of other states with laws comparable to what is proposed in Senate Bill 848.

The movement to provide student journalists with enhanced legal protection began with the U.S. Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which unleashed what one legal scholar has described as "a censorship tsunami" across public schools.¹ As applied by subsequent lower courts, *Hazelwood* has made it virtually impossible for a student journalist to challenge any infringement of her rights to speak about matters of public concern.² Although *Hazelwood* involved a newspaper published as part of a high-school course, the case has increasingly been applied at the college level as well.³

Each of America's leading journalism organizations has enacted resolutions calling on schools and colleges to refrain from exercising the *Hazelwood* level of authority over student journalism, because that level of authority is incompatible with the effective learning and teaching of journalistic skills, ethics and practices. An example is the April 2,

¹ Richard J. Peltz-Steele, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the 'College Hazelwood' Case*, 68 TENN. L. REV. 481 (2001).

² Dan V. Kozlowski, *Hazelwood's Application in the Circuit Courts*, 3 U.B. J. OF MEDIA L. & ETHICS 1, 6 (2012) ("Circuit courts have broadly applied *Hazelwood* - both in terms of when it is applied and to whom - and expansively interpreted the 'legitimate pedagogical concerns' standard, generally granting wide discretion to school officials. This makes *Hazelwood* doubly dangerous.").

³ See *Hosty v. Cater*, 412 F. 3d 731 (7th Cir. 2005) (*en banc*) (applying the *Hazelwood* level of control to a student newspaper on an Illinois college campus).

2013, resolution of the Association for Educators in Journalism & Mass Communication, the professional organization representing college journalism professors, which states:

[N]o legitimate pedagogical purpose is served by the censorship of student journalism even if it reflects unflatteringly on school policies and programs, candidly discusses sensitive social and political issues, or voices opinions challenging to majority views on matters of public concern. The censorship of such speech is detrimental to effective learning and teaching, and it cannot be justified by reference to 'pedagogical concerns.'

(3) Student journalism about contemporary issues has significant civic benefits for the entire school community

Because of severe cutbacks in the ranks of professional news media organizations, student journalists are being called upon in today's economy to "do more with less" – to serve as the community's first (and at times only) supplier of information about campus events, without the security of legal protection for what they write. Students now make up 15 percent of all of the journalists covering state Capitols, and in several states actually outnumber salaried professionals.⁴ The Brookings Institution has reported that coverage of education issues has diminished to only 1.4 percent of the space in mainstream news outlets, and has recommended protecting student press freedom as a partial solution to the erosion of education coverage: "Some school officials discourage student reporters from asking difficult questions or raising controversial issues. In fact, student journalism of this kind should be encouraged."⁵

A recently released study by the University of Kansas is the latest to confirm the substantial civic-education benefits associated with working in a newsroom supportive of students' editorial independence. A survey of 900 high school journalists in Missouri and Kansas found that students whose schools encouraged inquiry into contemporary issues reported significantly higher levels of civic efficacy – the ability to use media to make social and political change – than students whose schools discouraged the discussion of issues of public concern.⁶ These findings are especially meaningful at a time of a nationally recognized deficit in young people's civic readiness. The most recent evidence comes in the form of a study by the American Council of Trustees and Alumni, "A Crisis in Civic Education," which notes that college graduates over 65 – those who went to school before *Hazelwood* – performed far more proficiently on tests of civic knowledge than graduates 34 and under, the first generation to live their entire educational lives under a legal system that promotes suppressing discussion of social and political issues.⁷

⁴ Jodi Enda *et al.*, "America's Shifting Statehouse Press," Pew Research Center (July 20, 2014).

⁵ Darrell M. West *et al.*, "Invisible: 1.4 Percent Coverage for Education is Not Enough," The Brookings Institution (Dec. 2, 2009).

⁶ The study, "Civic Engagement Among High School Journalists," released in November 2015, is available at <http://civicsandjournalists.org/category/findings/>.

⁷ The ACTA report, released in January 2016, is available online at https://www.goacta.org/images/download/A_Crisis_in_Civic_Education.pdf.

(4) New Voices statutes have proven successful nationally

Eight states protect the ability of high school students to publish the lawful, non-disruptive content of their choice by way of state *statute*, while Pennsylvania and the District of Columbia do so by state *regulation*. The combined experience of these jurisdictions covers more than 160 years. Over that 160-year period, there has been no increase in litigation or any other documented adverse consequence associated with student journalism, and none of those states has made any effort to repeal or retreat from its New Voices law.

Senate Bill 848 is identical to the New Voices Act that was unanimously enacted with bipartisan support in North Dakota in 2015. Following the successful passage of North Dakota's statute, advocates in 20 other states, including Michigan, have begun work toward enacting lookalike laws in their own states.

(5) New Voices laws represent a modest "training wheels" level of press freedom

To be clear, Senate Bill 848 does not put the rights of student journalists on par with those of professionals at *The Washington Post* or *The Wall Street Journal*. The Supreme Court has indicated that nothing short of perhaps the leaking of military battle plans during wartime would be constitutionally unprotected speech in a professional newspaper.⁸ New Voices statutes simply restore the level of legal protection that existed pre-*Hazelwood* under the legal principles set forth in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). The *Tinker* standard has been the law of the land for 47 years. Schools are adept in administering *Tinker* because of a thoroughly developed body of legal precedent. It is the standard that applies today to students' baseball caps, T-shirts and other interpersonal communications. SB 848 simply recognizes that anything that can be safely and non-disruptively said on a T-shirt can be safely and non-disruptively said in an editorial as well.

SB 848 and other statutes of its kind expressly provide authority to revise or remove editorial content that is defamatory, invades privacy or would otherwise be legally actionable. Nothing in these statutes alters the ability of a school to protect against liability. Moreover, there are no published court opinions in the Westlaw or LEXIS databases going back to the earliest days of American history indicating that a school or district has ever been held financially liable for injurious material published in student media. There certainly is no indication that the enactment of New Voices statutes is in any way connected with a rise in liability suits in states that protect student press freedom.

(6) Conclusion

The current impetus behind reforming the *Hazelwood* standard is a recognition that, for better or worse, we no longer live in a world where students can be shielded from information about divorce and teen pregnancy by removing that material from the pages of a newspaper. Common Sense Media reports that teenagers are spending an average of 9 hours a day consuming media, and the Pew Research Center says 24 percent of teenagers are, by their own accounting, connected to social media "almost constantly." The *Hazelwood* level of institutional control is impractical and unworkable in a social-media

⁸ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

world where all students are carrying a portal to unlimited information – much of it gossip, speculation and falsehood – in their pockets. Students working in student media learn and model the values of balance, attribution, verification, ethics and responsibility – the skill set most needed to safely navigate the online world. Censorship does not prevent the discussion of controversial or mature topics; it just relocates the discussion from the accountable, adult-monitored newsroom to the anything-goes realm of Snapchat, Twitter and Yik Yak.

The subset of student journalistic work that is legally unprotected today that would be protected under SB 848 is journalism addressing social and political issues of public concern that might provoke differences of opinion, including journalism airing concerns about school policies and programs. This is the journalism of greatest civic and community value, both for those creating it and for those in the audience, including members of the adult community who benefit from hearing the perspective of students on issues of school and college effectiveness.

I appreciate the opportunity to share this background with the committee and invite anyone with questions about SB 848 to visit the website for the New Voices movement, www.newvoicesus.com, which includes Q-and-A's about the workings of these laws, editorial endorsements and more.

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COMMENTARY

Don't Silence Young Journalists

By Frank D. LoMonte

In Illinois, a student editor's plan to engage teens in the local school board election by hosting an online candidate forum on the website of the student newspaper is scuttled when her superintendent cancels the forum, explaining: "Too much could go wrong."

In New Jersey, a student editor is forbidden from publishing a story about multiple employee grievances filed against her district's superintendent, a fact publicly aired at a school board meeting covered only by high school reporters. The principal tells the editor that "personnel issues" are categorically off-limits for student publications.

In Wisconsin, a student editor is punished for a searingly candid magazine article interviewing survivors of sexual assault. It's an article hailed by experts in the field as sensitively done journalism of professional caliber, but which her superintendent considers "inappropriate" for teen readers.

These students share two qualities with Gillian McGoldrick, who has suffered withering attacks—up to and including a threat of criminal charges—from a school board bent on silencing her editorial crusade against her Pennsylvania high school's racially offensive mascot.

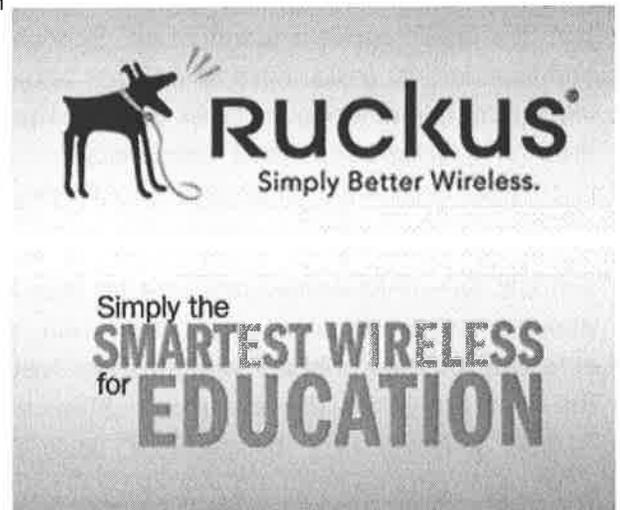
Related: "My High School Mascot Is Offensive," (2015)

These student journalists are all victims of a pervasive mentality elevating school image control over educational quality. And they're all women.

Censorship has always been with us. The Student Press Law Center was established in response to a groundbreaking study, "**Captive Voices**," which concluded 40 years ago that journalism students and teachers were being driven from the newsroom by administrative censorship—"the fundamental cause of the triviality, innocuousness, and uniformity that characterize the high school press."

But in recent years, K-12 school administrators have become unapologetically heavy-handed in retaliating for speech that may provoke controversy or reflect unfavorably on the school's image. Disproportionately, because student journalism is increasingly a female-dominated activity, those bearing the impact are young women—women like Kylie Sposato of Pemberton Township, N.J. When Ms. Sposato tried to publish a column decrying lax enforcement of her high school's anti-smoking policies, her principal vetoed the article, removed a journalism teacher with 20 years of professional newspaper experience, canceled the news-writing class, and ordered the students not to write about being censored.

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When schools are challenged over the misuse of censorship authority, they invariably fall back on the same tired rationalization: The law allows it.

With narrow exceptions, that's probably true. In a 1988 ruling, *Hazelwood School District v. Kuhlmeier*, the U.S. Supreme Court divested students of meaningful First Amendment protection when they use a school-subsidized outlet to convey a message.

But "it's legal" is not a justification. Schools hold students and teachers to a standard of optimal behavior, not minimally legally compliant behavior. Just ask the teachers who've been fired for griping about their supervisors or sharing racy photos on Facebook. "Poor judgment" is regularly regarded as a firing offense, except when you're a principal, and the "judgment" involves your students' rights.

Schools do not serve lunches with an eyedropper to make sure that no student receives one calorie more than the minimum to stave off starvation. Yet many apportion free-expression rights in exactly that way, enforcing policies cribbed straight from Justice Byron White's *Hazelwood* opinion, which sets the floor for the least protection the law allows. State school boards' associations even publish *Hazelwood*-based "model" policies, as if "barely legal" were an ideal to aspire to.

The public is entitled to expect schools to aim for a standard higher than "the worst thing we can do to kids and get away with it." Federal law allows employers to pay a **\$7.25 per hour minimum wage**, but we would not consider \$290 a week to be "model" compensation for teachers. We would regard it, accurately, as "one penny away from unlawful."

Debating whether censoring the discussion of controversial subjects is legal distracts from the question that really matters: whether it is educationally responsible.

During 2013, the 25th anniversary of the *Hazelwood* ruling, the nation's largest organizations of professional journalists, college journalism educators, and high school journalism advisers adopted resolutions condemning reliance on the *Hazelwood* standard to suppress the discussion of issues of public concern. **An August 2013 declaration from the Society of Professional Journalists** explains that "it is well-documented the *Hazelwood* censorship clause impedes an educator's ability to adequately instruct and train students in professional journalistic values and practices, including the right to question authority and investigate performances of governance."

It's tempting to say that principals and superintendents shouldn't be second-guessed because they have demanding jobs. But it is always "easier" for government officials to ignore individual rights. It would be "easier" to solve crimes if suspects could be beaten until they confessed. Respecting constitutional values means doing things the hard way because it is also the right way.

It can be tempting, too, to trivialize "high school journalism" as unworthy of adults' concern. But we wouldn't mistreat and miseducate students in geometry class and shrug it off as "just a bunch of high



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"How schools treat their young journalists matters because a news-literate public matters."

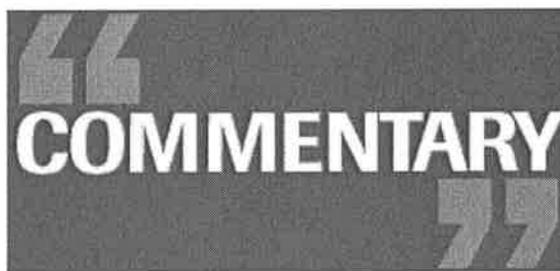
school math."

How schools treat their young journalists matters because a news-literate public matters. **The Pew Research Center reported in 2013** that news readership had fallen to historic lows, with two-thirds of Americans 34 and younger reporting they read no daily newspaper, about half the rate of their parents. Building healthy news-consumption habits must begin in schools, starting with news that's relevant and accessible to students' lives.

It matters because students are the "embedded journalists" on which the entire community depends for reliable information about schools' shortcomings. Image-obsessed schools are making meaningful news coverage more difficult than ever for the dwindling ranks of newsroom professionals. **In a survey of 190 journalists**, released in March by the Education Writers Association, 71 percent said they'd been blocked by media-relations officers from interviewing school employees.

It matters because journalism, alone among school activities, teaches the five competencies that, according to a **2010 survey of 450 executives by the U.S. Chamber of Commerce**, employers value most in new hires: ability to learn new skills, critical thinking and problem-solving, teamwork, interpersonal-communication skills, and "ability to analyze and synthesize information." This blueprint for a 21st-century-ready workforce reads like the syllabus for Journalism 101.

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It matters more today than ever, because the precarious future of journalism depends on the leadership of the strong, opinionated young women whose voices schools are most determined to silence.

In September, Harvard's Nieman Foundation released "**Where Are the Women?**"—a dismal study of gender diversity in media—which reported that women represent just 35 percent of newspaper supervisors, 31 percent of TV news directors, and 23 percent of radio news directors. The report, coincidentally, followed the replacement of top female executives at *The New York Times* (executive editor Jill Abramson) and *The Washington Post* (publisher Katharine Weymouth) by men, giving the issue a sense of national urgency.

Schools can't be solely faulted for a complex societal problem with many causes, but one of the most avoidable contributing factors undoubtedly is this one: Year after year, the female student in every high school who has been identified as having the greatest potential as a business leader, the female student most adept at motivating employees, managing a budget, meeting deadlines, and handling customer complaints is told by her administration that she is a troublemaker who should keep her worthless opinions to herself.

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