IN RE S. 18/As Passed by Senate *Pre-Filed Testimony of Heather T. Lynn, April 4, 2017*

Background:

I am attorney working in Burlington, Vermont and serve as panel counsel for Vermont School Boards Insurance Trust representing its members (school districts and supervisory unions) across the state of Vermont in both litigation matters and counseling with a focus on student discipline matters including harassment/hazing and bullying.

Scope of Protections/ 9-12 Grades

§ 1623. Freedom of Expression

While Section 180 appears to be directed at places of higher education, § 1623 in its "definitions" portion (section (b) simply defines "School" as a "public school operating in the State" and defines "student journalist" as "a student enrolled at a school." If this bill is adopted at all I would ask that its protections be limited to students grades 9-12, which would address a population which has achieved some benchmarks of maturity and instruction in journalistic standards, reducing the risk that such student activities would run afoul of the prohibitions set forth in subsection (e) and hopefully minimize one of the negative outcomes of this bill which will be put place schools in an impossible position of gatekeeper (with limited time to perform that role in every instance) on speech which by its very nature is designed to interest, challenge, and provoke.

School Liability/Exposure

As an attorney representing school districts and their administrators my perspective on any proposed bill is how it will impact the performance of administrator duties in their roles as protectors of both student access and student rights.

The United States Supreme Court has already long held that public schools "do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 273 (1988). In this way, schools retain greater control and leeway in limiting speech than that usually afforded in the "public square."

The proposed bill would in some ways state explicitly the limits and boundaries already set forth in the Hazelwood case regarding a school's control of **student journalistic activities in particular**. The bill retains prohibitions upon student activity (journalistic or otherwise) which may nevertheless constitute libel/slander, an "unwarranted" invasion of privacy; obscenity, gratuitously profane, threatening or intimidating; may be defined as harassment, hazing or bullying in violation of state law, a violation of federal or State law, or "creates an imminent danger of materially or substantially disrupting the ability of the school to perform its educational mission." (Subsection (e)).

Subsection (j) of Chapter 42 § 1623 continues by stating that student journalistic activities in school sponsored media as permitted under § 1623 "shall (not) be deemed to be an expression of school policy." This leaves unaddressed the question of who will be held legally and ultimately *responsible* for allowing the "school sponsored" journalistic activity to have occurred. An earlier version of the bill addressed that issue by continuing to say: "*No school, the governing body of any school, or any official, employee, or agent of any school or its governing body* ***shall be held liable in any civil or criminal action for an expression made or published by students in school-sponsored media***." **This additional phrase has been removed, and its removal causes me grave concern**. If the bill is passed without reinstating the excised language I believe the bill places schools in a potentially no win position.

For example, if a student journalist publishes a story about someone through school-sponsored media - which initially appears on its face to be true - but turns out to have been false, and the target of the falseshood suffers economic or professional harm what would prevent the slandered individual from seeking to hold the school legally responsible for those damages? The fact that libelous content is deemed to have been a "violation" of the provisions of acceptable student journalistic activity under subsection "e" of the bill only furthers the argument in such a case that the school ultimately retains the power to stop such content from being published in the first place.

And with respect to content that might be considered harassing or bullying of other students the concern is two fold. While liability for the school could arguably be imposed in cases where the school fails to "spot" it before publication, additionally, even if the "article" is not harassing in and of itself and is allowed to proceed, it may still be so provocative as to spawn "copy cat" behaviors throughout the school resulting in separate additional acts which do meet the standard of a harassment policy violation. This is a problem Vermont schools have already experienced in the current political climate.

Finally, if a student journalist prints materials which result in another student engaging in behaviors which result in yet a third student's (or non student's) physical harm, is the school to be responsible in subsequent civil action? Again given the school's presumed position to prevent publication prior to its release, would not the injured individual seek to hold the school legally responsible for that harm given that the school could have (in hind sight) barred the publication as "creating imminent danger" or for containing "threatening or intimidating" content? (§1623 (e)(3) and (6)). Given that reality would it not be prudent for schools to take significant steps to check every publication (and run it by legal counsel) prior to every publication? Which leads to an additional concern and challenge for schools posed by the bill.

The bill's provisions are not only aimed at clarifying when and how a school may restrict and control student journalistic expressions, it mandates that schools not engage in "prior restraint" of such expressions. The only exception for this is some level of prior restraint in cases of suspected violations of the areas outlined in subsection (e) and only there where a school has "lawful justification" and without "undue delay." How would one define those terms? In particular what will be deemed "undue delay?" **If the bill must proceed I would request that those terms be defined AND that any action taken by a school to review content prior to**

publication for concerns related to the areas outlined under (e) would be excluded from running afoul of the prohibitions against prior restratint; or absent that at the least state that lawful justification would always be found to exist and undue delay would never be found to where a school is reviewing content the content under the AOE HHB procedures. Otherwise this provision will inhibit schools from performing their due diligence in matters of potential HHB violations.

The two sections I have cited for concern combine to create the prospect that a school may still be held liable for content published that violates subsection (e) and only having the limited ability to review it prior to publication to consider whether the content indeed violates (e), knowing further that it may only engage in such a review when it is "lawful" and does not constitute undue delay – terms as yet undefined. Schools will be encouraged to engage in a hasty review knowing that when they are incorrect the damages and criminal outcomes of every student's violation of that same subsection (e) could be laid at the school's feet. The school will have to make the "call" on section (e) violations perfectly and expeditiously, every time. Even when a school succeeds in making the "perfect" call, I know from direct experience that will not insulate it from challenges, complaints and confusion amongst upset parents.

Concluding Remarks

It is my belief that the bill is unnecessarily duplicative of existing protections for student journalistic actions already recognized by existing caselaw, and instead creates additional burdens for schools and negative outcomes for school climate at odds with HBH policy, namely:

1) Schools will be required to quickly vet all content in order to ensure it does not run afoul of any of the areas outlined in subsection (e);
2) Schools creates new exposure to liability for the criminal and civil damages flowing from student journalistic activities;
3) In erring on the side of caution in order to avoid running afoul of the bill's provisions on "prior restraint" I can anticipate in the wake of such journalistic activities additional cases of incendiary student speech which will negative impact school climate, and cause parent concerns and complaints to schools about allowing the journalistic activity in the first place.

Given the already existing protections in the law I consider these risks and the anticipated outcomes to be at odds with the goals reflected in Vermont statutes as enacted for over a decade in Vermont schools to achieve harassment/hazing/bullying free schools.