

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.

Summary of Testimony

As an attorney representing school districts my perspective on proposed legislation is the potential impact upon the performance of administrator duties in their roles as protectors of both student access and student rights. Specifically, administrators are already asked to not only supervise students but to intervene - quickly – to respond to and address student behaviors which may have a negative impact on the climate of a school and in particular where that behavior may impair another student’s ability to access their education.

The current bill seeks to provide explicit protections (and to expand those protections in some ways) for student expression in the context of school sponsored media. My concern is that this bill, however, will have real unintended consequences with respect to school’s long existing obligations to respond to and address student-on-student behaviors which may constitute harassment and/or bullying. It is my belief that the bill creates an unnecessary burden for administrators who are already limited in their resource of time, and that adding these burdens will result in a worsening of the climate and culture which Vermont schools have been charged with improving for over a decade under Vermont’s bullying and harassment statutes.

School Liability/Exposure

The United States Supreme Court has 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 and censoring student speech in this context than that usually afforded in the “public square.”

The proposed bill would explicitly state 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 its stated prohibition upon student activity (journalistic or otherwise) which 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 also declares that all student journalistic activities in school sponsored media permitted under § 1623 “shall (not) be deemed to be an expression of school policy.”

**The bill leaves open the question of who could be held ultimately and legally *responsible* for the outcomes from the “school sponsored” journalistic expression, particularly where harm can be seen to be proximately caused by that publication.** An earlier version of the bill had apparently sought to address that issue by stating: “*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 phrase was removed from the bill. Its removal causes me grave concern. I would request that subsection (j) be amended to restore the above referenced phrase.**

In the alternative, should the bill pass - without reinstating the excised language – schools will face legal exposure with few options to minimize and address it given the other provisions contained within the bill.

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 later is shown to be false, and the slandered individual suffers economic, professional or emotional harm, what would prevent that individual from seeking to hold the school legally responsible for those damages? The fact that the libelous content “violated” the provisions subsection (e) of acceptable student journalistic activity in fact lends support for the argument that the school ultimately retains the power to stop subsection (e) violations from being published in the first place.

Another “violation” of subsection (e) would be journalistic speech that could be considered harassing or bullying of other students. As just pointed out liability could arguably be imposed against the school where it has failed to “spot” the content prior to publication, and thus be held responsible for the act of student on student harassment directly as the sponsor of the media involved. Additionally, even if the “article” is not harassing in and of itself - and thus is allowed to proceed – such content may prove provocative enough to spawn “copy cat” behaviors throughout the school. Subsequent in and out of school student speech behaviors meeting the standard of a harassment policy violation may occur and impact the climate of the school, and negatively affect other student educational access. In my daily work with schools around the state I can represent to the Committee that it has been my perception this school year that acts of student on student verbal harassment have increased in frequency and tone. While I cannot prove a connection I would note this increase coincides with similar increases in political engagement, debate and polarization.

Finally, should a student journalist publish school sponsored speech which results in another student engaging in behaviors which in turn physically harms another student (or non student/employee), could the school be held responsible in subsequent civil action? Student violence and the legal responsibility for it is typically viewed through lens of 16 V.S.A. §834 and common law principals of foreseeability. A school uniquely positioned to publish and “permit”

such language might be held legally responsible for subsequent violent behaviors considered to be “foreseeable.” Given the school’s presumed ability to control “school sponsored media” and to prevent publication prior to its release, could 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 these concerns it would only be reasonable and prudent for Vermont schools to check every publication (and run it by legal counsel) prior to every publication. However, another provision of the bill effectively acts to bar this as an available option.

**Subsection (f) mandates that schools not engage in “prior restraint” of student journalistic expression.** The only exception will be cases of suspected violations of the areas outlined in subsection (e) (some of which I have discussed above, slanderous content, harassing content, creating a “danger”). While this exception could address the concerns raised above, the bill guts this opportunity by limiting it to cases where the school has “lawful justification” to do so and where performing the review will not cause “undue delay.” To add to the uncertainty neither of those terms are defined.

**Accordingly if the bill must proceed I would request that the subsection (f) of bill be amended to BOTH:**

**(1) Define “lawful justification” and “undue delay”; and**

**(2) State explicitly that “any and all actions taken by a school stemming from subsection (e) content concerns will as a matter of law NOT be considered as unlawful prior restraint.”**

Otherwise subsection (f) will inhibit schools from performing their due diligence in matters of potential subsection (e) violations including cases of possible student harassment or 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.” While it would be my preference that this bill be limited to post secondary educational institutions, as I believe the concerns regarding student access and emotional resilience are lessened at that age level, if the bill must apply to lower grades I would ask that its reach be limited to students grades 9-12. This would at least limit the application to a population which has achieved some benchmark of maturity and instruction in journalistic standards, and reduce 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.

### Concluding Remarks

The combined impact of proposed 16 V.S.A. §1623 and in particular subsections (e), (f) and (j) creates the prospect that a school may be liable for the negative consequences of school sponsored media content published that violates subsection (e) with minimal ability to review it prior to publication to consider whether the content indeed violates (e), knowing further that where it does perform such a review they face legal exposure under (f) for illegal prior restraint.

Schools will thus be discouraged from engaging in any review, or in engaging in a hasty review knowing all the while 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, this will not insulate it from legal challenges, complaints and confusion amongst upset parents on either side of a given incident. Legal challenges will certainly arise.

It is my belief that the bill is unnecessarily duplicative of existing protections for student journalistic actions already recognized by caselaw. Given that I consider these risks and the potential negative outcomes to be at odds with the goals reflected and pursued by Vermont statutes as enacted for over a decade in Vermont schools to achieve harassment/hazing/bullying free schools.

**If the bill must pass, and I am opposed to its passage, I would ask that the amendments I have requested above be made to the bill.**

Thank you very much for the opportunity to provide you with my views and concerns.