

IN RE: S. 18/Draft No. 3.1/1/26/17 4:05 p.m.

FROM: Heather T. Lynn, Esq.,

DATE: February 1, 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/ 7-12 Grades

§ 1623. Freedom of Expression

While Section (a)(3) states that the intent of the bill is to provide “protections for both high school students and students of higher education,” and §1623 appears to be the section directed at high schools (while Section 180 appears to be directed at place of higher education), § 1623 in its “definitions” portion (section b) does not define or limit “School” to Vermont high schools. To remedy this I recommend § 1623 (b) (2) be amended to read “ ‘School’ means a public school operating in the state serving grades 7-12.”

School Liability/Exposure

One of the primary concerns I have as an attorney representing school districts is whether new legislation creates new areas of risk and exposure to schools. § 1623 (j) is a provision that is designed to address those concerns. It states that student journalistic activities in school sponsored media as permitted under § 1623 shall not to be imputed to schools or their agents. Those student actions/behaviors will therefore not expose the school to civil or criminal liability where those students engage in student journalist activities in school sponsored media outlined in the bill. This is appropriate.

Section (j) however then continues with a qualification on that protection by stating “except for content listed in subsection (e) of this section to the extent that the school or its governing body had actual knowledge of this content.”

I would note that statutes of comparable content as passed in other states do not have this phrase.

I am concerned that this phrase will impose liability upon schools and its agents for the conduct of student journalists where those students engage in writings/behaviors prohibited by subsection (e) (prohibiting slander, obscenity, violations of state and federal law, harassment, hazing, bullying, etc.).

It should first be noted that Vermont schools may already be held liable under Vermont and Federal law for the conduct of its students where those students engage in harassment, hazing and bullying, under certain specific situations which have been outlined by both Vermont courts and the Vermont legislature. I see nothing in S. 18 which could be interpreted to remove those

existing obligations. So in this respect the objected to phrase is redundant, and additionally to the extent it might be read to expand or modify the current understanding of the triggers and limits of that liability, it is inappropriate.

In addition with respect to the other subsections of prohibited content in subsection (e), (ie: libel, slander, obscenity, etc...) the objected to phrase at the end of subsection (j) could be read to impose strict criminal and civil liability for schools for these student actions - without any further examination of the context or basis for liability. To create such a blanket level of exposure is particularly inappropriate where the bill's stated purpose is simply to provide and/or preserve student's free speech journalistic expression rights. As a practical matter I believe it will result in an unworkable catch-22 for schools seeking to abide by all of its provisions that is ultimately self-defeating.

For example, if a student journalist prints a story - which appears on its face to be true - but turns out to have been false, shall the school now be held responsible for slander? This clause suggests that it could. What steps therefore will a school have to take to avoid this outcome in the future in order to ensure the accuracy of every article printed and will those efforts be seen as "prior restraint" that violates subsection (f)?

Similarly, 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 a criminal or civil action? Again section (j) suggests that merely because the school had knowledge of the publication in advance it is to be held 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?

The bill's provisions are aimed at reducing a school's ability to restrict and control student expression, mandating that schools seek to "restrain" only those expressions running afoul of the areas outlined in subsection (e) and only with "lawful justification" and without "undue delay." To then in the next breath hold schools strictly liable for the damages and criminal outcomes of every student's violation of that same subsection (e) hardly encourages that goal. The school will have to make the "call" on section (e) violations perfectly, every time.

If allowed to remain in the bill this phrase will create uncertainty and ultimately encourage "extreme vetting" of every proposed student journalist expression/publication through the lens whether or not it could possibly be barred under section (e) given that should a school make the "wrong call" the school faces exposure in in civil and criminal courts potentially for all of the negative outcomes of those publications. The objected phrase must be removed to avoid this level of uncertainty and exposure for schools.