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The double-edged sword of editorial policies

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In the post-Hazelwood world of high school journalism, many students and advisers are looking for ways to reestablish the boundary between the student media and school administrators when it comes to content control. One thing they are discovering is policies can help achieve that task.

But policies are a double-edged sword. If carefully drafted, they can be used to cut the bonds of censorship. If not carefully worded, however, they can ultimately create more trauma for advisers and students than having no policy at all.

Hazelwood made Tinker secondary

As a matter of law, before the Supreme Court's 1988 Hazelwood School District v. Kuhlmeier decision, the right of student journalists to be free from administrative censorship was relatively clear. Unless school officials could demonstrate the material they objected to would create a substantial disruption of school activities or otherwise was "unprotected speech" (such as libelous or legally obscene material), they could not interfere in the content choices made by student editors. The Hazelwood ruling did not throw out that standard, but just relegated it to a secondary position.

Now, the Supreme Court majority said in 1988, school officials would be allowed to censor school-sponsored student expression without running afoul of the First Amendment if they could demonstrate their censorship was "reasonably related to legitimate pedagogical (educational) concerns."

This new standard gave administrators much greater (but not unlimited) authority to prohibit controversial topics from being discussed in the pages of a student newspaper or yearbook. It certainly made practicing good journalism more difficult.

However, the Court left open an important loophole. If a school has "by policy or practice" opened a student publication as a "forum" for student expression, the restrictive Hazelwood standard will not apply. Rather, school officials will have to demonstrate substantial disruption before they can censor, just as they did before Hazelwood.

So what makes a student publication a "forum"? The Supreme Court gave little guidance, but it did make two things relatively clear. First, the notion of "forum" means the school has given content control, in whole or in part, to someone other than school officials, in this case student editors. Second, the Court said two things would indicate if transfer of control had in fact been made: school policy and practice.

Thus the importance of policies: if your school has one giving student editors content control, that policy can effectively exclude your student media from the limitations of Hazelwood.

Policies can be of two types

It is important to note when one refers to policies relating to the student media, that can mean one of at least two things. When most students and advisers refer to their editorial policies, they mean the internal policy they have adopted describing how their publication operates. It may include job descriptions for the differ-

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ent staff positions, the general mission of the publication and requirements for publication of letters to the editor.

Typically these policies are for the use of the publication staff so each new group of students does not have to reinvent the wheel every school year. School officials may or may not be aware of them, but these policies are primarily tools for students and advisers and are not intended to be restrictions on their rights.

The second kind of policy is one adopted by a school board or school building administrators relating to student publications or student expression. These policies have the most legal impact.

In fact, when the Supreme Court referred to the importance of “policy” in its Hazelwood decision, this was the kind of policy it was talking about: some official statement that reflected the intention of school officials as to who would have ultimate authority to determine the content of a student publication.

Internal editorial policies can be used to demonstrate the “practice” at a particular school has been to give student press freedom, but unless some school administrator has signed off on such a policy, it will not be considered a school policy that opens up the publication as a forum.

Many advisers who have believed they would never get their school to consciously endorse student editorial independence have attempted to establish forum status for their publication by publishing language describing their publication as a “forum for student expression” where “student editors make the content decisions” in the pages of their publication.

These efforts can be useful, but again, they only go to establish “practice,” not official school policy. If school officials adopt a policy that contradicts the internal policies of the publication or the “practice” under which the publication has operated, that policy will probably legally trump whatever efforts the students or adviser have made.

Given the importance policies can have, especially those school officials have adopted or endorsed, what general guidelines should advisers follow? Any specific language that they should look for or avoid?

A starting point for developing policies

If you are attempting to evaluate your existing policy or draft a new one, there are some traps to look out for. First, remember provisions which might be appropriate in your internal editorial policy could be dangerous in an official school policy. For example, a publication may decide it does not want to publish letters to the editor more than 200 words in length. Such a guideline might be very appropriate to publish in the newspaper or in an editorial policy. However, if the school’s publication’s policy said the newspaper would never publish letters to the editor longer than 200 words, the paper’s staff would have lost all ability to reconsider that limitation on a case-by-case basis.

If the paper did decide to publish an especially important and well written 250-word letter that happened to be critical of some school policy, school officials could justify punishment of the students or adviser based on violation of the word-limit rule.

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Encourage, not discourage

For policies school officials can read as enforceable limits on student expression, it is better to encourage certain kinds of student expression than to describe certain areas as prohibited.

This may seem like a distinction without a difference, but in fact the consequences of such language can be dramatic.

For example, a policy saying, “Students are encouraged to include opposing viewpoints in stories about controversial topics” is a positive statement giving students and adviser guidance about the expectations placed on the staff.

If the same provision instead said “Students must include opposing viewpoints in stories about controversial topics,” the provision would create not just a guideline but a requirement, and one few could ever agree on its meaning. What stories are “controversial” and which ones are not? How many “opposing viewpoints” must be included to satisfy the requirement?

School officials could attempt to answer those questions on a case-by-case basis after students had already published the stories in question. And if school officials decided the requirements had not been met to their satisfaction, no matter how vague the terms might be, they could attempt to censor the students or punish the adviser for not complying with the policy.

This problem has come up frequently for advisers working under policies requiring material to be submitted to a school administrator for prior review when “controversial material” is to be published. Many advisers have been burned when stories no one ever anticipated would cause controversy in fact do, at least in the mind of the principal. School officials have attempted to punish advisers for not having the psychic ability to anticipate every reader’s reaction when the school’s policy has required prior approval rather than just encouraged it.

Most school policies will stipulate student expression that is libelous, obscene (as defined by law) and substantially disruptive of school activities will not be protected. But policies that go much beyond these legally defined areas of the law, and attempt to prohibit other much more vague kinds of expression put advisers and students at significant risk.

Avoid imprecise language

A classic example of a provision many school officials have attempted to include in policies, with the best of intentions in most cases, is a prohibition on “offensive” expression, especially as it relates to race, ethnicity or religion and the policy does not provide any kind of precise definition of what is and is not considered “offensive.” Thus students, and more frequently advisers, are set up to become scapegoats any time even one person is “offended” by something the publication published. At one high school, an adviser almost lost

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her job after the student newspaper published a well-written signed opinion column critical of affirmative action. A couple of teachers found the position the columnist took “offensive.” Relying on the school policy that prohibited “offensive” expression in the student newspaper, the principal placed a reprimand in the adviser’s file.

Policies that do spell out concrete, legally based limitations on student free expression while at the same time offering protections for students from arbitrary censorship by school officials can make everyone’s life easier: student journalists, advisers and school administrators.

But a policy that creates obligations on the part of advisers and students so vague they cannot be complied with may be worse than having no policy at all. When the time comes to draft or revisit school policies, thinking defensively can be worth the effort.