January 25, 2023

— Sent by Email —

Dear Ms. Reynolds:

Thank you for contacting the Student Press Law Center regarding your rights as a college journalist in Utah. Founded in 1974, the Student Press Law Center is a nonprofit center of legal research serving the student media nationwide. For clarity, we should emphasize that we do not represent you or your publication as legal counsel and that if you have case-specific questions about your legal rights and responsibilities, we maintain a nationwide network of volunteer referral attorneys that student media regularly work with. With that understood, we are happy to provide information about the law of the First Amendment and your rights as a journalist.

The Law

The U.S. Supreme Court first explicitly recognized that public school students enjoy First Amendment protections in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Although the *Tinker* decision involved symbolic expression of high school students, the Court subsequently applied the same constitutional principles to a case involving censorship of a student publication at a public college. *Papish v. Board of Curators*, 410 U.S. 667 (1973). The Court again affirmed the strong First Amendment protections afforded college student publications when it struck down a decision by University of Virginia officials to withdraw school funding of a student publication solely because of its content. *Rosenberger v. University of Virginia*, 115 S. Ct. 2510 (1995).

Moreover, in a comprehensive and consistent body of case law that began even prior to the Supreme Court's ruling in *Tinker* and that continues to this day, lower federal courts have made clear that First Amendment protections must be afforded to student media at public colleges and universities, even though the school may provide funds and facilities. *See, e.g., Dickey v. Alabama Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001)(en banc); *Husain v. Springer*, 494 F.3d 104 (2nd Cir. 2007). Indeed, as one court has said, student publications at state-supported schools are entitled to the constitutional protections afforded all members of the "press," including freedom of expression for editors. *Sinn v. Daily Nebraskan*, 638 F. Supp. 143 (D. Neb.), *aff'd* 829 F.2d 662 (8th Cir. 1976). All circuit courts that have addressed the issue of schools subsidizing student publications have held that "when a public university creates or subsidizes a student newspaper . . . neither

the school nor its officials may interfere with the viewpoints expressed in the publication without running afoul of the First Amendment." *Springer* at 124.

The law is clear: at a public college or university, the student editor is responsible for making all decisions regarding the editorial content in his or her student publication. School officials, while they may act in an advisory role, are required to exercise a strictly "hands-off " approach. For example, a school, or those acting on the school's behalf, may not withdraw, withhold or limit funding, fire editors, fire student media advisers, censor articles or issues, "stack" a publications board, limit access to facilities or equipment or take any other action whose effect or intent is to mold, manipulate, punish or otherwise inhibit constitutionally protected expression. *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir.), *modified en banc per curiam*, 489

F.2d 255 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Joyner v. Whiting*, 477 F.2d. 456 (4th Cir. 1973); *Lueth v. St. Clair County Community College*, 732 F.Supp. 1410 (E.D. Mich. 1990); *Antonelli v. Hammond*, 308 F.Supp. 1329 (D. Mass. 1969); *Trujillo v. Love*, 322 F.Supp. 1266 (D. Colo. 1971); *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983); *Moore v. Watson*, 738 F. Supp.2d 817 (N.D. Ill. 2010)(termination of student media adviser can be adverse action in violation of First Amendment); *Coppola v. Larson*, 2006 U.S. Dist. LEXIS 51205 (D.N.J. 2006)(granting injunction preventing removal of student media adviser in retaliation for college newspaper's content.)

A public college student editor's nearly unfettered right to determine student media content absolutely includes your right to determine which comments violate a comment policy — if you even choose to have a comments policy (it's not required that you do) — and the procedure for handling repeat offenders.

Courts have consistently ruled that the First Amendment not only protects the right to speak, it also protects the right to refrain from saying anything at all. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943)(holding that a public school could not require students to recite the pledge of allegiance). The U.S. Supreme Court has held that forcing publications to include certain content is unconstitutional, as the decision on what is going to be included in the paper "constitute[s] the exercise of editorial control and judgment." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Student journalists, unlike the University's lawyers, are not state actors. Their editorial decisions are not limited by the First Amendment and courts have long recognized the virtually unlimited right of public college student editors to reject content — for any reason or for no reason. *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977) (student newspaper's refusal to print a homosexual organization's ad did not violate the First Amendment even though the newspaper was partially funded by student fees); *Owens v. Idaho Argonaut*, No. C-193 (Idaho Dist. Ct. 1987) (student newspaper at the University of Idaho had right to reject ad its editor believed was unsuitable for publication after judge determined no contract existed); *Yeo v. Town of Lexington*, 131 F.3d 241 (1st Cir. 1997) (en banc), *cert. denied*, 524 U.S. 904 (1988) (holding that the editors of high school student newspaper were not required to run an advertisement submitted by a community group urging sexual abstinence where no state action was involved in editor's rejection of the ad); *Leeds v. Meltz*, 85 F.3d 51 (2d Cir. 1996) (dismissing First Amendment claim of advertiser where student editors of a public college newspaper are not "state actors" and their rejection of advertisement not state action).

Finally, even if the University's attorneys are not First Amendment fans in protecting your rights as editor, one would think they'd be concerned about exposing the university they represent to liability. Courts have consistently made clear that where public college administrators follow the law and keep their hands off student media content, the university's deep pockets are safe. *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983); *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981); *Lentz v. Clemson Univ.*, No. 95-CP-39-66 (S.C. Ct. of Common Pleas Dec. 20, 1995) (unpublished)(finding "[t]here is overwhelming authority across the country in support of the position that a public university which does not censor or otherwise control the content of a school-sponsored newspaper is not liable for what is published by the students in the student-run newspaper."); *McEvaddy v. City University of New York*, 633 N.Y.S.2d 4 (N.Y. App. Div. 1995), *appeal denied*, 642 N.Y.S.2d 195 (N.Y. 1996) (TABLE); *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466 (Minn.

App. 2005), *review denied*, 2005 Minn. LEXIS 347. See also *Antonelli v. Hammond*, 308 F. Supp. 1329, 1336 (D. Mass. 1970)(finding that a school's financial support for its student publication did not make the college president "ultimately responsible for what is printed.")

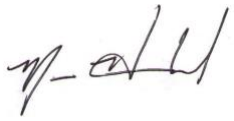
In forcing a comment policy on you that you don't want and in insisting that they approve any comment takedowns — something that, as far as we know, no other public college in the country does — they are effectively opening the university's checking account to future plaintiffs' attorneys.

The law is clear. I would give the school a week to drop its current comment moderation policy. I cannot imagine that they want to find themselves the defendants in a First Amendment legal battle that they will certainly lose. Nevertheless, if they refuse, we would be happy to consult with members of our nationwide Attorney Referral Network to assist you in finding local pro bono counsel and help you in holding the University of Utah very publicly accountable for its actions.

We hope that this information has been of some help. If you have any questions, please feel free to contact us.

With Respect,

STUDENT PRESS LAW CENTER



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