NEWS RELEASE

CALIFORNIA STATE DEPARTMENT OF EDUCATION
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HONIG CLARIFIES STATUS OF STUDENTS' "FREEDOM OF THE PRESS"

SACRAMENTO—"California public school students still enjoy substantial 'freedom of the press' despite the recent U.S. Supreme Court decision to the contrary," says Bill Honig, State Superintendent of Public Instruction.

"Many people in California did not understand that the justices only clarified what the U.S. Constitution says about students' rights. What the Supreme Court did not do was change existing state law. In this state, the Education Code is crystal clear on this matter," according to Honig.

The State Department of Education's general counsel has advised all county and school district superintendents of their rights and the rights of students in the wake of the U.S. Supreme Court's Hazelwood decision.

"Some people may not like the fact, but California's law bends over backwards to protect the student journalist. School authorities can only prohibit publication of stories in school newspapers if they are obscene, libelous, slanderous or likely to incite others to commit illegal or disruptive acts," said Honig.

Honig cited Education Code Section 48907 which requires school districts to write regulations before acting to censor; give the students involved a clear explanation for the proposed censorship; and an opportunity to appeal.

Honig also told school authorities they may hold students to high journalistic standards, but only through post-publication responses such as grading or discipline.

Part of the legal advisory to schools said, "...while the specific prohibitions in Section 48907 may be subject to some interpretation, it seems clear that a school district rule which generally prohibits such potentially sensitive topics as pregnancy and divorce is not permitted by the statute. Unless the treatment of an otherwise permissible subject could reasonably be construed as obscene, defamatory, illegal, or disruptive, school officials do not have authority to delete material submitted for publication 'as a matter

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of taste or pedagogy' in the words of a California Court of Appeals decision in Leeb v. DeLong, 1/29/88. This is where Section 48907 and the California case differ significantly from Hazelwood.

"It is permissible, under Section 48907, to hold student submissions to high standards of proper English and journalistic quality. However, the Leeb decision makes it clear that school officials in California may not engage in prior restraint or censorship based on journalistic concerns. In holding students to high standards of responsible journalism, school officials are limited to post publication responses such as grading or discipline. This is another point of distinction from Hazelwood where the Court found that journalistic concerns justified prior restraint.

"If school officials consider material submitted for publication to violate Section 48907, they must show 'justification without undue delay prior to any limitation of student expression...' In our view, this language requires that, prior to deleting any part of a story, the school official must notify the student and give specific reasons why the submitted material may not be published. Absent extraordinary circumstances, such notice should be given in sufficient time to allow the student to either modify the material (particularly where the problem is journalistic) or to seek review of the school official's determination at the school district level.

"California law authorizes school officials to engage in prior restraint of certain enumerated types of prohibited student expression, but only under procedural limitations that would pass constitutional muster. That is, all publications rules must be stated in writing in layman's terms in regulations issued by the school district; a school official intending to censor must tell the student the reasons for any deletions in advance in terms the student can understand; and the student's opportunity to seek timely review of any potential deletion must be guaranteed. If these conditions are met, we believe, that districts and county offices will be able to maintain reasonable controls over the contents of student newspapers while avoiding legal challenges to school publication rules or policies."

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DATE: March 4, 1988

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LEGAL ADVISORY

CALIFORNIA STATE DEPARTMENT OF EDUCATION
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TO: All County and District Superintendents

FROM: Joseph R. Symkowick, General Counsel
Legal and Audits Branch

SUBJECT: LIMITATIONS ON STUDENT EXPRESSION IN SCHOOL-SPONSORED PUBLICATIONS

PURPOSE

This Advisory provides legal guidance regarding the extent to which county office and school district officials may edit or delete material written by students for school-sponsored newspapers or other publications.

SUMMARY

In general, California school officials shall censor material written by students for school publications <u>only</u> when the material is:

- obscene,
- libelous or slanderous,
- likely to incite others to commit illegal or disruptive acts.

Even within these specific types of expression, school officials may not censor student material unless:

- there are written school district regulations governing publications in understandable terms;
- the reasons for censoring particular materials are set forth in advance to the students in terms they can understand; and
- the student has a reasonable prior opportunity to seek review of the decision to censor.

It is permissible in California to hold students to high journalistic standards. However, these standards may not be enforced through "prior restraint" of student speech; enforcement is limited to "post-publication responses" such as grading or discipline.

Finally, before engaging in any prior restraint of student expression, school officials should consult with their legal counsel.

BACKGROUND

Many public schools provide a student newspaper or other publication, at district expense, to teach students the elements of journalism and to supplement the language arts curriculum. School officials can become concerned, however, that the content of certain student articles may be inappropriate for the general student population or that the articles do not meet the standards of journalism expected of all students contributing to the publication. Balanced against these concerns are the interests of students and school officials in free and uncensored student expression. The tension between these concerns has spawned a series of lawsuits over the years, challenging school district rules or policies regarding student expression under the First Amendment to the United States Constitution.

The United States Supreme Court recently visited this issue in Hazelwood School District, et al. v. Kuhlmeier, No. 86-836, Slip Opinion issued January 13, 1988. In Hazelwood, the Court held that, as the publisher of a school-sponsored newspaper, a school may exercise substantial control over the contents of student articles, consistent with the pedagogical purposes of the newspaper. Such control may be exercised, despite the absence of any obvious disruption of school activities or invasion of the rights of others, because the forum of the school newspaper directly associates the school with the published article.

Although the Hazelwood decision clearly gives broad authority to school officials under the Federal Constitution, California school officials are also governed by California constitutional provisions and statutes. As a California Court of Appeals recently noted in Leeb v. DeLong (Jan. 29, 1988) 88 Daily Journal D.A.R. 1338, 1339, Education Code section 48907 and California decisional law make Hazelwood largely inapplicable in this state. This Advisory will analyze both state and Federal laws and attempt to guide you in formulating school publication rules and policies that avoid legal challenges.

DISCUSSION

U.S. Supreme Court Decisions Regarding Student Expression Require Balancing of Competing Interests.

Whenever significant civil liberties are at stake, competing

interests must be balanced to allow necessary public functions to occur with minimum infringement on the individual rights and freedoms of citizens. In the context of student newspapers, the school has an interest in maintaining general order on campus, teaching proper language and journalistic skills, and in shielding students from speech that is inappropriate for their level of maturity and which would undermine the school's ability to convey appropriate moral values. On the other hand, students have an interest in full expression of their ideas on topics of concern, even when those ideas conflict with or are critical of those of the school or the majority of the public.

This issue first came before the U.S. Supreme Court during the era of protest against the war in Vietnam. Tinker v. Des Moines Independent Community School Dist. (1968) 393 U.S. 503, involved a high school student who expressed his anti-war views by wearing a black armband to school. The school district responded by creating a rule which prohibited wearing armbands and excluded from school any student violating the rule. The Court found that rule offensive to the First Amendment, holding that students must be allowed to exercise their freedom of expression unless the

> ...conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others... (Id. at 513.)

The Court in Tinker found several factors to be significant. First, the content of the speech, though symbolic, was clearly the kind of political dissent that is fundamental to a pluralistic, democratic form of government. Second, the form of expression was completely passive and not likely to incite a disruptive response. Third, the views of the student were clearly his own and did not purport to represent the views of the school. Under these circumstances, the Court struck the balance of competing interests in the student's favor.

When speech becomes vulgar or obscene, however, the balance tips back toward control of the school and the moral values the school chooses to convey. In Bethel School District No. 403 v. Fraser (1986) 106 S.Ct. 3159, the Court upheld the discipline of a student who delivered a speech to an assembly of high school students that contained an elaborate sexual innuendo. The Court distinguished Tinker on these four grounds. First, the student's speech was "offensively lewd and indecent" and expressed no particular political viewpoint. Second, permitting such lewd speech "would undermine the school's basic educational mission," that is, teaching "the shared values of a civilized social order." Third, attendance at the high school assembly was mandatory and therefore gave the impression that the school sanctioned the student's remarks. Fourth, the speech did cause some disruption among the other students during and after the assembly. Under those circumstances, the Court held that the school appropriately disassociated itself

from the remarks by suspending the student for three days.[1]

In Hazelwood, the Court took another step away from Tinker. In the majority's view, a school-sponsored newspaper may not be considered a public forum unless "school authorities have 'by policy and practice' opened those facilities 'for indiscriminate use by the general public' or by some segment of the public, such as student organizations." (Hazelwood, Slip Opinion at p. 5.) Absent the creation of a public forum, the school newspaper is intended to serve as "a supervised learning experience for journalism students." (Ibid.) In upholding the school principal's deletion of articles dealing with teen pregnancy, birth control, and divorce, the Court held that:

> Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.

Although the Court did not equate the subjects of the deleted stories with obscenity, the opinion nonetheless holds that certain topics may be censored if they are "potentially sensitive" or might be perceived as advocating conduct inconsistent with the values that the school advocates. Further, the Court affirmed the school's authority to insist that students meet high journalistic standards, particularly where an individual's privacy could be violated by an unbalanced presentation or uncorroborated recitation of intimate family matters. (Ibid., Slip Opinion at p. 10.) Finally, since the principal believed his only choices were to delete the offensive stories or cancel publication of the last issue of the newspaper, the Court held that it was not necessary for the principal to seek modifications in the stories.

Hazelwood, then, allows schools to censor or engage in "prior restraint" of student articles that address sensitive topics relating to intimate personal or family matters or which appear to advocate conduct contrary to the values of the school. The school is also authorized to hold student reporters to high journalistic standards, including the proper handling of sensitive topics. The prior restraint of student speech in Hazelwood, therefore, did not violate the First Amendment, since the educator's actions were

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[1] With regard to indecent or obscene speech, the Court has always been more protective of children than the general adult population. In Federal Communications Comm. v. Pacifica Foundation, (1978) 438 U.S. 726, the Court upheld an FCC citation against an obscene radio broadcast on the ground that children were undoubtedly in the potential audience. (See also, Board of Education v. Pico, (1982) 457 U.S. 853 [School board has the authority to remove vulgar books from a school library].)

"reasonably related to legitimate pedagogical concerns." (Ibid., Slip Opinion at p. 8.)

California Law Is More Protective of Students' Rights To Free Speech Than the U.S. Constitution.

Although Hazelwood and Bethel give school officials broad power under the Federal Constitution, California statutory law tilts toward greater protection of individual rights. Specifically, Education Code section 48907 states:

> Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.
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> Each governing board of a school district and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction.
>
> Student editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section.
>
> There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section.
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> "Official school publications" refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.

> Nothing in this section shall prohibit or prevent a governing board of a school district from adopting otherwise valid rules and regulations relating to oral communication by students upon the premises of each school.

As the Fourth District Court of Appeals held in Leeb v. DeLong, Section 48907 clearly limits the power of school officials to a greater degree than the First Amendment standards set by the Hazelwood decision. (88 Daily Reporter D.A.R. 1338, 1339.) The statute declares that only obscenity,[2] defamation,[3] and creating a "clear and present danger" of the commission of illegal or disruptive acts shall be prohibited. All other student expression is protected. The statute further states that, unless material prepared for official school publications contains speech that violates one of the specific prohibitions, "there shall be no prior restraint."[4]

The Leeb Court further noted that section 48907 is consistent with the California Supreme Court's interpretation of the limitations on censorship imposed by the State Constitution, Article I, section 2. In Bailey v. Loggins (1982) 32 Cal.3d 907, 917, the Court held that

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[2] As to obscenity, no California court has yet addressed the scope of the term, since the Bethel decision. Based on the limiting language of Section 48907, however, we recommend that schools only engage in censorship of obscene language or conduct by students which presents a "clear and present danger" of "substantial disruption." Of course, the degree of restraint or discipline imposed will depend upon the nature of the obscene speech and the maturity level of the student population.

[3] According to the Leeb decision, defamatory material may only be censored based on a good faith belief that the information is false, likely to injure someone's reputation, and likely to result in a meritorious lawsuit against the district. (88 Daily Journal D.A.R. 1338, 1341.) Since the threat of a lawsuit alone is not a sufficient basis for prior restraint, we strongly suggest that school officials discuss the likelihood of actual tort liability with local counsel before engaging in censorship.

[4] The statute as currently formulated allows a school official to prevent any publication or distribution of material which is "prohibited." A previous version of the statute, Education Code section 10611, was interpreted by the California Supreme Court as not authorizing prior restraint. In the Court's view, the word "prohibited" in former Section 10611 meant only that a school could discipline a student for violation of a publications rule or prohibit further distribution. (Bright v. Los Angeles Unified School District (1976) 18 Cal.3d 450, 464.) The Legislature addressed the ambiguity noted by the Bright court by rewriting the statute to clearly state that prior restraint is allowed, but only where student expression violates the specific prohibitions of Section 48907. (See, Leeb v. DeLong, supra, 88 Daily Reporter D.A.R. at 1340.)

a prison newspaper, though used by the prison partly for vocational training, was also "intended to serve as a limited forum for prisoner expression." Under this "limited forum" theory, "government publishers do not enjoy unrestricted freedom to engage in content-based censorship in certain circumstances." (Leeb v. DeLong, supra, at 1340.)

Therefore, while the specific prohibitions in Section 48907 may be subject to some interpretation, it seems clear that a school district rule which generally prohibits such "potentially sensitive" topics as pregnancy and divorce is not permitted by the statute. Unless the treatment of an otherwise permissible subject could reasonably be construed as obscene, defamatory, illegal, or disruptive, school officials do not have authority to delete material submitted for publication "as a matter of taste or pedagogy." (Id., at 1341.)[5] This is where Section 48907 and the California cases differ significantly from Hazelwood.

It is permissible, under Section 48907, to hold student submissions to high standards of proper English and journalistic quality. However, the Leeb decision makes it clear that school officials in California may not engage in prior restraint or censorship based on journalistic concerns. In holding students to high standards of responsible journalism, school officials are limited to "post-publication responses," such as grading or discipline. (Id., at 1341.) This is another point of distinction from Hazelwood where the Court found that journalistic concerns justified prior restraint.

If school officials consider material submitted for publication to violate Section 48907, they must show "justification without undue delay prior to any limitation of student expression..." In our view, this language requires that, prior to deleting any part of a story, the school official must notify the student and give specific reasons why the submitted material may not be published. Absent extraordinary circumstances, such notice should be given in sufficient time to allow the student to either modify the material (particularly where the problem is journalistic) or to seek review of the school official's determination at the school district level.

CONCLUSION

California law authorizes school officials to engage in prior

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[5] These principles apply equally to official school publications and "underground" publications distributed on campus. The Hazelwood Court, in fact, acknowledged that the First Amendment provides greater protection for underground publications, since the opinions expressed there are clearly not the opinions of the school. (Ibid., Slip Opinion at fn. 3; citing Papish v. Board of Curators (1973) 410 U.S. 667.) Distribution of any publication on school premises is, of course, subject to reasonable limits as to time, place, and manner.

restraint of certain enumerated types of prohibited student expression, but only under procedural limitations that would pass constitutional muster.[6] That is, all publications rules must be stated in writing in layman's terms in regulations issued by the school district; a school official intending to censor must tell the student the reasons for any deletions in advance in terms the student can understand; and the student's opportunity to seek timely review of any potential deletion must be guaranteed. (See, Leeb v. DeLong, supra, 88 Daily Journal D.A.R. at 1341; Bright v. Los Angeles Unified School District, supra, 18 Cal.3d 450, 463-464.) If these conditions are met, we believe that districts and county offices will be able to maintain reasonable controls over the contents of student newspapers while avoiding legal challenges to school publication rules or policies.[7] However, as in any other complex or sensitive area of the law, we strongly suggest that questions regarding the prior restraint of particular student expression be submitted to local counsel for review.

For further information regarding this Advisory, contact either Michael E. Hersher or Joseph R. Symkowick in the Legal Office of the State Department of Education at (916) 445-4694.

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[6] The California Legislature may have intended only to conform to Federal constitutional standards when drafting Section 48907. If so, the statute may be revised to reflect the standard announced in Hazelwood. However, it is certainly within California's prerogative to create rights for its citizens that exceed those guaranteed by the Federal constitution. (Compare, e.g., Serrano v. Priest (1971) 5 Cal.3d 584 with San Antonio v. Rodriguez (1973) 411 U.S. 1 [Wealth as a suspect classification in the distribution of public education funds]; and California Teachers Assn. v. Riles (1981) 29 Cal.3d 794 with Board of Education v. Allen (1968) 392 U.S. 236 [Providing free public textbooks to sectarian schools].) In the area of free speech, California courts have repeatedly stated that State guarantees, under California Constitution Article I, section 2a, are "more definitive and inclusive" than the First Amendment. (Compare, Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, 908 with Lloyd Corp. v. Tanner (1972) 407 U.S. 551 [Soliciting signatures for a petition at a privately owned shopping center].) The decision of the Court of Appeal in Leeb v. DeLong clearly found Section 48907 to be constitutional under California standards; and, so long as Section 48907 is in effect, it is unlikely that a court will decide what California constitutional standards would apply in the absence of a statute.

[7] To the extent that schools may want to disassociate themselves from a particular idea or opinion, we believe that it would be appropriate to require student articles to include disclaimers.