

February 11, 2015

President Fritz Erickson  
Northern Michigan University  
1401 Presque Isle Ave.  
Marquette, MI 49855-5301

Dear President Erickson,

We represent the student editors and faculty adviser of *The North Wind* in connection with their ongoing difficulties with Northern Michigan University. It became necessary for the student editor and their adviser to seek legal counsel because of a pattern of antagonism toward the newspaper, its staff and faculty adviser connected with *The North Wind's* pursuit of news stories about the University's contracting practices. We are encouraged by your recent comments that you value an open and transparent administration and a positive working relationship with the student media, and for that reason are asking that you personally take immediate steps to address a campus culture hostile to an independent journalistic voice.

To briefly recap the recent events leading to our involvement, members of the *North Wind* staff and their faculty adviser, Prof. Cheryl Reed, began experiencing a pattern of escalating antagonism following the newspaper's reporting during the fall semester of 2014 on the terms of the University's contract with Starbucks for retail coffee services. The *North Wind's* reporting included a description of the newspaper's difficulty in obtaining a copy of the contract, which the University initially withheld on the basis of a confidentiality agreement, in contravention of FOIA.

Following the publication of a sequence of articles about the contract, the editor was called into a meeting with a faculty member who told her that the administration was unhappy with the stories the paper was publishing and that if she continued to write and publish such articles it could hurt her professionally when she went to look for jobs and no one would write her a letter of reference. Subsequently, the news editor of the *North Wind* was called to meet with the head of the Department of Communications and Performance Studies, who told her that she individually and the newspaper were at risks of sanctions, including withdrawal of the newspaper's funding, if she persisted in coverage of the University. Around this same time, Prof. Reed was notified that her compensation structure, which provided four hours of paid release time for time spent performing advising duties, was being unilaterally modified. The machinations surrounding the administration's rescinding Prof. Reed's adviser release time are outlined in detail in the FOIA documents provided by the University.

On December 6, Emma Finkbeiner, a *North Wind* editor, filed a Freedom-of-Information-Act (FOIA) request for internal correspondence among specified NMU

administrators concerning the newspaper, its editors and adviser. The newspaper was quoted an estimated fee of \$613 (and later modified to \$300) to fulfill the request, half of which was payable in advance as a deposit, but were told that the expenditure of newspaper funds for the FOIA required a vote from the newspaper's Board of Directors. During a contentious Jan. 16 meeting, members of the Board quizzed Ms. Finkbeiner and Prof. Reed about the purpose for the FOIA and, based on their opinion that the story for which the records were sought lacked merit, denied the funding request. (Among the Board members who took part in the discussion and vote was University Vice President Steven Neiheisal, whose correspondence is itself a subject of the FOIA request.)

After the *North Wind's* difficulty in obtaining fulfillment of the FOIA request attracted the attention of the national news media, you interceded and directed that responsive records be produced without delay and without charge. The newspaper received approximately 200 pages of documents on Jan. 24 and a supplemental production of approximately 1,000 pages of documents on Jan. 26. A number of these records contain significant redactions, the nature of which cannot be fully determined from the context. In transmitting the records and acknowledging that some were redacted or entirely withheld, the University provided a blanket list of exemptions to the Michigan Freedom of Information Act that were unmatched to decisions to redact or withhold particular documents. Ms. Finkbeiner filed an appeal Jan. 29 challenging the University's response to her FOIA as inadequate.

The foregoing sequence of events evidences fundamental misunderstandings about the role of student journalists on a university campus and about the law governing student journalists' rights.

At a public university, students have at a bare minimum the legal protection that the U.S. Supreme Court recognized in K-12 schools in the landmark 1969 case of *Tinker v. Des Moines Community Independent School District*<sup>1</sup> (and probably more; the Supreme Court has never held that college students are limited to the same level of free-speech protection as K-12 students, and has at times equated the rights of college students with those of adult speakers in the off-campus world). In the *Tinker* case, the Court ruled that nothing short of a "substantial" disruption of the orderly operations of the school could justify censoring students or punishing them for the content of their speech. As the *Tinker* ruling and subsequent lower-court rulings have made clear, speech is not "substantially" disruptive merely because it is controversial or offends some listeners.

Student media produced outside the boundaries of a graded class assignment, such as *The North Wind*, are recognized as "public forums" for the expression of student editors' views.<sup>2</sup> In a public forum, the First Amendment disfavors any government restriction based

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<sup>1</sup> 393 U.S. 503 (1969).

<sup>2</sup> See *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001)(*en banc*) (college yearbook is a public forum in which student editors have the right to determine editorial content); *Lueth v. St. Clair Cty. Comm. Coll.*, 732 F. Supp. 410 (E.D. Mich. 1990) (newspaper produced by students

on the content or viewpoint of a speaker, and any such restriction is presumed to be unconstitutional unless the government can carry a heavy burden of justifying it.

A government agency (such as a public university, or those acting under the authority of a university or on its behalf) is prohibited from censoring indirectly as well as directly. While direct censorship is the most obvious and the most clearly illegal type – such as confiscating a newspaper to prevent it from being distributed – the First Amendment does not stop there. In the past, courts have recognized that retaliatory or punitive actions short of literally “stopping the presses” can still violate the First Amendment if intended to chill the exercise of free-speech rights, including withholding printing funds,<sup>3</sup> suspending<sup>4</sup> or firing<sup>5</sup> a student editor, or discharging a faculty adviser.<sup>6</sup>

In summary, the law of the First Amendment is clear that administrators at a public university may not interfere, directly or indirectly, with the student editors’ decision to publish or not publish the content of their choice. This is true even if the publication receives financial support from the institution.<sup>7</sup>

With these legal principles as background, the University needs to reexamine both the structure by which it governs student media and, as importantly, the training given to administrators and staff about respect for constitutional boundaries.

NMU has an encouraging but incomplete policy in its Code of Student Rights and Responsibilities (Section 1.3.2) addressing freedom of the student press. The policy clearly prohibits college employees from meddling in news judgments, stating that student media “will be free of censorship and advance approval of copy, and their editors and managers will be free to develop their own editorial policies and news coverage.” But that assurance is undermined by the policy’s mistaken insistence that NMU is the “publisher” with “ultimate control” over editorial content.

A university does not become the “publisher” of a student newspaper by providing office space and financial support. “Publisher” status is inconsistent with the judicial recognition of student newspapers as public forums; the university can no more be the “publisher” of a student newspaper than the City of Marquette can be the “publisher” of

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at Michigan community college outside of class is a public forum entitled to full First Amendment protection).

<sup>3</sup> *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970).

<sup>4</sup> *Trujillo v. Love*, 322 F. Supp. 1266 (D. Colo. 1971).

<sup>5</sup> *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975).

<sup>6</sup> *Coppola v. Larson*, No. Civ. 06-2138(SRC), 2006 WL 2129471 (D. N.J. July 26, 2006).

<sup>7</sup> For example, in *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), the Supreme Court ruled that a public university could not deny funding to a student newspaper just because its editors chose to publish news from a religious perspective, because that would be linking government funding to the content decisions of the student editors.

remarks made by a citizen into the microphone at a City Council meeting. Every court to be asked the question has concluded that, so long as a public university refrains from actually controlling the content of a student publication, then liability for editorial content stops with the student editors. For example, in the case of *McEvaddy v. City University of New York*,<sup>8</sup> the court held that the university could not be held liable for an allegedly defamatory article in the student newspaper. The fact that the university provided the newspaper with a faculty adviser and funding was irrelevant; the key, the court said, was that the university was legally prohibited from exercising — and, in fact, did not exercise — control over the content of the newspaper that would justify imposing liability.<sup>9</sup> Interjecting university employees needlessly into newsroom decision-making weakens the institution's ability to disclaim responsibility for what is published.

In addition, it appears that NMU takes an unnecessarily negative view of FOIA requests. Every reputable journalism school of which we are aware incorporates requirements that students learn how to obtain records through sunshine laws like Michigan's Freedom of Information Act. Similarly, students are often required to attend open meetings and understand compliance with open meetings laws. These sunshine laws are the cornerstone of newsgathering for journalists, and newsgathering is similarly protected under the First Amendment. The fact that *The North Wind* staff issues FOIA requests to NMU is not antagonistic, it is standard journalistic practice.

Some degree of friction in the relationship between journalists and their subjects is inevitable and, indeed, arguably healthy. But when friction escalates as it has at Northern Michigan, to the point that students and their faculty adviser are made to feel unwelcome on their own campus and placed in fear of retribution for legitimate journalistic inquiry, immediate intervention is warranted. We ask that you take the following curative steps without delay:

(1) Direct that your administrators respond completely to Ms. Finkbeiner's FOIA request of December 6, 2014 without any redactions, for several reasons. It is simply incorrect as a matter of law that "drafts of final documents/correspondence are not subject to FOIA". These documents **are** public records **and subject to FOIA**. The pertinent questions are: (a) is there an applicable exemption, and, if so, (b) should the University apply it here. NMU's communications indicate that the University believes that it may withhold any "draft" documents, under the "frank communication" exemption set forth in

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<sup>8</sup> 633 N.Y.S.2d 4 (N.Y. App. Div. 1995).

<sup>9</sup> For other cases reaching the same conclusion see *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466 (Minn. App. 2005); *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983). See also *Lentz v. Clemson Univ.*, No. 95-CP-39-66 (S.C. Ct. Com. Pleas Dec. 20, 1995) (unpublished). In *Lentz*, the court held that Clemson University was held not liable for an alleged defamatory article printed in its student newspaper because the paper was not subject to prior review by university officials: "[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."

FOIA subsection 13(1)(m). Such an overly broad interpretation of this exemption does not comport with Michigan law. Moreover, the exemption does not apply to factual materials; to the extent that the documents contain factual materials, those portions must be provided.<sup>10</sup> In addition, the communication must be of an advisory nature and preliminary to a final determination of policy or action, NMU has failed to provide any explanation as to what “final determination of policy or action” is implicated by the withheld materials. For example, what “final determination of policy or action” is implicated by: “Possible North Wind Story”; or “North Wind Story”? Finally, even if the exemption applies, the records must be disclosed under Michigan law unless the University, in the particular instance (i.e., as to each withheld document or portion of document) demonstrates that the interest in frank communication outweighs the public interest in disclosure. It does not appear that the University has engaged in this weighing process. Demonstrating that the presumption of disclosure is outweighed is the University’s burden to meet. Continued insistence on secrecy will breed further public distrust and suspicion. (The only exemption that even debatably is not discretionary, student privacy, seems plainly inapplicable, as Ms. Finkbeiner has executed a written privacy waiver.<sup>11</sup>)

(2) Comprehensively revise the Bylaws of the *North Wind* Board of Directors to make clear that the Board has no authority over the “tone” of news or editorial content in the publication, including the editors’ determination as to which public records are needed for journalistic use. Bringing the governance of the newspaper up to prevailing standards in the field should include affording the editor, not the Board, discretion to expend funds up to a budgeted line-item sum on FOIA requests without the need to justify the journalistic merits of the request to the Board. (The need for student editors to have autonomy to manage the financial affairs of the newsroom is recognized in Section 1.3.2 of the Student Handbook, which provides: “In the delegation of editorial responsibility to students, the University should provide sufficient editorial freedom and financial autonomy for the

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<sup>10</sup> It is not at all clear whether the University has withheld any documents in their entirety that are responsive to *The North Wind’s* FOIA request; if the University has produced all responsive documents, it should say so plainly.

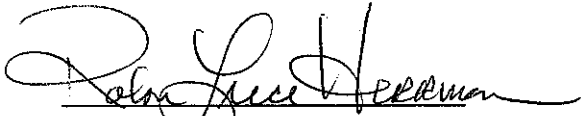
<sup>11</sup> It should go without saying that correspondence among administrators talking about students is not legitimately subject to a claim of FERPA privacy, since such records are not centrally maintained with a student’s permanent records. Such records, created for the administrators’ own personal use and subject to their deletion at any time, are not “confidential education records” at all. *See Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 524 U.S. 426 (2002); *see also Phoenix Newspapers, Inc. v. Pima Cmty. Coll.*, No. C20111954 (May 17, 2011) (relying on *Falvo* and ordering college to release employees’ internal correspondence about student in response to journalists’ open-records request: “Documents are not ‘maintained’ by an educational institution under FERPA unless the institution has control over the access and retention of the record. Simply because emails exist on a central server and in inboxes at some point does not classify those documents as education records. ... If emails can be removed from the database in question simply by the account holder deleting the email from their inbox then emails that happen to remain on the server by no action of the educational institution are not maintained by the school.”).

student communications media to maintain their integrity of purpose as vehicles for free inquiry and free expression in an academic community.”).

(3) Restore the four (4) hours of compensated release time afforded to the newspaper adviser that were promised upon her hiring, in recognition of the substantial time commitment entailed in advising student media and the value of that advising work to the University community. We understand that Prof. Reed has had to file a union grievance in order to get the University to comply with her promised release time for the current semester, but that she has been informed that the administration is cutting her release time in half for the future. We’d ask you to restore the faculty-approved release time.

We appreciate your interest in promoting a civil and respectful working relationship with the student media, and we hope to see immediate concrete steps toward improving that relationship without the need for legal intervention.

Sincerely yours,



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