



March 18, 2024

*The Budget* Editors  
*LHSBudget.com*  
Lawrence High School  
1901 Louisiana St.  
Lawrence, KS 66044

— Sent by Email —

Dear *Budget* Editors :

Thank you for contacting the Student Press Law Center for information regarding the rights of student journalists. 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. We would be happy to help you find an attorney licensed in Kansas to assist you with this matter.

### **The Facts**

As you have told me, your school implemented Gaggle software on all student accounts issued by the school in November 2023. The program was approved by the board without discussion with student media of the potential consequences of the software's implementation.

Your understanding of Gaggle is that it will scan all data and files uploaded to your school account's Google suite, which includes programs like Google Drive, Google Docs and Gmail. If the AI that completes the scan finds something it deems potentially hazardous, it will send the document to a Gaggle employee. The employee will then review the work of the AI, and if it is deemed an actual concern, it will notify your school administration. You understand that if it is an image that is flagged for child pornography, the image will be removed from the student's Google Drive without any prior notification to those students. The school administration does not have a way to review the removed images.

The first Gaggle problem your newsroom heard of was when many students in the art department were called to the office. These students were told that their work had been flagged for nudity by Gaggle and the photos were removed from their accounts. Upon review, students say none of the images included nudity. Rather, images included photographs of girls that were wearing tank tops or someone laying on a couch fully clothed. *Red and Black* Co-Editor in Chief Maya Smith [wrote a story](#) last month about this issue and how students were losing their work.<sup>1</sup>

Upon concerns with how Gaggle would inspect your reporting documents, your newsroom scheduled a meeting with the district's administration to discuss your concerns. Concerns shared included the deletion of student work, scanning of reporter's research and drafts of stories, and the potential chilling effect Gaggle would have on future stories. As you have shared, you are concerned that sources in difficult stories will be hesitant to be interviewed — even off the record — if they know that the school has access to those interviews, unpublished interview notes or other reporter work product at any time. The scanning software also raises concerns about your ability to use anonymous sources in the rare instances where it would be necessary.<sup>2</sup>

District officials articulated their own concerns during a meeting earlier this month. They stated that Gaggle was important to protect students' mental health and keep the district aware of students who are potentially struggling. Administrators also expressed concern about a higher risk for legal liability if they were to stop monitoring journalism students. The district also stated that because students signed an acceptable use policy, which is required in order to use one of the school-issued devices, they consented to the monitoring.

Moving forward, you are asking that the school stop using Gaggle on the journalism program's shared Google Drive. You would also like to see a process be put in place to return students' copyrighted images – their legal property — if they are deleted by Gaggle. Finally, you are asking for a policy that states that the district will not scan or monitor the unpublished work of student journalists, and that the acceptable use policy properly recognizes student copyright protections.

## **The Law**

The implications of the Gaggle program you described raise serious legal concerns. 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). Kansas enshrined these protections in its state laws in 1992 when it passed the Kansas Student Publications Act. K.S.A. 72-7209. This law ensures that school-sponsored publications in Kansas have broad free speech and press protections and that the school can only censor student media if it contains unprotected speech or “creates material or substantial disruption of the normal school activity.” *Id.*

There are many legal considerations that you have mentioned during our conversations. This letter will break them down by category with the hope that makes it a bit more clear.

*The Acceptable Use Policy cannot be interpreted to violate the Constitution and state laws*

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<sup>1</sup> <https://lhsbudget.com/news/2024/02/09/art-students-push-back-against-potential-gaggle-censorship/>

<sup>2</sup> Anonymous sources have been used in your reporting, including a 2018 story about teacher's awareness of student's potentially violent behavior. See Nikki Aqui, *Teachers say lack of info hurts safety*, The Budget (Sept. 20, 2018) <https://lhsbudget.com/news/2018/09/20/teachers-say-lack-of-info-hurts-safety/>.

Federal and state laws and the Constitutional protections offered by the First Amendment cannot be superseded by a school policy. In *Tinker*, for example, the students were suspended for violating a policy that was put in place to stop students from wearing armbands. *Tinker* at 504. The fact that there was a board policy enacted that banned this type of expression was not a consideration in the case. *Id.* at 513. The case hinged on the fact that punishing these students for their speech was a violation of their First Amendment rights. *Id.* Clearly, an unconstitutional application of a technology policy would not withstand review by a court.

While the district can have terms that the students must agree to in order to use the school-issued technology, that policy cannot require students to give up their First Amendment or other legal rights. Although the district indicates that students have no reasonable expectation of privacy, that does not mean that student journalists are giving up other protections available to them, such as shield laws and copyright protection. The AUP also incorrectly states that any material on a district computing device will “remain” the property of the district. As explained below, the students are the owners of the copyrightable material, such as photos taken or articles written, that they upload to the computers. Copyright ownership cannot and does not depend on what device the image is stored on.

*Students retain ownership and copyright to the works they create, not the administration*

In copyright law, absent a formal employer/employee relationship or agreement to the contrary, the “author” of a photo or a story is deemed the owner of the work and the exclusive rights granted by copyright law remain with the owner. 17 U.S.C. § 201(a). The only circumstance that someone besides the photographer would be deemed the author and therefore owner of a photograph, is if it is a work made for hire. 17 U.S.C. § 201(b). Works are “made for hire” when they are made within the scope of traditional employment.. *Id.* See also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)(providing list of factors to be considered in determining whether someone is an employee or an independent contractor). Your school district does not treat high school journalists as traditional district employees; no work for hire relationship exists. In the absence of a formal work for hire relationship, it does not matter if the photo is taken with another’s camera or stored in someone else’s computer system, authorship remains with the person who took the picture. See e.g. *Burrow-Giles Lithographic v. Sarony*, 111 U.S. 53 (1884) (holding that the person who takes the photo, not the person who develops the photo, owns the copyright).<sup>3</sup> Students have been successful in asserting their ownership in their work against school districts and others.<sup>4</sup>

We find it deeply troubling that Gaggle is removing students’ personal intellectual property — copyrighted material protected by all the legal rights granted to copyright owners — with seemingly no process to return the work to the students. In the case of student work, students own the copyrighted photos they take and the stories they write. It does not matter if they are using a school’s camera or the school’s technology to edit the photos. As mentioned above, there have already been

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<sup>3</sup> The fact that a school journalist is using school resources materials likewise does not diminish their First Amendment protections. See *M.C. v. Shawnee Mission Unified Sch. Dist. No. 512*, 363 F.Supp.3d 1182, 1212 (D. Kan. 2019)(finding that a student journalist whose school-owned camera was confiscated by school officials during a student walk-out stated a plausible First Amendment claim.)

<sup>4</sup> *Quinto v. Legal Times of Washington*, 506 F.Supp. 554 (D.D.C 1981)(finding that copyright in article submitted to law school student newspaper was retained by student author.) See also Elvia Limón, *Ex-student photojournalist dismisses suit against Lewisville ISD after sides agree he owns rights to images he shot*, The Dallas Morning News (June 29, 2018 3:59 P.M.) <https://www.dallasnews.com/news/education/2018/06/29/ex-student-photojournalist-dismisses-suit-against-lewisville-isd-after-sides-agree-he-owns-rights-to-images-he-shot>.

multiple instances where Gaggle has incorrectly flagged student work for being “nudity” when it in fact was just a student in a tank top. This has great implications for student journalists, who may take photos that include a student showing their arms. It is hard to see how a photojournalist could adequately cover gymnastics or swim meets without their photos potentially being removed. The school should work to ensure that the students are able to retain access to their lawful property. Destroying property that does not belong to it obviously raises serious legal concerns for the district.

*The Child Internet Protection Act does not require this level of student surveillance*

The Child Internet Protection Act (CIPA) was signed into law nearly 25 years ago. The law conditioned federal funding on making sure that libraries and schools were restricting minor’s access to material that is obscene, child pornography or harmful to minors. 47 U.S.C. § 254(5)(B). The Federal Communications Commission, the agency charged with enforcing CIPA, has explicitly stated that the law “does not require the tracking of Internet use by minors or adults.” There is also nothing in the law that requires the scanning of documents that students have stored on their school drive. *Children’s Internet Protection Act (CIPA)* Federal Communications Commission (Dec. 30, 2019) <https://www.fcc.gov/consumers/guides/childrens-internet-protection-act>.

You have pointed out that there have been concerns from politicians that the programs that monitor and scan all work of students have gone beyond the scope of CIPA and infringe on students’ rights.<sup>5</sup> The ACLU of California argued that the use of the program is a violation of the civil rights of students and is not required by CIPA.<sup>6</sup> Again, CIPA requires that schools place some sort of content filter on the material that students are able to access from the school’s internet. It does not require that schools monitor the works that students themselves are creating. If a student journalist was to write a story about gun laws or quote a student who used profanity, that would be flagged by Gaggle. CIPA does not require the use of a program like Gaggle to scan the work of student journalists or any other student at your school. Gaggle goes beyond what is required by CIPA and your school cannot hide behind that law to justify the use of software that raises some of the serious legal concerns you have raised.

*School liability is increased by this kind of monitoring*

The Kansas Student Publications Act was passed to protect the rights of student journalists, but it also protects the school from liability for student publications. K.S.A. 72-7209. If a student journalist were to publish something obscene, defamatory or otherwise unlawful, the law limits the school district’s liability. *Id.* However, the more a school becomes involved in the work and content produced by student journalists, the more they risk becoming liable for the publication. See, e.g., *Millner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983) (exempting school from liability for defamation claim where it was shown that school played no role in determining content); *Mazart v. State*, 441 N.Y.S.2d 600 (NY Ct. Cl. 1981)(holding that university could not be held liable for student newspaper because it did not have the right, and did not, control its content); *Sisley v. Seattle School Dist. No. 1*, No. 10-2-10522-1 SEA (King Cty. Super. Ct.)(July 22, 2011)(unpublished)(dismissing school district as defendant in libel lawsuit brought against high school student newspaper where district showed that it did not play a role in determining its content). *Yeo v. Town of Lexington*, 131 F.3d 241 (1st Cir. 1997).

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<sup>5</sup> Senators Warren, Markey, and Blumenthal wrote a letter to the CEO of Gaggle expressing their concerns in 2021. <https://www.warren.senate.gov/imo/media/doc/2021.09.29%20Patterson%20-%20EdTech%20letter.pdf>

<sup>6</sup> *ACLU Letter to Fresno Unified School District Superintendent*, (Dec. 15, 2020)

[https://www.aclusocal.org/sites/default/files/advocacy\\_letter\\_fusd\\_online\\_monitoring\\_of\\_students.pdf](https://www.aclusocal.org/sites/default/files/advocacy_letter_fusd_online_monitoring_of_students.pdf).

In this case, your school is arguably incurring more liability with the use of Gaggle. Now, they are potentially on notice for everything that happens on their internet server. A court could find that any incident that happens at Lawrence High School was foreseeable, as long as the student had any sort of indicator of the potential incident on their computer. Schools have often been sued for the negligent handling of students who are displaying concerning behavior and the tragic violence that results from the negligence, even without the constant monitoring that Gaggle provides.<sup>7</sup> The removal of *The Budget's* Google Drive from Gaggle surveillance will not result in a higher risk of legal liability for the school or the journalism program.

*Kansas Shield Laws apply to student journalists and protect any information they gather in the reporting process*  
Kansas also has recognized protections for journalists both in its judicial interpretation of the First Amendment and through enacted shield laws. See *In re Pennington*, 224 Kan. 573, 581 P.2d 812 (Kan. 1978); K.S.A. 60-481. The shield law protects journalists from being forced to reveal “any information or the source of any such information procured while acting as a journalist.” *Id.* Kansas’s shield law defines “journalist” as, partially, “an online journal in the regular business of newsgathering and disseminating news or information to the public.” K.S.A. 60-480. In addition, Kansas courts have recognized a First Amendment-based reporters privilege. See *State v. Sandstrom*, 581 P.2d 812 (Kan. 1978), cert. denied, 440 U.S. 929 (1979). That law has been successfully used by student media in Kansas, for example, to protect a reporter’s notes and identity of a confidential source. “Court protects source’s identity,” SPLC Report (Spring 1991) at 37.

The law protects you and the rest of the journalism staff from having to turn over your work product to those outside of your newsroom. As government and law enforcement officials in Marion, Kansas, recently learned the hard way: Newsrooms have special protection under our Constitution and laws.<sup>8</sup> See Privacy Protection Act, 42 U.S.C. Section 2000aa (federal law limiting the search of newsrooms and confiscation of a reporter’s work product and documentary materials by government officials that was inspired by the search of a student newspaper newsroom.) Courts have made it quite clear that public government officials can’t bust down the front door of a newsroom to search journalists’ notes and computer files. And Lawrence School District administrators — also public government officials — may also need to learn the hard way that they cannot employ a software system that effectively creates a back door for doing the same thing.

I urge you to share this information with Lawrence Public Schools officials and ask that they reconsider their actions and work with you to amicably resolve your concerns and remove Gaggle from the publication’s shared Google Drive. This is a serious issue that threatens the editorial independence of all student media. We — and other press freedom groups — are watching very carefully. I cannot imagine that your district officials want to find themselves the defendants in a very public First Amendment legal battle, especially as your newsroom has received many accolades. 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.

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<sup>7</sup> See Taylor Romaine, *Lawsuit over Oxford High School shooting claims negligence by some school staff and the shooter’s parents*, CNN (Jan. 28, 2022 1:23 A.M.)

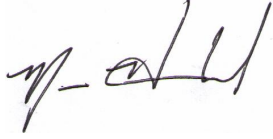
<https://www.cnn.com/2022/01/28/us/oxford-high-school-shooting-lawsuit-parents-staff/index.html>

<sup>8</sup> See Jonathan O’Connell, *How a small-town feud in Kansas sent a shock through American journalism*, The Washington Post, (August 26, 2023 6:00 A.M.)

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

Sincerely,

STUDENT PRESS LAW CENTER

A handwritten signature in black ink, appearing to read "M. Hiestand". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping underline.

Mike Hiestand  
Senior Legal Counsel

Ellen Goodrich  
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