



Foundation for Individual Rights in Education

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September 10, 2008

Patrick T. Harker
President
University of Delaware
104 Hüllihen Hall
Newark, Delaware 19716

URGENT

Sent via U.S. Mail and Facsimile (302-831-1297)

Dear President Harker:

It is with marked disappointment that FIRE writes to you again with renewed concern regarding the constitutional rights of students at the University of Delaware (UD). Specifically, FIRE is concerned about the threat to freedom of expression posed by the recent actions of UD administrators in imposing unreasonable limits on the distribution of student publications on campus.

This is our understanding of the facts. Please inform us if you believe we are in error.

On the evening of Monday, September 1, UD student Carl Rimi was distributing self-published student newspapers to passing students on the UD campus in front of Trabant University Center, where a university-sponsored activities fair was occurring that night. The newspapers were distributed free of charge.

In response, Scott Mason, the Associate Director of UD's Student Centers, approached Rimi and demanded that he cease distribution. Mason told Rimi that passing out published materials outside of Trabant University Center was prohibited unless Rimi had obtained a permit from the City of Newark. When student Tom Schrandt arrived, Mason conveyed the same demand and justification, saying that students were prohibited from passing out newspapers anywhere on campus without a city permit. Mason also told Rimi and Schrandt that distributing the materials counted as solicitation.

Later that same evening, Schrandt and student Alyssa Koser met with Mason and Marilyn Prime, Director of UD's Student Centers. Mason again told Schrandt and Koser that students were not allowed to distribute any printed materials on UD's campus without a city permit. Mason also told the students that "an individual

student cannot hand out things on campus.” When Koser reminded Mason that students enjoy a constitutional right to distribute materials, Prime responded: “According to policy, they don’t.”

Shortly after this meeting, Mason again approached Koser and Schrandt at the activities fair and angrily provided them with a printed copy of UD’s “Distribution of Published Materials on Campus” policy. Mason left without answering further questions from assembled students.

UD’s “Distribution of Published Materials on Campus” policy is riddled with constitutional deficiencies, as are Mason’s and Prime’s understandings of the policy’s operation. Indeed, the policy is in direct conflict with UD’s legal and moral obligation as a public institution of higher learning to uphold the First Amendment. Mason’s and Prime’s insistence that the policy supersedes constitutional imperatives is deeply troubling.

Federal case law regarding freedom of expression does not support the transformation of public institutions of higher education into places where constitutional protections are the exception rather than the rule. Federal courts have repeatedly held that “time, place, and manner” restrictions must be “narrowly tailored” to serve substantial governmental interests. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). UD’s “Distribution of Published Materials on Campus” policy is neither sufficiently narrow to meet this standard, nor is it in service of a substantial governmental interest. As such, it fails to pass constitutional muster.

UD’s policy reads in relevant part:

- In order to distribute materials as described in each case below, a space on campus from which to distribute approved materials must be reserved through the Events Services Office.
- Members of the University community (all classifications of students, faculty, staff, and registered student organizations) may distribute published materials on campus with the understanding that they accept responsibility for the materials, and the materials are labeled to indicate sponsorship and are distributed in accordance with this policy statement.

[...]

- When, in the opinion of a University official authorized to make the determination, the manner or place of distribution of published materials constitutes a violation of this policy or a disruption of normal University activity, the official should inform the distributors, and request that distribution be discontinued. If the distributors refuse, the official shall advise them that they may face disciplinary action if they persist.
- The University may not limit the distribution of published materials solely on the basis of what is contained in such materials.

This policy unconstitutionally restricts speech in several ways. First, in requiring prior approval of student publications before distribution, the University may not *in any way* condition approval on the content or viewpoint of the materials to be distributed. At present, the policy only states that consideration of content or viewpoint cannot be the *sole* basis of any limitation on distribution. This degree of discretion is unconstitutional. According to the U.S. Supreme Court, “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.” *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969). UD’s policy, which requires a “license” from the university in that it prohibits the distribution of literature or newspapers without the university’s prior approval, includes none of these “narrow, objective, and definite standards,” and therefore cannot pass constitutional muster.

UD’s requirement that all published materials are “labeled to indicate sponsorship” is equally untenable. The First Amendment clearly supports the right to anonymous speech. The Supreme Court has ruled that “[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible... Accordingly, an author’s decision to remain anonymous...is an aspect of freedom of speech protected by the First Amendment.” *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341–342 (1995). Requiring published materials distributed by students to indicate “sponsorship” is akin to a requirement of disclosing authorship and violates the First Amendment. Further, the policy’s *de facto* ban on anonymous published materials cannot be supported as a reasonable time, place and manner restriction. The requirement neither advances a significant governmental interest (other than a generalized desire for “order”), nor is it sufficiently tailored to pass muster as the least restrictive means to a recognizable end.

It is also unclear what, if any, significant governmental interests are served by requiring students to have materials “approved” by UD administrators prior to distribution, or how this approval process functions. This lack of clarity is a problem in and of itself, for it leaves students guessing at how material might be “approved,” leaving them likely to self-censor as a result of this confusion.

Even more troubling than the actual policy are the bizarre claims of Prime and Mason that the students’ actions counted as solicitation, that individual students may not distribute published materials on campus, and that those wishing to do so are required to obtain permits from the City of Newark. First, it is worth noting that nowhere in UD’s policies is it stated that individual students may not distribute published materials on campus. This is, of course, a necessary omission, since such a ban would be unconstitutional.

Second, distributing student newspapers does not qualify as solicitation even under UD’s own “Sales and Fund Solicitations by Registered Student Organizations” policy, which states:

By definition, sales/solicitations includes solicitation of information, membership, admissions, charges for events, donations, and any funds derived from programs and services rendered or sale of goods.

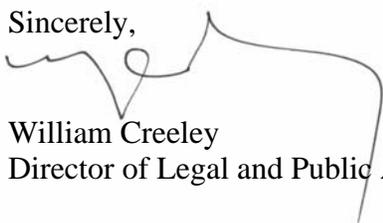
Distributing student newspapers free of charge does not fall under the purview of this policy, and Prime and Mason were wrong to suggest otherwise.

Finally, Prime and Mason were similarly mistaken in claiming that the students needed a permit from the City of Newark to pass out published materials on campus. Again, this statement finds no support in current UD policies. Indeed, a cursory review of City of Newark statutes and regulations demonstrates that even if Prime's and Mason's contention that Newark code governs student distribution of published materials at UD were correct (which is unlikely), the Newark code includes no requirement of a permit or license for distribution of noncommercial literature, including newspapers. Rather than being an accurate description of university policy or the law of the City of Newark, it seems likely that the claims made by Prime and Mason were the result of hostility towards either the students in question or their viewpoints.

In light of both the constitutional infirmities inherent in UD's distribution policy and the inaccurate and misleading statements made by UD administrators to students, FIRE asks that you immediately clarify the university's commitment to freedom of expression on campus, with specific recognition of the right of UD students to distribute independent student publications on campus without need of prior approval, sponsorship, or permission from the university or its governing municipality.

FIRE is committed to using all of its resources to abolish the unconstitutional limits on freedom of expression at UD. Because both UD's policy and administrators' misinformation regarding that policy continue to interfere with students' rights, we urgently request a response on this matter by 5:00 PM on Friday, September 12, 2008.

Sincerely,



William Creeley
Director of Legal and Public Advocacy

cc:

Michael Gilbert, Vice President for Student Life
George Brelsford, Dean of Students
Scott Mason, Associate Director, Student Centers
Marilyn Prime, Director, Student Centers
Alyssa Koser
Carl Rimi
Tom Schrandt