



October 23, 2008

Shannon Torii, Editor-in-Chief  
*The Courier*  
College of DuPage  
425 Fawell Blvd.  
Glen Ellyn, IL 60137

Dear Ms. Torii,

You asked the Student Press Law Center to review the proposed revision to the Policy Manual of the Board of Trustees of the College of DuPage, pertaining to Student Publications. The editors of the *Courier* are concerned that the proposed policy would result in imposing administrative control over the editorial content of the newspaper, which now operates as a public forum for the expression of student voices free from administrative censorship.

As described below, we do not believe that the proposed policy can have any legal effect. If the College attempted to enforce the policy to require administrative review or approval of the content of the *Courier*, it would plainly be in violation of the Illinois College Campus Press Act. The change, if enacted, also would be subject to legal challenge under the United States and Illinois constitutions as a violation of students' free-speech rights, because in the absence of any lawful motivation, the change appears to be retaliatory for the editorial content of the September 26, 2008, edition of the newspaper.

We think it is unlikely that the Trustees ultimately will approve this change. As explained below, the change would be of no benefit to the College but would potentially expose the president to legal liability that does not now exist; once the Trustees have reviewed this proposed change with legal counsel, we do not believe the College will make such a foolish and self-destructive decision.

To be clear, the following does not constitute "legal advice" upon which you or your editors should take action. The staff of the Student Press Law Center provides information and analysis, but if you are considering initiating a lawsuit or otherwise taking action, this information does not substitute for consultation with local legal counsel in your state. As we discussed, the Student Press Law Center maintains a nationwide network of referral attorneys who will represent student journalists free of charge, and if you and your staff are in need of a local attorney to advise you as to a specific situation, we will be happy to arrange volunteer counsel.

## Proposed Policy Manual Change

The Board of Trustees of the College is considering adding the following wording to its Policy Manual under the "Student Publications" heading: "The College President will be responsible for overseeing student publications." No comparable provision appears in the Policy Manual regarding any other student organization or activity.

The Trustees have not publicly explained the rationale for the provision or what effect they believe that it will have. There is no dispute that a college cannot, by policy, override a state statute or the federal or state constitutions. To the extent that a Trustees policy conflicts with one of these legal authorities, the policy is void and unenforceable.

## The Illinois College Campus Press Act

The Illinois College Campus Press Act, provides in pertinent part: "All campus media produced primarily by students at a State-sponsored institution of higher learning is a public forum for expression by the student journalists and editors at the particular institution. Campus media, whether campus-sponsored or noncampus-sponsored, is not subject to prior review by public officials of a State-sponsored institution of higher learning." 110 ILCS 13/10. The Act also provides that speech in a student publication "is neither an expression of campus policy nor speech attributable to a State-sponsored institution of higher learning," 110 ILCS 13/25, and specifies that state colleges are "immune from any lawsuit arising from expression actually made in campus media, with the exception of the institution's own expression." 110 ILCS 13/35.

The Act makes it clear that the president of your college could not require prior administrative approval of the content of the newspaper, or otherwise interfere with what students lawfully choose to publish. The Act further makes clear that speech in a student publication is the students' speech and not that of the college's administration. Any rule or policy that attempted to give a college president editorial control over the content of a student newspaper would be contrary to the Act and void. Violation of the Act is enforceable by civil action and by a monetary award of attorney fees.

## First Amendment Protection Against Retaliation

As you describe the situation, the proposed rule was introduced less than a month after the newspaper published an article describing critical comments about the Board of Trustees made at a public meeting regarding the search for a new College president. The same Board of Trustees member who proposed the policy change also publicly criticized the *Courier's* coverage of that meeting.

As discussed above, to the extent that the Trustees intend for the new policy to give editorial control over the newspaper to the College through the president, that policy would violate the College Campus Press Act. Because the Trustees have put forward no lawful purpose for the policy change, and because the policy change

immediately followed a dispute over editorial content that the *Courier* lawfully published, a court would have no difficulty concluding that the policy change was put forward to “send a message” to the editors of the newspaper discouraging critical coverage of the Trustees.

Any attempt to use government authority to pressure citizens into refraining from lawful speech is a violation of the First Amendment. “[A]n individual has a viable claim against the government when he is able to prove that the government took action against him in retaliation for his exercise of First Amendment rights.” *Anderson v. Davila*, 125 F.3d 148, 160 (3d Cir. 1997). If the change to the Student Publications policy was motivated in any substantial part by displeasure with the *Courier’s* lawful coverage of a Trustee meeting, then the policy change would violate the First Amendment.

### Liability of Colleges for Content of Student Publications

In addition to the protection of the College Campus Press Act, your college is protected against liability for the content of student publications by a body of legal precedent that establishes that a college with no editorial control over the content of a newspaper cannot be made to pay damages if the newspaper injures someone. To imply that the president is responsible for the content of student publications would muddy this clear division of responsibility, and would risk opening up the College – and the president personally – to legal liability that does not now exist.

The courts have been clear that, if a college refrains from exercising editorial control over a student publication, the college will not be held financially liable for the content of the students’ work. *See, e.g., Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983) (holding that university could not be held liable because it did not have the authority to control the content of newspaper: “The relationship between a university and its student newspaper is anomalous and cannot be compared with a publisher and its newspaper. The latter may exercise censorship to the fullest, as it deems commercially proper to do so, but the former is almost completely barred from censoring its student paper since that would be prior restraint and would impede the free flow and expression of ideas.”).

Similarly, courts have rejected attempts to impose liability on colleges for the work of student journalists as “agents” of the college. Because college officials do not control the manner in which student journalists work or review their work product, there is no “agent” relationship. *See, e.g., Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981) (university could not be held liable because it did not have the right to control the content of the newspaper even though it provided the paper’s operational funding, office space and equipment; therefore, no agency relationship could be established). *See also Lentz v. Clemson Univ.*, No. 95-CP-39-66 (S.C. Ct. of Common Pleas Dec. 20, 1995) (unpublished) (university was held not responsible 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.”); *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). These cases demonstrate that colleges seeking to avoid liability for their student publications are best served by keeping their distance from the newsroom.

To imply that the president of the College has responsibility for the content of the paper would confuse an otherwise clear liability situation for the College, and potentially for the president personally. It is doubtful that the College's attorneys will allow this to happen once they have had a chance to review this proposed policy. We suspect that cooler heads will prevail and that the Trustees will quickly figure out that, to the extent that the proposed policy is meant to imply any degree of editorial control over the *Courier*, the policy has no legal effect (except, potentially, to cloud the College's protection from liability for editorial content).

Please feel call on us further if we can be of help. If you and your editors feel that the newspaper needs legal representation, we will be pleased to assist you in securing volunteer counsel in your area.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Frank LoMonte". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Frank D. LoMonte, Esq.  
Executive Director  
Student Press Law Center