



Foundation for Individual Rights in Education

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February 22, 2011

Steven Lee Johnson, President
Sinclair Community College
444 West Third Street
Dayton, Ohio 45402

Sent via U.S. Mail and Facsimile (937-512-4596)

Dear President Johnson:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is concerned about the threat to freedom of expression posed by Sinclair Community College's (SCC's) ban on constitutionally protected distribution of literature on campus and its demand that SCC student Ethel Borel-Donohue not distribute flyers in her SCC classroom outside of class time.

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

After class, on or about October 19, 2010, Borel-Donohue, a student in SCC's Paralegal Program, unobtrusively and without disruption distributed roughly fifteen flyers relating to National Breast Cancer Awareness Month to various students in her Probate Law I class. In some cases, Borel-Donohue left flyers on the desks of students who had left their seats.

On November 1, 2010, according to Borel-Donohue's written account of events, she was called by SCC Paralegal Program Secretary Jane Moix because Judge Michael Brigner, Paralegal Program Chair, had asked to meet with her. Borel-Donohue and Brigner met on November 2.

On January 4, 2011, Borel-Donohue submitted her account of the meeting to Brigner for review and correction. Her account read, in relevant part:

You [Brigner] reached into your briefcase and pulled out two brochures and said that these were the reason you had called me into your office. One of the brochures was on the link between abortion and breast cancer and the other on the link between oral contraceptives and breast cancer. You said that a student (whose name you kept anonymous) had come to you to complain that I had given the brochures to her and that she told you she had had an abortion and was offended by the material in the brochures. [...] You told me that the student had told you that I had left the brochure on her desk and so she was not able to tell me in person that she did not want the brochure. You then told me that I had no right to hand out any materials to students in the classroom.

Brigner replied to Borel-Donohue on January 4 that her account was “not accurate,” but he failed to offer corrections or to indicate specific inaccuracies.

In any case, SCC’s Student Code of Conduct bans “distribution ... of materials on Sinclair owned or controlled property.” The policy lists only one exception: “recognized student organizations after registering with the appropriate college official.” This ban violates SCC’s legal and moral obligation to uphold the First Amendment rights of its students.

That the First Amendment protects students at public institutions is settled law. The Supreme Court has repeatedly emphasized the primacy of the First Amendment on public college campuses, noting that “the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’” *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted). See also *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities”).

As a public college legally bound by the First Amendment, SCC may not subject Borel-Donohue to unreasonable restrictions on distribution of literature outside of class time. The U.S. Supreme Court has held that reasonable “time, place, and manner” restrictions on freedom of expression must be “narrowly tailored” to serve significant governmental interests and must leave open ample alternative means of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 782–83 (1989). While SCC instructors may limit the expression of students during class time in the service of SCC’s educational mission, such narrowly tailored restrictions for instructional purposes cannot lawfully be extended to restrict all distribution of literature outside of class time. The United States District Court for the Southern District of Ohio—whose jurisdiction includes Sinclair Community College—has made clear that distribution of literature on a public university campus is protected by the First Amendment and can only be subjected to the type of carefully crafted regulations the Supreme Court outlined in *Ward*. In striking down Ohio State University’s restrictions on literature distribution on First Amendment grounds, the district court in *Solid Rock Foundation v. Ohio State University*, 478 F. Supp. 96, 102 (S.D. Ohio, E.D. 1979) fully explained that absent “material disruption” or “substantial disorder,” the distribution of literature on campus is student expression protected by the First Amendment:

The Supreme Court has considered the special interests of the educational environment in connection with First Amendment rights. The college campus is peculiarly suited to serve as a marketplace of ideas and a forum for the robust exchange of different viewpoints. The principle that “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ ... is not confined to the supervised and ordained discussion which takes place in the classroom.” Plaintiffs’ distribution of *Today’s Student* is not the kind of activity which “materially disrupts classwork or involves a substantial disorder or invasion of the rights of others” such as the noisy picketing in *Grayned* or the classroom demonstrations in *Sword v. Fox*, 446 F.2d 1091 (4th Cir. 1971). The argument that limitations on expression may be imposed for the purpose of diminishing litter has been rejected. Distribution of newspapers is not inconsistent with the goals of maintenance of law and order and the pursuit of educational objectives in an orderly manner set forth in R.C. 3345.21. Nor does it conflict with a serene atmosphere conducive to the study and sober reflection necessary in the process of higher education. Less restrictive alternatives are available to the parties to maintain free movement of students and faculty and to prevent transforming the University into a “gigantic newsstand.” [Internal citations omitted.]

The district court in *Solid Rock Foundation* also made clear that the complaints of other students about the content of distributed material do not qualify as sufficient reason for banning student literature or punishing its author:

There may be complaints from those in the campus community who desire not to be subjected to plaintiffs’ views, such as appear to have prompted the University action in the first place. But the University may not, in the interest of protecting particular persons from an unpopular viewpoint substitute its judgment for the judgment of the individual, who has a right to determine whether or not he is willing to receive plaintiffs’ message.

Id. at 93. That is, the school may not substitute its judgment for that of the recipient of a pamphlet, who may choose to read it or simply throw it away.

Judged in light of these binding rulings from both the Supreme Court and the federal district court, SCC’s broad prohibition on distribution of literature is neither sufficiently narrow, nor is it in service of a significant governmental interest, nor does it leave open ample alternative means of communication on campus. As such, it fails to pass constitutional muster.

SCC’s requirement of prior registration for distribution of literature is similarly unconstitutional. The Supreme Court has made clear that “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). Despite this clear precedent, SCC fails to indicate the “narrow, objective, and definite standards” used by the “appropriate college official” in deciding whether to allow groups to

distribute literature on campus. Nor does SCC indicate any means by which individual students may distribute literature on campus without fear of punishment. By requiring all student groups to “register” with the “appropriate college official” before distributing literature on campus, neglecting to indicate the standards by which registration will be granted, and failing entirely to recognize the right of individual students to distribute literature, SCC has impermissibly restricted the First Amendment rights of its students in general and Borel-Donohue’s First Amendment rights specifically.

Since the time of Thomas Paine, it has been inconsistent with basic American conceptions of liberty to require any kind of licensing or pre-approval for pamphleteers or others who wish to distribute literature. Given our nation’s long and storied protection of the right of citizens to speak their minds via the printed word, Sinclair Community College’s attempt to prevent both Borel-Donohue and all SCC students from doing so is particularly unfortunate.

FIRE asks that SCC spare itself the embarrassment of fighting against the Bill of Rights. SCC must acknowledge Borel-Donohue’s right to distribute literature to fellow students outside of class time. FIRE further asks that SCC revise its Student Code of Conduct to comply with SCC’s First Amendment obligations.

We respectfully ask for a response to this letter by March 15, 2011.

Sincerely,



Adam Kissel
Vice President of Programs

cc:

Judge Michael Brigner, Chair, Paralegal Program, Sinclair Community College
Helen Grove, Senior Vice President and Provost, Sinclair Community College