1980 S.C. Op. Atty. Gen. 113 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-69, 1980 WL 81951

Office of the Attorney General

State of South Carolina
Opinion No. 80-69
June 12, 1980

**Subject: Education, Colleges and Universities, Student Activities**

***1** Homosexual advocacy rights organizations may not be denied official recognition by public colleges and universities if such organizations comply with college rules and regulations and the aims of such organizations are not illegal or disruptive of orderly campus functioning.

TO: University Legal Counsel
University of South Carolina

Question:

Is the University of South Carolina required to recognize a homosexual advocacy rights organization as a licensed student organization?

Statutes and Cases:

United States Constitution, First Amendment, Fourteenth Amendment; Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); Tinker v. Des Moines Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); Hammond v. South Carolina State College, 272 F.Supp. 947 (D.C.S.C. 1961); Healy v. James, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977), 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789; Gay Students Organization of University of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974); Gay Alliance of Students v. Metthews, 544 F.2d 162 (4th Cir. 1976); Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); 'Gay Lib v. University of Missouri', 22 St. Louis Univ. L.J. 711 (1979); 'Beyond Tinker and Healy: Applying the First Amendment to Student Activities', 78 Columbia L.Rev. 1700 (1978); Carolina Community-Student Information Manual—1979–80.

Discussion:

The questions entertained in this opinion are neither new nor novel, having been the subject of opinions in both the United States Supreme Court and the lower federal courts. This opinion will not attempt to determine whether the Lamboda Alliance, which has been identified as a homosexual rights advocacy organization, is entitled to formal University recognition through the University's licensing procedure. The opinion will identify controlling legal authority in this area and generally discuss student associational rights with particular emphasis on homosexual advocacy organizations.

Attacks upon public institutions for refusal to formally recognize various organizations have been based upon several theories; however, the most direct and successful avenue of assault has been assertion of the constitutional rights of free speech and assembly guaranteed by the First Amendment to the United States Constitution. [1] The First Amendment does not literally state a constitutional right to freedom of association, but the Supreme Court has declared that such a right emanates from the First

Amendment. Since the decision in NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), the right of association has been protected with as much vigor as have the other rights specifically enumerated in the First Amendment.

***2** Application of the requirements of the First Amendment has been difficult in school settings in which students and teachers assert absolute First Amendment rights in the face of school authorities' assertion of disciplinary authority to protect the educational environment. In Tinker v. Des Moines Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), the court noted:

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate. This has been the unmistakable holding of this court for almost fifty years.

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On the other hand, the court has repeatedly emphasized the need for affirming the comprehensive authority of the state and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.

Tinker involved the rights of high school students, suspended from school for wearing black armbands in protest of the Vietnam war. The Supreme Court determined that the 'silent, passive expression of opinion' undertaken by the students was 'akin to pure speech' and held as follows:

The district court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any words spoken, in class, in the lunchroom, or on the campus, that deviate from the views of another person may start an argument to cause a disturbance. But our Constitution says we must take this risk [citation omitted]; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputations society.

The Supreme Court determined that the school officials did not and could not, demonstrate that the wearing of the armbands would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . ..'

In its holding in Tinker, the court relied in part on the case of Hammond v. South Carolina State College, 272 F.Supp. 947 (D.C.S.C. 1967), in which District Judge Hemphill noted that a school differed from a hospital or a jail and remarked, '. . . assembling at the site of government for peaceful expression of grievances constituted exercise of First Amendment rights in their pristine form.' Judge Hemphill concluded, 'I am not persuaded that the campus of a state college is not similarly available for the same purpose for its students.' See also, Edwards v. State of South Carolina, supra, and Bistrick v. University of South Carolina, 324 F.Supp. 942 (D.S.C. 1971).

***3** Faced with another case bringing student associational rights squarely into question, the Supreme Court built upon the Tinker opinion in Healy v. James, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972). There, a local chapter of the Students for a Democratic Society (SDS) was successful in obtaining recognition at Central Connecticut State College, a state supported institution. SDS nationally had been recognized as a radical anti-war student organization. The court recognized that First Amendment protections are entitled to a broad unrestricted application in an academic setting, describing the college classroom as a "marketplace of ideas". The Court stated:

There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes. The practical effect of nonrecognition was demonstrated in this case

when, several days after the president's decision was announced, petitioners were not allowed to hold a meeting in the campus coffee shop because they were not an approved group.

Petitioners' associational interests were also circumscribed by the denial of the use of campus bulletin boards and the school newspaper. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students.

Once a prospective campus organization files for recognition in conformance with school policies, the burden of denying recognition shifts to the school, as noted in Healy:
It is to be remembered that the effect of the college's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action. (citation omitted).

In Healy, the Court made clear that the students' associational rights were not without limitation and pointed out possible justifications for the college to refuse official recognition depending upon the facts at hand. Generally, the only justification fully recognized by the Court is a situation in which association promotes unlawful conduct. The Court declared:
The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.' Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

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In the context of the 'special characteristics of the school environment', the power of the government to prohibit 'lawless action' is not limited to acts of a criminal nature. Also prohibitible are actions which 'materially and substantially disrupt the work and discipline of the school.' (citation omitted).

***4** Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.

A college has authority to promulgate reasonable regulations and impose reasonable requirements as to student discipline and conduct In doing so, a college does not necessarily infringe upon students' First Amendment rights, as noted by the Healy Court:
It merely constitutes an agreement to conform with reasonable standards respecting conduct.

This is a minimal requirement, in the interest of the entire academic community, and any group seeking the privilege of official recognition.

Thus, the Healy Court enunciated a standard, which is admittedly flexible; however, one which provides colleges a basis to enforce reasonable rules concerning student associations:
As we have already stated in parts B and C, the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not. Petitioners may, if they so choose, preach the propriety of amending or even doing away with any or all campus regulations. They may not, however, undertake to flout these rules.

The federal courts have entertained several cases, which appear on point with the question presented herein. In Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977), cert. denied, (Ratchford v. Gay Lib), 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789, the Court of Appeals reversed and remanded the case to the District Court for the Western District of Missouri upon finding that the University had invoked a prior restraint upon the First Amendment rights of Gay Lib. The University relied upon expert psychiatric testimony in an attempt to demonstrate that the mere recognition of a homosexual advocacy organization would tend to promote homosexual contracts in violation of Missouri's sodomy statute. The Court dismissed the University's psychiatric testimony as conclusory inference without historical or empirical basis, stating, '. . . as demonstrated by the substantial body of professional medical opinion conflicting with defendants' case, it must be acknowledged that there is no scientific certitude to the opinions offered.' The Eighth Circuit opinion placed great weight on an earlier case addressing the same topic, Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976). The following excerpt from Gay Alliance of Students v. Matthews, supra, at p. 166, succinctly addressed the issue at hand:

If the University is attempting to prevent homosexuals from meeting one another to discuss their common problems and possible solutions to those problems, then its purpose is clearly inimical to basic First Amendment values. Individuals of whatever sexual persuasion have the fundamental right to meet, discuss current problems, and to advocate changes in the status quo, so long as there is no 'incitement to imminent lawless action.' (citation omitted).

***5** If, on the other hand, VCU's (Virginia Commonwealth University) concern is with a possible rise in the incidence of actual homosexual conduct between students, then a different problem is presented. We have little doubt that the University could constitutionally regulate such conduct. (citations omitted). Additionally, it may regulate any conduct (homosexual or otherwise) which 'materially and substantially disrupt[s] the work and discipline of the school.' But denial of registration is overkill.

The Court in Gay Lib v. University of Missouri, supra, clearly points out that an organization whose stated aims do not include propagation of illegal or disruptive conduct, as opposed to mere advocacy of ideas, is not subject to prior restraint. Other courts considering the issue herein have adhered to the same principle, as did the Court in Gay Alliance of Students v. Matthews, supra, at p. 164, nothing the limitation of the organization asserting its rights:

So far as this record establishes, it is, at most, a 'pro-homosexual' political organization advocating a liberalization of legal restrictions against the practice of homosexuality and one seeking, by the educational and informational process, to generate understanding and acceptance of individuals whose sexual orientation is wholly or partly homosexual.

The court in Gay Lib at p. 856 carried this reasoning further, stating, 'It is difficult to singularly ascribe evil connotations to the group simply because they are homosexuals.', and concluded:

An interesting fact is that not all members of the group are homosexuals. Furthermore, this approach blurs the constitutional line between mere advocacy and advocacy directed to inciting or producing imminent lawless action. Finally, such an approach smacks of penalizing persons for their status rather than their conduct, which is constitutionally impermissible. See Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

The court also specifically found that any organization recognized by the University was required to comply with reasonable. University regulations, and the University would not be prevented from revoking previously granted recognition if an organization failed to comply with University rules. See also, Gay Students Organization of University of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974), and Student Coalition for Gay Rights v. Austin Peay State University, 477 F.Supp. 1267 (M.D.Tenn. 1979).

The precepts enunciated in the various opinions cited herein must be applied to each situation on an individual basis.[2] A University of South Carolina publication, entitled Carolina Community-Student Information Manual—1979–80, outlines the requirements for licensing of new campus organizations, including submission of an application and proposed constitution. The purposes, goals, and proposed activities of the Lambda Alliance as specified in an application for licensing and proposed constitution will initially determine its eligibility for recognition, and whether its activities are entitled to protection afforded by

the First and Fourteenth Amendments. A statement and revised statement of aims and the nature of intended program are set forth in the opinion in Gay Lib v. University of Missouri, supra, at pp. 850 and 851, which Gay Lib relied upon to successfully obtain recognition. This may serve as a guide for matters that are constitutionally protected. Beyond these aims, the University must carefully consider and weigh each proposed aim and activity and determine whether the aim or activity crosses the admittedly gray line from mere advocacy to action that is either unlawful or disruptive of the orderly functioning of the University.

Conclusion:

***6** Homosexual advocacy rights organizations may not be denied official recognition by public colleges and universities if such organizations comply with college rules and regulations and the aims of such organizations are not illegal or disruptive of orderly campus functioning.

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Footnotes

1 The First Amendment states, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.' The First Amendment has been made applicable to state action via the Fourteenth Amendment to the United States Constitution. See Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); and Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963).

2 In making your decision regarding the Lambda Alliance, you may find two recent law review articles beneficial. 'Gay Lib v. University of Missouri', 22 St. Louis Univ. L.J. 711 (1979), and 'Beyond Tinker and Healy: Applying the First Amendment to Student Activities', 78 Columbia L.Rev. 1700 (1978). The Columbia Law Review article, in particular, contains a good discussion concerning imputed approval by an institution of conduct of recognized organizations and responsibility of an institution for incidental illegal conduct of a recognized organization.

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