Tuesday, March 10, 2008

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Muzzling minor dissent

By NICOLE BLACK
Daily Record Columnist

"How come Andrew gets to get up? If he gets up, we'll all get up, it'll be anarchy!"

— "THE BREAKFAST CLUB" (1985)

It is the thorn in the side of every school administrator: organized student dissent, which "substantially and materially interfere[s]" with schoolwork and discipline.

This legal standard, which controls all student speech, was first enunciated in the pivotal U.S. Supreme Court decision on the First Amendment rights of students, *Tinker v. Des Moines*, 393 U.S. 503 (1969).

The issue of student free speech rights was re-visited last year in *Morse v. Frederick*, 127 S. Ct. 2618 (2007). At issue in *Morse* was whether a high school student's unfurling of a banner stating "Bong Hits 4 Jesus" on a sidewalk not located on school property was speech protected by the First Amendment. The Supreme Court concluded that the First Amendment does not protect student speech that could "plausibly be interpreted" by school administrators to promote illegal drug use in violation of "established school policy."

Central to the court's decision in *Morse* was its conclusion that the conduct at issue, while not occurring on school property, happened during a school-sponsored event, rendering the protections of the First Amendment inapplicable to the speech at issue.

Last week, the U.S. Court of Appeals for the Second Circuit Court heard arguments in another interesting student speech case, *Doninger v. Niehoff*, 3:07-cv-1129.

In this case, the plaintiff, a 17-year-old high school senior, alleges the officials at her high school violated her First Amendment rights by preventing her from serving on the student council as a result of statements she wrote on a blog, from her home computer, regarding the administration.

Specifically, she expressed her disappointment with the cancellation of the school's annual "Jamfest," a musical event she had helped to organize, and blamed the "douchbags [sic.] at the central office" for the cancellation.

The school administrators learned of the comment two weeks later, and subsequently barred her from serving on the student council as a direct result of the blog post.

The U.S. District Court of Connecticut found in favor of the school, concluding the penalty imposed — barring her from serving on the student council — was not discipline but, rather, the denial of a privilege, thus failing to implicate her First Amendment rights.

Alternatively, the court concluded the off-campus blog entry actually was on-campus speech for First Amendment purposes, since it was related to school issues and it was reasonably foreseeable other students would read it.

In other words, the court decided to engage in the creative endeavor of redefining "discipline" and "reality" rather than accepting an unpalatable alternative: acknowledging that students have the constitutional right to criticize school administrators, as long as the on or off-campus critique does not "substantially and materially interfere" with school operations or the dissent levied on-campus is not lewd, profane or sexually explicit, see, *Tinker, supra*. and *Bethel v. Fraser*, 478 US 675 (1986).

Granted, the blog post in question certainly is not a shining example of the diplomatic use of terminology. However, the fact remains that it was created using a computer that was not located on school grounds. Even assuming the language used was, in fact, lewd or profane, it simply does not fall within the *Bethel* exception to *Tinker* and, likewise, cannot be viewed as substantially and materially interfering with school operations.

The method of delivery of the dissent is irrelevant, and the advent of new ways of communicating should not alter this conclusion. A blog post is no different than the use of a megaphone or mass mailing.

The First Amendment protects students from being subjected to in-school penalties as a result of their off-campus dissent, no matter how upsetting or annoying the conduct may be to school administrators. As Judge Sonya Sotomayor aptly noted during oral arguments last week: "Pedagogical rights can't supersede the rights of students off campus to have First Amendment rights."

Nicole Black is of counsel to Fiandach & Fiandach and co-authors Criminal Law *in New York, a West-Thomson treatise. She also publishes a popular New York law blog,* Sui Generis, *nylaw-blog.typepad.com and a blog devoted to legal humor,* Legal Antics, *nylawblog.typepad.com/legalantics.*