FIRE

**Foundation for Individual Rights in Education**

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Delegate R. Steven Landes
General Assembly Building
P.O. Box 406
Richmond, Virginia 23218

*Via First Class Mail & Electronic Mail (DelSLandes@house.virginia.gov)*

Subject: FIRE's Support for HB 1123

Dear Chairman Landes:

My name is Joe Cohn. I am an attorney and the Legislative & Policy Director for the Foundation for Individual Rights in Education (FIRE; thefire.org), a nonpartisan, nonprofit organization dedicated to defending core constitutional rights on our nation's university campuses. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity.

I write to you today to voice FIRE's strong support of HB 1123, which provides students and student organizations facing serious, non-academic disciplinary charges the right to be represented by an attorney or other advocate of the student's choosing. This legislation is sorely needed because today's colleges and universities operate what amounts to their own parallel justice system, albeit without the meaningful due process protections provided in our nation's courts. Universities throughout the Commonwealth hold hearings for a wide range of serious offenses including theft, harassment, assault, drug and weapons possession, stalking, and rape. Until HB 1123 is passed, students in Virginia's public universities accused of such serious misconduct will continue to be forced to represent themselves—alone—against experienced and professionally trained deans, administrators, and university attorneys in proceedings that fail to guarantee core components of the right to due process.

The stakes are very, very high; the results of these hearings dramatically change the course of students' lives. An expulsion for criminal activity will have life-long consequences for a student's education and professional career. Such a finding impedes a student's ability to secure jobs—even jobs that do not require a college degree. After all, why should an employer take a chance on a "proven" rapist or thief? Complicating matters further, nothing prevents criminal prosecutors from using statements made in college courts against the

accused in criminal proceedings. Without a lawyer during these campus hearings, students may unknowingly waive Fifth Amendment rights.

Today, Virginia's universities prohibit students from getting the professional assistance and advice they need during disciplinary hearings. Some institutions may allow a lawyer to attend the hearing, but prohibit them from participating in the proceedings. Others ban them altogether. The universities, on the other hand, are free to send as many attorneys as they wish to prosecute the case against the student.

**Delegate Morris's HB 1123 would end this inequity. It is long overdue.**

If college tribunals were adequately protecting students' rights, this bill might not be necessary. But that is not the case. FIRE learns of shocking due process abuses from college students across the nation every year. At the University of North Dakota, for instance, undergraduate student Caleb Warner was accused of sexual assault. Upon investigating, the local police refused to charge him with any crime. In fact, after the evidence they gathered overwhelmingly indicated that Warner's accuser had been untruthful, the police charged her with filing a false report. Yet the university still found Warner guilty—a decision it vacated a year and a half later and only after negative national media attention.

Unsurprisingly, Warner was not permitted legal representation during his hearing. There are thousands of "Caleb Warners" throughout the country—and undoubtedly many in Virginia—who would benefit from the meaningful due process this bill would inject into the campus disciplinary process.

Recently, the Association for Student Conduct Administration (ASCA) wrote to Virginia legislators in opposition to this legislation, arguing that campus disciplinary hearings are part of the "educational process" and that "[t]he representation of a student by counsel thereby distancing the student from any potential for personal learning, growth, and development violates the very purpose of an educational proceeding." ASCA relies largely on a "General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline at Tax Supported Institutions of Higher Education" issued by the Western District of Missouri in 1968 to make the case that the analogy to criminal courts is inappropriate. Of course, a district court's general order in another state has no controlling value on the Virginia legislature. More to the point, its reasoning is outdated and no longer persuasive. The document was issued 45 years ago, near the close of a long era in which colleges and universities acted in many ways as parents ("*in loco parentis*") to their students and before decades of jurisprudence from our nation's courts establishing the need for due process protections in university hearings. In fact, the "General Order" cited by ASCA is so out-of-date that it came three years before the 26th Amendment lowered the voting age to 18, giving the majority of students on college campuses legal status as adults. Denying voting-age adults the right to be represented by an attorney when their educations and careers are on the line makes no sense.

When similar legislation was passed by an overwhelmingly bipartisan vote last year in North Carolina, campus administrators made the same misplaced argument about the "educational"

nature of campus disciplinary hearings. Recognizing the vital importance of fundamentally fair hearings and the need to protect student rights, the North Carolina legislature rejected this claim and recognized that when a student is accused of a crime and subject to expulsion if found responsible, the process is undeniably punitive. The North Carolina legislature has been noted for its partisan division as of late, but it was hardly divided on this question—the right to counsel bill passed by a resounding vote of 112 to 1.

The law has been in effect in North Carolina since last July. To date, there have been no reports and there is no evidence that providing students the right to the assistance of lawyers or the advisors of their choice in these hearings has disrupted or prevented any institutions from conducting hearings. Simply put, the sky has not fallen, as the bill's opponents loudly predicted.

ASCA also argues that HB 1123 would compromise universities' ability to comply with their obligations under Title IX, the Violence Against Women Act (VAWA), and the Clery Act. ASCA is wrong. Specifically, ASCA claims that allowing students to have access to an attorney or the advisor of their choice may delay the judicial process, and, in the context of sexual misconduct hearings, may require the institution to supply a lawyer to the accusing student. Both arguments are without merit. Nothing in HB 1123 changes the substance or timeline of any campus judicial hearing. Nor does HB 1123 mandate the adoption of any rules of evidence, provide the right to discovery, or supply any additional grounds for unwarranted delay.

To be clear, Department of Education guidance on Title IX simply states that if a student accused of sexual misconduct is allowed an attorney or advisor in the process, that same right must be afforded to the complainant. So long as universities do not restrict complainant's access to attorneys, they will be fully compliant with both HB 1123 and Title IX, as well as all other federal obligations. It is important to note that no law—federal, state or local—anywhere in the country prohibits universities from allowing accused students to have legal representation. In fact, some colleges already allow such access. What's more, institutions and student governments nationwide—like the University of Colorado - Boulder, the University of California - San Diego, and the State University of New York - University at Albany—voluntarily provide legal resources to students facing disciplinary sanctions to make sure that their procedural rights are honored.

HB 1123 does not require that universities pay for student representation at hearings. Nor does it require students be offered the opportunity to be represented by lawyers when they face charges of academic misconduct like cheating or plagiarism. By exempting those cases, the legislation properly strikes the balance between hearings that are truly educational in nature and those that are punitive.

HB 1123 is necessary because it is simply unreasonable to expect 18- or 19-year-old students acting alone to competently answer serious charges posed by deans and administrators with decades of professional experience acting as judge, jury and executioner for campus crimes. FIRE notes that this imbalance is particularly exacerbated for students from disadvantaged backgrounds. While wealthier students who have lawyers or other

professionals for parents may confidently face these tribunals, first-generation students or those who rely on substantial financial aid have the added burden of knowing that their livelihoods—and often the dreams of their families—are on the line. For those students, having legal representation during the few hours of a hearing could make a difference that will last decades.

**FIRE urges you to support this critically important bill.**

Thank you for your attention to our support for HB 1123. Please do not hesitate to contact me if I can be of any assistance.

Respectfully submitted,

Joseph Cohn
Legislative and Policy Director

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