

Syracuse University
COLLEGE OF LAW

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Re: Fraternity Administrative Proceedings
Objections and Requests Regarding Conduct of Hearing

Dear Daniel and Company:

I agreed to serve *pro bono* as the faculty procedural advisor to four of the eighteen students (the "Students") who have been charged with violating the Syracuse University Code of Student Conduct and Title IX of the United States Code as a result of their participation in a fraternity skit that was recorded for the private viewing of the fraternity. Please let me know if there are any forms that need to be filled out to confirm my designation as procedural advisor.

My understanding is that everyone present at the skits understood that they were satirical, part of a "roast," no one was harmed at the event in any way, and to the best of my knowledge no one present at the skits has made a complaint.

The video of the skits was stolen and made public by some unknown person. The public dissemination of the skit video has raised vociferous protests, resulting in the Chancellor issuing public video recordings condemning the content of the videos, suspending the fraternity, and promising swift retribution against the young students who participated in the skits. The fraternity issued a public apology and explained the satirical nature of the skits, which is available at: <http://www.tauthetatau.com/>

The University directed its Department of Public Safety (DPS), acting under color of New York law, to investigate and bring charges against the students under the Syracuse University Code of

Student Conduct and more recently Title IX of the United States Code. Other administrators under the Chancellor's direction have made public promises of a truncated hearing process to seek suspensions or expulsions.

The University has rejected my proposal for a community mediation process to attempt to reach a balance between the anger of protestors, the student's right to free expression, and the needs of the University.

I believe that my role as a procedural advisor is to appear with the Student at the hearing, to provide procedural advice, and to make sure that the Students are being provided with a procedurally fair hearing in accordance with Syracuse University policies and legal requirements. The purpose of this letter is to raise concerns about the procedural fairness of the process, and the dubious use of the harassment provisions of Title IX in a way that violates free speech rights in direct contravention of the Department of Education's guidance and without any consideration of the undisputed context of the allegedly offensive conduct.

The Recent Title 9 Complaint

As set out in the University's Resource Guide, Title IX is designed to address issues of sexual misconduct, sexual harassment, sexual assault, relationship violence and stalking. The complaint alleges a violation of Title IX without providing any information whatsoever about the conduct alleged to constitute a violation or what specific rule was violated. The procedural aspects of this case raise particularly thorny questions about the use of Title IX to prosecute free speech that was not directed at a specific person.

The Office of Civil Rights of the Department of Education has issued a clear public policy against using Title IX in a way that would harm free speech. The following is from the Office's public website:

How do educational institutions balance their Title IX obligations with individuals' First Amendment rights?

OCR has consistently reaffirmed that the Federal civil rights laws it enforces protect students from prohibited discrimination, and are not intended to restrict expressive activities or speech protected under the U.S. Constitution's First Amendment.

The fact that discriminatory harassment involves speech, however, does not relieve the school of its obligation to respond if the speech contributes to a hostile environment. Schools can protect students from such harassment without running afoul of students' and staff First Amendment rights. For instance, in a situation where the First Amendment prohibits a public

university from restricting the right of students to express persistent and pervasive derogatory opinions about a particular gender, the university can instead meet its obligation by, among other steps, communicating a rejection of stereotypical, derogatory opinions and ensuring that competing views are heard. Similarly, educational institutions can establish a campus culture that is welcoming and respectful of the diversity of all students and institute campus climate checks to assess the effectiveness of the school's efforts to ensure that it is free from harassment. Schools can also encourage students on all sides of an issue to express disagreement over ideas or beliefs in a respectful manner. Schools should be alert to take more targeted responsive action when speech crosses over into direct threats or actionable speech or conduct.

I am sending a letter of complaint to the Office of Civil Rights asking for an investigation of Syracuse University's use of Title IX for political purposes to prosecute students for engaging in off campus speech, clearly intended to lampoon or as satire and that is protected by the First Amendment in federal Title IX cases, and by Syracuse University's own contractual promises of free speech.

How Will the Independence of the Hearing Panel be Assured?

The University has promised an independent hearing panel to consider the charges and the due process and free speech defenses of the participants. Because this is a high profile process initiated by the Chancellor in public video statements, the University needs to be especially sensitive to the rights of the students to a fair and independent hearing panel, as promised in the rules. It would be fundamentally unfair to appoint administrative officers to the panel whose independence would be compromised by the Chancellor's control over their salaries and jobs. Therefore, the only way to have a fair process when both the charges and the process are controlled by the Chancellor and his subordinates is to appoint tenured faculty members, chosen independently and not for their allegiance to the Chancellor or particular political views, to constitute the panel. Please let me know whether you agree, and how the hearing panel members will be chosen.

Due Process Concerns

Paragraph 9 of the Syracuse University Statement of Student Rights and Responsibilities provides as follows:

Students have the right to **written notice** and the **opportunity for a hearing** before any change in status is incurred for disciplinary reasons unless a significant threat to persons or property exists. Students have the **right to**

fundamental fairness before formal disciplinary sanctions are imposed by the University for violations of the Code of Student Conduct--as provided in the published procedures of the University's Student Conduct System or other official University publications.

As discussed below, I am concerned with the lack of written notice and evidence that the Students have been provided, with the unreasonably short time for scheduling the hearings, and various other matters listed below which would impair the fundamental fairness of the hearing process. I also note for the record significant doubts about the fairness of the decision to suspend the Students without a hearing, and without notice of the appeal process, shortly before finals.

No Proper Written Statement of Charges.

The University is obligated to provide the Students with written notice of the basis of the charges against them as part of providing them with "fundamental fairness" in the judicial hearing process. The Students cannot possibly prepare to defend themselves against charges that they know nothing about.

Although the Students have been provided with two form letters containing rules that they are apparently being alleged to have violated (dated April 21, 2018, and supplemented with the additional Title IX complaint on April 29, 2018), no **facts** have been alleged to show how their conduct constitutes a violation of the rules or Title IX. The Students have only recently been given the Department of Public Safety charging statements. Only some students have been given access to the Department's investigation, report or files. The Students cannot prepare a proper defense without knowing what they are alleged to have done that would fit within the rules. Who among us would be prepared to defend against the most serious allegations of wrongdoing without being told what precise conduct is at issue, what "specific person" was harmed by the conduct, what is the nature of the harm and when and where did the harm occur?

Policy Manuals Charges Without Identifying Rule Violations.

Two of the identified rule violations do not even cite to a rule.

15) Violation of University policies, rules or regulations that are published in the Student Handbook, or other official University publications or agreements.

Office of Fraternity and Sorority Affairs Policy (specifically, Sexual Abuse and Harassment)

Syracuse University Anti-Harassment Policy (specifically, Prohibited Harassment)

On, Sunday April 29, 2018, the Student received a separate letter containing this:

I am writing today to notify you that the university is also alleging that you have violated the following policy (constituting an additional predicate violation of Section 15):

Syracuse University Policy on Sexual Harassment, Abuse, and Assault Prevention.

These are long policies with multiple provisions, and do not constitute fair notice of the rules that the Student is being alleged to have violated, let alone the factual basis for the allegations. I note that the Fraternity and Sorority Policy appears to contain rules directed to fraternities, not the members or prospective members.

Lack of Factual Support for Specific Rule Violations.

The base charges alleged in the complaint contain no factual allegations, and the facts that we know do not aid us in understanding what is being alleged. The charges are as follows:

1) Physical harm or threat of physical harm to any person or persons, including but not limited to: assault, sexual abuse, or other forms of physical abuse.

Who is alleged to have been physically harmed or threatened with physical harm by the Students. How was the person physically harmed?

2) Harassment – whether physical, verbal or electronic, oral, written or video – which is beyond the bounds of protected free speech, **directed at a specific individual(s)**, easily construed as “fighting words,” or likely to cause an immediate breach of the peace.

What “specific individual” are the Students alleged to have harassed, and how? What conduct are you alleging was “beyond the bounds of protected free speech?”

3) Conduct – whether physical, verbal or electronic, oral, written or video – **which threatens** the mental health, physical health, or safety of **any person or persons** including, but not limited to hazing, drug or alcohol abuse, bullying and other forms of destructive behavior.

How did the Students’s conduct “**threaten** the mental health, physical health or safety of any person,” and who was so threatened?

10) Illegal use, possession, purchase, distribution, manufacture or sale of alcohol, drugs or controlled substances, or any other violation of the Syracuse University Policy on Alcohol, Other Drugs, and Tobacco.

The Students have told me, and I suspect the reports conclude, that they did not use, see or have any connection with any alcohol, drugs or controlled substances at the fraternity. What is the basis for this allegation?

Several of the Students were told at their initial meeting that certain of these charges would be dropped, but so far they continue to be asserted.

In order to prepare a defense, and identify witnesses who can oppose the charges, the Students should have an opportunity to view the full charges and evidence against them on an individual basis. This is especially so when the complaints are being filed by the University and not by any particular students who were present and claim to have been harmed by the skits.

Unreasonably Short Time to Prepare for Hearing.

The University has made public commitments, apparently to quell student protests over the unapproved public release of the fraternity videos by unknown persons, to accelerate the hearing process in these cases. The latest email indicates that the University intends to schedule the hearing in less than two weeks from the date of the added charges (May 9 and/or 11, 2018). This seems to be a completely unreasonable timetable, set without consultation with me or the Students, and in disregard of the Students's rights to a fair hearing. I do not see anything in the rules that requires these hearings to be set on a short time table during the Students's finals. I am concerned that the Students will not be able to learn the basis for the charges, prepare a defense, and arrange for witness in such a short period of time.

What Procedures Will Be Employed at the Hearing?

There are two different sets of procedures in the Student Conduct System Manual for the Student Code of Conduct claims and the Title IX sex harassment claims. You have indicated that the University intends to have both sets of claims heard as part of the same process. Please advise which sets of procedures (Part 8 or Part 9) the University intends to utilize at the hearings.

How Will Evidence be Presented at Hearing.

As there are 18 separate cases being brought as part of the hearing process, how will witnesses and evidence be presented that are common to all of the cases? Will witnesses have to make the same presentations 18 times, or will there be a process for common matters to be heard by the panel once, with individualized presentations of separate issue witnesses (such as character witnesses)?

Presentation of Evidence at Hearing.

Who will be presenting the argument on behalf of the University at the hearing? As this is not a dispute between students – it is an action by the University against 18 and 19 year old students – I am concerned about the fairness to making the Students represent themselves against an experienced prosecutor or administrator. I believe that Title IX will require the University to adopt its procedures when the charges are filed and prosecuted by the University rather than by a student to afford Constitutionally mandated due process.

DPS Availability for Questioning.

It would be fundamentally unfair for DPS to be able to bring charges without being available for questioning by the panel. Since DPS is bringing the charges, DPS should be available at the hearing for examination by the panel as to the nature of the direction they received from the University, the evidence upon which the charges are based, and the correctness of the charges. Please let me know whether the DPS representatives who are responsible for bringing the charges will be made available for questioning at the hearing by the panel.

Record of Proceeding.

It is very important that the hearings be recorded or transcribed. We hereby request recording of all aspects of the proceeding for later review by a court concerning compliance with the policies and due process. Please advise us how the recording will be made and preserved to assure student confidentiality.

Notice of Objection to Suspension without Hearing.

For the record, the Student were initially prohibited from attending classes at the end of the semester, were not promptly provided with materials available to other students for their finals, and are being segregated from their classes for examination purposes. I understand that the University is now trying to provide materials, but the decision to suspend has been damaging. I assume that the University must have determined that the Student poses “a significant threat to persons or property,” which is what the rules require. Unless the University has some information that I am not aware of, I cannot imagine how participation in a skit obviously intended by the parties solely to generate laughs, could justify such a serious determination. The University should provide the Students with whatever factual evidence was used by the University in reaching its determination that the student posed a “significant threat.”

Final Concern.

The University prominently advertised in its student manual that students at Syracuse University have broad rights of free speech, limited only by specific rules where improper speech or conduct are directed at others, or incite violence.

SPEECH/EXPRESSION/PRESS

Students have the right to express themselves freely on any subject provided they do so in a manner that does not violate the Code of Student Conduct. Students in turn have the responsibility to respect the right of all members of the University to exercise these freedoms.

It is the nature of free speech that speakers may not be punished for speech that may be offensive, especially when viewed out of context.

I am concerned that the University has made a decision to prosecute these students and seek heavy sanctions, where no students present have complained, out of a concern for its own image in the media, and to deflect blame from itself for failing to adequately supervise fraternity programs. Please keep in mind that this ethnically and religiously diverse group of young students were pledging a University approved fraternity that had held these types of skits for many years without University complaint. The recruits were at the off campus event because the fraternity was approved by the University. The University has no provision prohibiting skits that use offensive or politically incorrect language or themes. The pledges were asked to make skits and roasts of the fraternity members for the amusement of the fraternity members, and were told that the skits would be kept private for viewing solely by the participants. They thought it was a safe space to make over-the-top satirical jokes during a roast of persons consenting to be roasted. It was an attempt at comedy, and obviously did not reflect the real views of the participants. They have apologized for the skits and the negative public attention they have brought. To my knowledge, no one at the event was harmed or has complained about the skits. The Students are not responsible for the release of the videos to the public.

I was disappointed that the University rejected my proposal to engage in a community mediation process to discuss in a fair way to discuss the anger felt by protestors, the intent and feelings of the student participants, the importance of free speech and open dialog, and the proper remedy for the hurt feelings that the video has caused. The community mediation process is specifically mentioned in the University's rules and procedures for addressing cases such as this not involving specific attacks on students.

If the University does not want the continued presence of the students, the students should be allowed to transfer. I believe all of the students would be willing to leave. Many of them had a great year at Syracuse University, and would also be willing to stay if the school wants them to stay. The only real issue in these hearings is whether punitive sanctions for wrongdoing labelling them as racist, sexist, homophobic, anti-Semitic or otherwise intolerant should be noted on the Students's academic records for engaging in misguided comedy skits. The University's dubious allegations show that the University cannot, consistent with the University's own rules, punish their speech. The University has a clear choice to make: provide a fair hearing process in which the University will certainly lose, or provide an unfair process under which administrators follow the Chancellor's directions in violation of the Students's civil rights. I beg the University

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to choose the honorable way by providing a fair process which considers the undisputed context and intent of the conduct at issue.

Thank you for your attention. I look forward to your response to these issues.

Very truly yours,



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