FIRE
Foundation for Individual Rights in Education

June 13, 2018

Kent Syverud
Office of the Chancellor
Syracuse University
Crouse-Hinds Hall, Suite 600
900 South Crouse Avenue
Syracuse, New York 13244

URGENT

Sent via Electronic Mail (chancellor@syr.edu)

Dear Chancellor Syverud:

FIRE is in receipt of Daniel J. French's response to our letter of May 4, 2018, regarding Syracuse University's (SU's) disciplinary action against members of Theta Tau stemming from their private, satirical expression. Unfortunately, French's response did not adequately address our concerns, which have deepened following SU's suspension of all students it had charged with conduct violations. SU's actions remain fundamentally in conflict with the university's ostensible commitment to freedom of expression and due process, and the imposed discipline must be reversed.

I. Facts

The facts underlying the disciplinary charges have been communicated to you in our first letter regarding this incident on May 4, 2018.[1] The following is our understanding of the facts that have arisen subsequent to that letter. Please inform us if you believe we are in error.

On May 9, 10, and 14, Syracuse University held disciplinary hearings against members of the SU Chapter of the Theta Tau fraternity.[2] During these three days, 18 prospective Theta Tau members were tried together before a disciplinary board of SU administrators (the Board). The students' procedural advisors, including their attorneys, could not address the Board, leaving only the students able to address the Board.

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[1] FIRE Letter to Syracuse University [hereinafter FIRE Letter], 1-4, (May 4, 2018), *available at* https://www.thefire.org/fire-letter-to-syracuse-university-may-4-2018.
[2] Syracuse University Hearing Results [hereinafter SU Hearing Results], 4, (June 5, 2018), https://www.thefire.org/syracuse-university-hearing-results-june-5-2918.

The Board consisted of three members and two alternates, all of whom are SU administrators who report directly to your office.[3] The Board was advised by Devon Riley, Esq., an outside counsel paid by SU. At the beginning of the hearing, the students objected to the bias of the Board, citing your office's comments that the videos were "disgusting" and that "[t]here is absolutely no place at Syracuse University for tolerance of this behavior."[4] The Board denied these objections.

After denying the students' objection for bias, the Board assured the students it would consider all relevant evidence and allow them to present witnesses.[5] Towards the end of the first day, a student asked the Board to allow an expert witness from FIRE to testify on how SU's free speech policies apply to the pending disciplinary charge. The Board refused to allow live testimony, opting instead for the expert witness to submit written testimony via email to Office of Student Rights & Responsibilities Associate Director Eric Nestor by May 14, who promised to share the testimony with the Board and include it in the case file. The expert witness sent the testimony to Nestor on May 11.[6]

On the first day of the hearing, SU Department of Public Safety Detective Michael Toia testified that there were no complaints about the videos from any member of the SU community between the date the videos were created and the date they were released.[7] That is, based on the uncontradicted testimony from Detective Toia, from March 30 to April 18, the videos caused no reported harm to anyone at SU. Rather, the impact of the videos occurred entirely after their unauthorized release by *The Daily Orange* on April 18.

On June 5, 15 of the students received notification that they have been found responsible for violating three provisions of the Code of Student Conduct and were suspended.[8] The students were found responsible for harassment, conduct "which threatens the mental health . . . of any person," and a Fraternity and Sorority Affairs policy which prohibits chapters from "tolerat[ing] or condon[ing] any form of sexist or sexually abusive behavior."

The Board justified its harassment finding by asserting that "the following scenes [of the videos] are likely to cause an immediate breach [of] the peace . . . It is reasonable to conclude that a person hearing the sexist and racist language in these scenes would become upset, reactive, and responsive to its content, thereby breaching the peace of that person's environment." The Board discussed at length the "community outrage . . . *[w]hen the videos were made public* by The Daily Orange" (emphasis added).

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[3] SU Hearing Results, 4.
[4] *Message from Chancellor Kent Syverud,* Syracuse University News (April 22, 2018), https://news.syr.edu/2018/04/message-from-chancellor-kent-syverud-3/.
[5] FIRE program officer Zach Greenberg attended the first day of disciplinary hearings on May 9, 2018, and served as the expert witness for the students.
[6] Syracuse University Expert Witness Testimony, *available at* https://www.thefire.org/syracuse-university-expert-witness-testimony/.
[7] A stenographer recorded the entire the hearing, which SU has in its possession.
[8] SU Hearing Results, 1. Three of the 18 students reached informal agreements with SU.

The Board further concluded that the videos made others feel unsafe on campus once they were released, stating that "[t]he impact of the Respondents' conduct on the community was immediate, intense, severe, and pervasive. Despite the fact that there is no evidence of similar conduct had occurred [sic] prior to the evening of March 30, the nature and severity of the acts depicted on the skit and the language employed is sufficiently severe to create a hostile environment."[9]

The Board then suspended each student for at least one year with conditions for reinstatement. In making these determinations, the Board claims that it considered all information presented, and listed the evidence, documents, and witnesses considered. The Board listed no witnesses for the students, nor did the students' expert witness testimony appear anywhere in the case file or under the list of evidence considered by the Board.

II. ANALYSIS

The result of this disciplinary hearing is at odds with the principles of freedom of expression and fundamental fairness that SU is morally and contractually bound to uphold.

In response to an editorial by SU Professor Gregory Germain, who serves as an advisor to the accused students, SU issued a statement that read, in part:

> The Theta Tau fraternity videos presented a situation where the rights of one group to speak freely collide with the rights of others to have a safe and welcoming learning environment. The Theta Tau videos have had a significant impact on the well-being of students, faculty and staff on this campus and in the greater university community. The videos contain language, even if offered under the guise of satire, that is sexist, racist, ableist, anti-Semitic and demeaning to the LGTBQ community. That the videos were extremely offensive does not appear an issue of debate. Moreover, speech or conduct can be harassing in nature based on its effect on others, even if it that was not the underlying purpose or intent.[10]

It is apparent that SU and the hearing panel fundamentally misconstrue the principles of freedom of expression to which SU has voluntarily committed itself. We write today to reiterate several reasons that SU's disciplinary action against the accused students violates their rights and must be reversed.

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[9] SU Hearing Results, 16.

[10] Gregory Germain, *Law professor: Syracuse betrayed its commitment to free speech when it punished fraternity members for their videos*, WASHINGTON POST (June 11, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/06/11/law-professor-syracuse-betrayed-its-commitment-to-free-speech-when-it-punished-fraternity-members-for-their-videos/?utm_term=.1978276bec78.

A. SU misconstrues "fighting words" in punishing the students for their protected expression

SU attempts to circumvent its promises of expressive rights by classifying the content of the videos as "fighting words," defined by SU as speech that is both "directed at a specific individual(s)" and "likely to cause an immediate breach of the peace."

As we explained in our May 4 letter, to the extent that the fighting words exception to the First Amendment remains valid,[11] it has been severely curtailed by courts so as to only apply to an extremely narrow category of speech: face-to-face communications directed at a specific individual that would likely provoke an immediate violent reaction from that individual. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining fighting words as expressions "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."); *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) ("The fighting words exception is very limited because it is inconsistent with the general principle of free speech recognized in our First Amendment jurisprudence.").

To fall under this exception, the speech in question must be made to the face of another. *Sandul*, 119 F.3d at 1255-56 (finding it clearly established that fighting words only encompass an extremely narrow range of face-to-face communication). SU's own policy recognizes this requirement, defining as harassment only expression "directed at a specific individual(s)."

SU has ignored this crucial component of both the fighting words doctrine and its own policies. It is indisputable that the expression in question was not directed at anyone other than the attendees at the private event at which the skits were performed. It is with respect to the audience at which the expression is directed that the analysis of whether it would cause a breach of the peace is conducted. SU's own findings reflect the fact that the relevant audience reacted primarily with laughter, and not with any violence. The requirement that expression be directed at a person or persons would make little sense if divorced from the requirement that it be "likely to cause an immediate breach of the peace." All expression is directed to others, and SU may not claim that expression directed to certain individuals constitutes harassment because it might cause a reaction if a different audience were to hear it.

Further, the Board failed to appreciate the requirement that any likelihood of a breach of the peace be "immediate." The Board conceded it based its determination entirely on the reaction of the speech that occurred *weeks after* the videos were released—a rationale that strains any reasonable definition of "immediate." The entire rationale behind the fighting

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[11] *See* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 510-11 (1990) ("For the foregoing reasons, Supreme Court Justices and constitutional scholars persuasively maintain that Chaplinsky's fighting words doctrine is no longer good law."). The Supreme Court has not upheld a single "fighting words" decision since the doctrine's legal inception in 1942, meaning that the doctrine is now alive, if at all, far more in theory than in actual practice.

words doctrine is to prevent against instances where one is so immediately overcome with emotion that they are likely to react with a fist rather than words. Such circumstances are not present where the audience that might be inflamed is not in the presence of the speaker, and only learns about the expression weeks later.

The Board's logic is also inconsistent with New York State law on disturbing the peace, defined as "[a]busive or obscene language or gestures in *public*".[12] SU's conclusion that these videos somehow disturbed the public peace is patently false, as the videos were recorded entirely in private with no reported complaints to the administration, or to anyone else, at the time they were made.

Put simply: speech directed to individuals in private, which then—through no doing of the speakers—becomes known to outsiders, cannot be deemed harassment simply because those who later heard of it, and chose to expose themselves to it by watching the videos, were offended. Contrary to the Board's determination, applicable and well-recognized principles of freedom of expression clearly place the videos well within the bounds of protected free speech, precluding SU from punishing the students. Further, and moreover, in abandoning the express provisions of its own policies, SU has undertaken an arbitrary and capricious effort to penalize expression that brought substantial unwelcome attention to the university.

Due to this crucial error in the Board's logic, SU must acknowledge it wrongfully applied its own policies and clear the students of harassment.

B. SU did not consider all evidence presented in refusing to recognize expert witness testimony

Under the SU Bill of Rights, "All students have the right to: . . . Participate in a process that is fair, impartial, and provides adequate notice and meaningful opportunity to be heard."[13] According to the SU Code of Student Conduct, in a section titled "FUNDAMENTAL FAIRNESS," students are afforded "the right to written notice and the opportunity for a hearing before any change in status is incurred for disciplinary reasons . . . [and] 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."[14] It further guarantees "the opportunity to present relevant testimony and/or information to the hearing Board on his or her own behalf and the opportunity to respond to testimony or information presented by other parties."[15]

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[12] N. Y. Penal Law § 240.20 (Disorderly Conduct) (emphasis added).
[13] *Bill of Rights,* SYRACUSE UNIV. (last visited June 12, 2018), http://studentconduct.syr.edu/sexual--relationship-violence/bill-of-rights.html.
[14] SYRACUSE UNIV., STUDENT CONDUCT SYSTEM HANDBOOK 4 (2016-17), http://studentconduct.syr.edu/_documents/StudentConductSystemHandbook2016%20-%202017.pdf.
[15] *Id.* at 20-21.

These policies allow students facing disciplinary charges to present relevant evidence in their defense, a right the United States Supreme Court has extolled as a "fundamental requirement of due process" and "a principle basic to our society." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Furthermore, the accused students were assured by the Board throughout the hearing process that they would have a chance to present a meaningful defense to the charges, including a chance to present witness testimony.

However, despite the Board's assurances and university policy, the testimony regarding SU's speech policies was not heard by the Board, nor was it placed in the case file or considered by the Board in its determination.[16] This refusal to consider relevant testimony—information directly applicable to the central issue of whether SU may punish the students for their expression—violates SU's repeated promises to afford students the right to defend themselves against the charges. The Board's failure to take into account a crucial part of the students' defense flatly contradicts its determination that it considered all evidence presented, rendering its ruling unsurprisingly misinformed and incorrect.

C. The Board's determination is tainted by bias

The right to an impartial tribunal is a core component of any just system of adjudication. *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980) ("This requirement of neutrality in adjudicative proceedings . . . helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law."); *Nash v. Auburn University*, 812 F.2d 655, 665 (11th Cir. 1987) ("An impartial decision-maker is an essential guarantee of due process.") (internal citations omitted). It is a right guaranteed by the SU Bill of Rights[17] and promised to the accused students by SU throughout the disciplinary process.

Despite SU's repeated assurances that the students will face an impartial tribunal, SU populated the Board with administrators answerable directly to your office, which has made comments that would lead any reasonable employee predisposed toward finding the students responsible in this case. This is particularly the case given SU's statement to a former adjunct instructor that he is not eligible to teach at SU because he criticized the university's response in this matter. Although the Board asserted its impartiality in this matter, the principle of a neutral tribunal encompasses both the appearance and reality of neutrality. *See Marshall*, 446 U.S. at 242 (impartiality "preserves both the appearance and reality of fairness . . . by ensuring that [each party] . . . may present his case with assurance that the arbiter is not predisposed to find against him.") A Board full of members who may reasonably fear adverse employment action for disagreeing with their superiors presents an obvious conflict of interest, one that impermissibly biases these individuals against the students and corrupts their determination.

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[16] SU Hearing Results.

[17] See *Bill of Rights,* SYRACUSE UNIV. ("Participate in a process that is fair, impartial, and provides adequate notice and meaningful opportunity to be heard.").

III. CONCLUSION

When taking away something as precious as a student's education, sober analysis and sound logic should be the foundation of any adjudicatory decision. The Board's determination, divorced from fairness and common sense, fails to comport with basic due process protections and misconstrues the free speech principles SU is bound to uphold. Due to the severe flaws of this hearing, SU must overturn the Board's erroneous decision and restore the accused students to good standing.

We request a response to this letter by no later than June 19, 2018.

Sincerely,

Ari Z. Cohn
Director, Individual Rights Defense Program

Zach Greenberg
Program Officer, Individual Rights Defense Program
Syracuse University College of Law, Class of 2016

cc:
Daniel J. French, Senior Vice-President and General Counsel
Pamela Peter, Director, Office of Student Rights & Responsibilities
Eric Nestor, Associate Director, Office of Student Rights & Responsibilities
Sheila Johnson-Willis, Associate Vice President, Chief Equal Opportunity & Title IX Officer
Robert D. Hradsky, Senior Associate Vice President for the Student Experience and Dean of Students