

January 16, 2019

G. Corey Farris
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Sent via U.S. Mail and Electronic Mail (Corey.Farris@mail.wvu.edu)

Dear Dean Farris:

FIRE is in receipt of your December 21 response to our December 7 letter to West Virginia University President E. Gordon Gee regarding WVU’s failure to afford five fraternities due process before punishing them.

Unfortunately, your response is inadequate and wholly fails to engage with the substance of FIRE’s concerns. Indeed, your response mischaracterizes the process used to punish the student groups as a non-disciplinary matter—a determination at odds with WVU’s written, published policies. Further, your response concedes that WVU maintains specific procedures for addressing student group misconduct, yet provides no explanation for why those procedures were not followed. Finally, your claim that the groups were provided notice and an opportunity to be heard because WVU informed them of the sanctions represents a disturbing disregard for basic due process principles and fundamental fairness.

I. The Reaching the Summit working group imposed disciplinary sanctions on the fraternities

WVU’s assertion that the sanctions imposed on the fraternities are non-disciplinary¹ is refuted by the WVU Campus Conduct Code provisions you cite. You state that “[t]he University understands that student organizations facing disciplinary action are entitled to an appropriate process—that is why the Campus Conduct Code and Disciplinary Procedure for WVU has an entire section, Section 15, devoted to the student organization disciplinary

¹ G. Corey Farris, WVU Response Letter 4 (Dec. 21, 2018) (“Your letter indicates that this was a disciplinary process. That is not true. Rather, it was a recognition review process separate and apart from any student conduct process.”).

process.”² This very same section of WVU’s Code of Conduct lists “Sanctions Applicable to Student Organizations,” including “Disciplinary Reprimand,” “Educational Sanction,” “Attainment of Standards,” “Disciplinary Probation,” “Social Probation,” “Full or Limited Suspension of University Recognition,” and “Revocation of University Recognition.”³ These are the very same penalties imposed in various forms by the Reaching the Summit working group on the fraternities.⁴ It is clear the sanctions were in fact, disciplinary in nature.

WVU’s failure to follow its published disciplinary procedures does not make its punishment of the fraternities any less disciplinary. You claim that “[FIRE’s] letter indicates that this was a disciplinary process. That is not true. Rather, it was a recognition review process separate and apart from any student conduct process.”⁵ It is undisputed that WVU did not follow the applicable student conduct procedures prior to penalizing the fraternities. However, WVU’s refusal to follow the proper procedures does not mean that such procedures were inapplicable, nor does it erase the effect of imposing sanctions. University sanctions, and the process used to impose them, do not lose their disciplinary purpose and effect simply because they may also implicate other university interests. For example, WVU’s desire to improve Greek life would not justify the expulsion of a student without due process, nor should this objective justify deviating from university policy in addressing student group misconduct. WVU may not characterize its actions as non-disciplinary to make an end run around providing proper procedures.

In discussing the specific procedure WVU has established for student group misconduct, you claim it does “not need to be exactly the same as [the policy for] individual students facing suspension or expulsion, and does not need to apply to non-disciplinary matters, such as the Reaching the Summit plan for excellence and recognition review.”⁶ FIRE certainly hopes individual WVU students facing suspension or expulsion do not first learn of their alleged misconduct *after* their guilt has been decided, as WVU has done with the fraternities. Regardless, the fact that WVU maintains different processes for individual students than for student groups in no way addresses FIRE’s argument that the procedures applicable to student groups were not followed here.

Additionally, your suggestion that WVU’s actions were not disciplinary because the penalties on the fraternities were “not unreasonable restriction[s] on a student organization” is divorced from fact and common sense.⁷ The severity of WVU’s restrictions does not alter their

² *Id.*

³ WVU, STUDENT CONDUCT CODE AND DISCIPLINE PROCEDURE FOR THE MAIN CAMPUS OF WEST VIRGINIA UNIVERSITY 26–27 (Oct. 17, 2018), *available at* <https://studentconduct.wvu.edu/files/d/f0ae69b9-1461-45cb-81ee-40e48e2d978b/student-conduct-code-10-17-18-pdf.pdf>.

⁴ WVU explicitly forecasted the possibility imposing sanctions on the fraternities when announcing the Reaching the Summit program. WVU, *Reaching the Summit Report 4* (Feb. 2018), *available at* https://wvutoday.wvu.edu/files/d/be894190-cbba-4346-b403-90d8023440de/reachingthesummit_greeklife.pdf.

⁵ Farris at 1.

⁶ *Id.* at 4.

⁷ Your statement was as follows: “To be clear, and as an example, asking an organization to participate in a University-sponsored hazing prevention week is not an unreasonable restriction on a student organization. Nor

punitive character. The working group’s actions limit the privileges of the fraternities and impose mandatory, targeted requirements to ensure their continued existence at WVU, and these limitations and requirements were imposed in response to alleged misconduct.⁸ These restrictions and requirements are all listed as “Sanctions Applicable to Student Organizations” in WVU’s Code of Conduct. That same Code of Conduct requires WVU to provide a detailed and specific set of procedures *prior* to issuing said sanctions.⁹ WVU’s actions were, per WVU’s own Code of Conduct, punitive, and the imposition of sanctions—even if viewed as proportional or reasonable—puts the cart before the horse.

Your reference to FIRE’s *Guide to Due Process and Campus Justice* to justify the failure to follow WVU’s procedures falls short. Like courts, the *Guide* repeatedly notes that universities must generally adhere to their own explicit, written policies:

Many public colleges and universities, however, promise students considerably more than due process requires. . . . Courts will generally compel both public and private universities to give you all of the procedural protections that they have promised you. The courts enforce these obligations, however, not as a matter of your rights to due process, but as a right you have under state contract law.¹⁰

[...]

However, nearly all universities have student handbooks and manuals that set out rules and standards for their student judicial systems. Courts in many states have held that these rules and standards form a contract of sorts, and that universities must live up to them in at least a general way.¹¹

The legal requirement that universities actually give students the rights they promise stems from a variety of doctrines, above all from the law of contracts. The basic principle of contract law is also one that lies at the heart of morality: People have to live up to their reciprocal promises.¹²

[...]

is asking a student organization to develop a ‘Be a Good Neighbor’ campaign or an educational program on conflict resolution, when they have had several altercations with their neighboring fraternity.” Farris at 2.

⁸ WVU, *Reaching the Summit: Recommendation and Report*, 5-9 (Aug. 6, 2018), available at <https://greeklife.wvu.edu/files/d/21d0a602-7e58-4c86-b59c-9185ab2c55eb/reaching-the-summit-summary-and-%20report-aug-2018.pdf>.

⁹ See *supra* note 2 and accompanying discussion.

¹⁰ See HARVEY A. SILVERGLATE & JOSH GEWOLB, FIRE’S GUIDE TO DUE PROCESS AND CAMPUS JUSTICE 38, available at <https://www.thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice>.

¹¹ *Id.* at 41.

¹² *Id.*

Courts have often held that the representations universities make in their student handbooks about the disciplinary process are promises that they must keep. . . . The consensus of the courts is that the relationship between a student and a university has, as one judge put it, a “strong, albeit flexible, contractual flavor,” and that the promises made in handbooks have to be “substantially observed.”¹³

Even a cursory glance at FIRE’s *Guide* would apprise a reader that due process is only as “flexible” as allowed by the applicable law and university policy.¹⁴ When a university makes promises to students, it must put forth a good faith effort to uphold such promises.

II. Basic due process requires notice and an opportunity to be heard before punishment is imposed

You claim that due process was satisfied because “[a]ll fraternity and sorority organizations had adequate notice of the recommendations made to the Dean of Students.”¹⁵ This belies a serious misunderstanding of how notice protects the rights of the accused.

Notice is designed to inform the accused of their alleged misconduct *before* they are punished in order to give them a fair chance to contest the accusations.¹⁶ It would be a mockery of due process if those facing deprivations of their rights were first told of their transgressions *after* receiving the penalty. Under your logic, it would be no issue at all to imprison individuals *prior* to telling them what crimes they committed, or expect individuals to pay fines *before* informing them of their infraction. Notice of the working group’s recommendations describing the sanctions is no notice at all.

Your understanding of what constitutes a meaningful opportunity to be heard is similarly lacking. You claim that “[e]ach organization then had the opportunity to be heard through an appeals process to the University’s Provost,” through which it “had the opportunity to present its case.”¹⁷ An opportunity to be heard *after* an appealable decision has been made is flatly insufficient, as the fraternities had already been deemed responsible and subsequently disciplined. Like notice, a hearing must be conducted *before* a determination on responsibility is made, else the accused is given no chance to contest the accusation until after guilt is

¹³ *Id.* (quoting *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381, 382 (Mass. 2000)); *see, e.g.*, *Mangla v. Brown Univ.*, 135 F.3d 80, 83 (1st Cir. 1998) (“The student-college relationship is essentially contractual in nature.”); *see also* Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145 (2010), *available at* <https://dfkppq46c1l9o7.cloudfront.net/pdfs/710f0f022e1745ed1e1924fb278aa379.pdf>.

¹⁴ You state that “any protections provided to student organizations are not the same as individual students facing suspension or expulsion from a public university given that due process is flexible.” Farris at 3.

¹⁵ The recommendations of the working group detailed the sanctions on the fraternities and did not encompass the initiation of disciplinary processes.

¹⁶ *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”).

¹⁷ Farris at 1.

decided.¹⁸ Such a process not only deprives groups of procedural protections leading up to the finding (such as the right to challenge witnesses or evidence), but reverses the burden, requiring respondents to prove their innocence rather than requiring the university to prove their responsibility. If, as you state, the fraternities were only afforded their *first chance* to dispute the working group's recommendations *on appeal*, WVU has still betrayed its commitment to provide an opportunity to be heard *prior* to punishment.

WVU's backward approach to due process is reflected in its treatment of the Phi Sigma Kappa fraternity chapter. Your response criticizes the chapter's refusal to participate in the student conduct process following the working group's recommendations.¹⁹ The chapter refused because, prior to the initiation of student conduct charges, the working group had *already* suspended the fraternity without due process.²⁰ When the chapter asked WVU to be reinstated *prior* to undergoing the student conduct process, WVU refused.²¹ Why would any student organization, having been already punished, and knowing full well that its rights would not be protected, choose to participate in student conduct proceedings? WVU's treatment of this chapter betrays WVU's policies, the law, and the fundamental tenets of due process.

Finally, WVU's characterization of Dr. Matthew Richardson's statements as "attempting to explain to students that individuals have different due process rights than student organizations" is plainly disingenuous.²² Richardson's explanation was that student groups

¹⁸ See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (internal quotations and citations omitted).

¹⁹ As stated in your response letter: "In subsequent conversations with the national organization for Phi Sigma Kappa following the Reaching the Summit program, the national organization stated that it would not recognize the Reaching the Summit recommendation. However, it said that it would recognize any determination made through the University's student conduct process. Despite several attempts to proceed through the student conduct process on these charges, Phi Sigma Kappa kept postponing scheduled meetings with the Office of Student Conduct necessary to adjudicate these matters. Instead of proceeding through our student conduct process, this fraternity ultimately chose to voluntarily disassociate from the University. In short, your assertions regarding this fraternity are not supported by the facts." Farris at 5.

²⁰ The chapter learned of the working group's decision to suspend its official university recognition on June 13, 2018. Letter from Matthew R. Richardson, WVU Director of Greek Life, to WVU Phi Sigma Kappa chapter (June 13, 2018) (on file with author). Three weeks later on July 3, the group first receive notice of the misconduct charges. Letter from Carrie Showalter, WVU Interim Director of the Office of Student Conduct, to Timothy Thaddeus Malloy, WVU Phi Sigma Kappa chapter leadership (July 3, 2018) (on file with author).

²¹ The chapter appealed the working group's decision on July 30. Letter from WVU Phi Sigma Kappa chapter to Joyce McConnell, WVU Provost and Vice President for Academic Affairs (July 30, 2018) (on file with author). WVU denied the appeal on August 6. Letter from Joyce McConnell to the WVU Phi Sigma Kappa Chapter (August 6, 2018) (on file with author).

²² In response to Dr. Matthew Richardson's assertion that student organizations have no due process rights, you state: "Lastly, your letter criticizes Dr. Matthew Richardson, the University's Director of Fraternity and Sorority Life. The statements that you attribute to Dr. Richardson was recorded during a student meeting earlier this year. It is our understanding that Dr. Richardson was attempting to explain to students that individuals have different due process rights than student organizations. In the course of making that point, Dr. Richardson did

have *no* rights and are entitled to no process whatsoever—a position not meaningfully distinguishable from WVU’s current position. In lieu of explaining away Richardson’s astonishing and revealing statements, the university should rescind its current penalties and commit to educating its own employees about students’ fundamental rights—before they are recklessly breached again.

WVU has every right to address allegations of misconduct, so long it goes through the proper procedures. The fraternities would be happy to adhere to your request to “abide by the University’s reasonable policies and procedures, including its student conduct process,” but only if WVU, in turn, promises to abide by its own policies.²³

III. Conclusion

Nothing in your response contradicts the factual or legal assertions in our letter, nor substantially addresses our concerns about the lack of due process.²⁴ To show that WVU is serious about upholding its stated commitment to due process, we again ask that WVU rescind the sanctions imposed by the working group, allow the fraternities to rejoin WVU Greek life, and reestablish official university recognition.

We request a substantive response to our concerns by January 30.

Respectfully,



Zach Greenberg
Program Officer, Individual Rights Defense Program

cc:

E. Gordon Gee, President
Stephanie D. Taylor, General Counsel
Kevin J. Cimino, Deputy General Counsel

not convey that understanding. Regardless of what was said, the University’s actions reflect appropriate organization due process considerations.” Farris at 3.

²³ *Id.* at 3.

²⁴ FIRE’s letter cites legal precedent binding on WVU as well as information acquired from the fraternities, WVU official documents, open records requests, and public media sources. Considering the dearth of legal citations or documentation in your response (besides citing FIRE’s literature), we reject your assertion that our letter “contain[s] incomplete or inaccurate facts.” *Id.* at 5.