



December 7, 2018

President E. Gordon Gee
West Virginia University
Office of the President
P.O. Box 6201
1500 University Avenue
Morgantown, WV 26506

Sent via U.S. Mail and Electronic Mail (presidentsoffice@mail.wvu.edu)

Dear President Gee:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience, on America's college campuses.

FIRE is concerned about the state of students' constitutional due process rights at West Virginia University (WVU) in the wake of the university's recent sanctions of the Kappa Alpha Order, Theta Chi, Alpha Sigma Phi, Phi Sigma Kappa, and Sigma Chi fraternity chapters ("fraternities"). WVU's failure to provide these groups with adequate notice of charges or a meaningful opportunity to contest the sanctions contravenes its constitutional obligations and its disciplinary policies. We ask WVU to rescind its constitutionally infirm sanctions and restore the fraternities to their prior statuses as registered student organizations in good standing with the university.

I. Facts

The following is our understanding of the facts. Please inform us if you believe we are in error.

A. WVU's "Reaching the Summit" Plan

On February 14, 2018, WVU released the "Reaching the Summit: Plan for Excellence in Fraternity and Sorority Life."¹ The plan sought to make "the fraternity and sorority

¹ WVU, *Reaching the Summit Report* (Feb. 2018), available at https://wvutoday.wvu.edu/files/d/be894190-cbba-4346-b403-90d8023440de/reachingthesummit_greeklife.pdf.

community at West Virginia University . . . an exemplar among peer and aspirant institutions.”² This plan included five phases.³

Phase One was the “Special Review Status & Additional IFC Measures,” which placed all social fraternities and sororities under special review by the administration.⁴ President Gee announced “an immediate moratorium on all social and recruiting activities” for organizations associated with the Interfraternity Council (IFC), citing “concern over continued behavioral issues.”⁵ Additionally, WVU limited fraternity activities to “basic chapter operations, philanthropy/service, and brotherhood events” from February 14 to August 18.⁶

Phase Two was the creation of a working group “tasked with creating a strategic plan of the future Fraternity & Sorority Life at WVU”⁷ The working group consisted of “students, alumni, and national headquarter partners” and was led by Dr. Matthew Richardson Ed.D., Director of the Office of Fraternity & Sorority Life.⁸ It was charged with “[r]eview[ing] judicial history of all chapters” and “[d]etermin[ing] which organizations will be invited back to full recognition in the Fall 2018 semester.”⁹ The process, procedures, or standards of review by which the working group would make these determinations were not identified.

The remaining three phases imposed “New Community Standards” and “Continuous Educational Programming” on the groups, and then provided for a “Relaunch” where the working group’s determination will be communicated to the organizations.¹⁰

B. “Reaching the Summit” Working Group, Recommendations, and Report

On February 28, after the “Reaching the Summit” working group was announced, Richardson held a meeting with the presidents of the chapters.¹¹ During this meeting, Richardson answered questions and offered more information about the working group. He stated that the working group was “essentially going to ask the fundamental question: Does

² *Id.* at 2.

³ *Id.* at 2.

⁴ *Id.* at 2.

⁵ WVU Today, *WVU establishes moratorium on IFC activity, launches system review* (Feb 14, 2018), available at <https://wvutoday.wvu.edu/stories/2018/02/14/wvu-establishes-moratorium-on-ifc-activity-launches-system-review>.

⁶ *Id.*

⁷ *Reaching the Submit Report*, at 2.

⁸ WVU Today.

⁹ *Reaching the Submit Report*, at 2.

¹⁰ *Id.* at 3-5.

¹¹ Audio recording: WVU Greek Organization Presidents Meeting (Feb. 28, 2018) (on file with author). An abridged recording featuring some of Richardson’s statements is available on YouTube. *WVU Chapter Presidents Meeting April 2018*, YOUTUBE (Feb 28, 2018), <https://youtube.com/watch?v=IKHRGOqpcLQ>. This video was mislabeled, the meeting took place on February 28, not in April.

this organization add value to our campus? And have they behaved in a way consistent with our values?”¹²

When a student asked whether there would “be a point where we get to make a case for ourselves,” Richardson replied: “Yes . . . So if we say ‘goodbye,’ we will send it in writing and say ‘You have not been invited back and here’s the rationale.’ You will then have the opportunity to come in front of the working group, headquarters included, and make a case to make us change our mind.”¹³ Richardson added that students “need to know” that “student organizations do not have due process rights; they don’t.”¹⁴ Richardson explained that while individual students have these rights, they were inapplicable to student organizations. “There doesn’t need to be a hearing. There doesn’t need to be anything. In theory, I can just say ‘goodbye.’”¹⁵

After this meeting, the working group convened to discuss each organization’s “judicial history” from 2014 through 2018, with individual chapter names redacted.¹⁶ The group was tasked with making recommendations for sanctions on the fraternities based on this judicial history.¹⁷ Among the information considered by the working group was a slideshow with each fraternity’s “Conduct Violations” listed in three categories: (1) the group was found responsible for the violation, (2) an individual member of the group was found responsible, or (3) adjudication of the violation was still pending.¹⁸ Some violations were listed without a marked status, and committee members were instructed to “assume nobody was found responsible” for these violations.¹⁹ At no point did the working group share with the fraternities which incidents it based its determination on, which was described as “a Recognition Review process . . . not a Student Conduct Disciplinary process.”²⁰

C. Sanctions Imposed on the Fraternities

On June 12 and 13, Richardson sent the fraternities letters noting that the working group “reviewed your chapter’s academic, disciplinary, and community engagement history from

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Email from Michael Mayer, Theta Chi Fraternity Executive Director, to Zach Greenberg (Oct. 26, 2018) (on file with author).

¹⁷ *Id.*

¹⁸ *Id.*; WVU, *WVU Fraternity and Sorority Life Reaching the Summit Committee Meeting #2* (2018), available at <https://bloximages.newyork1.vip.townnews.com/thedaonline.com/content/tncms/assets/v3/editorial/c/a1/ca190804-e0c2-11e8-bc31-2bdf9ca46b78/5bdf11d0f585.pdf>. The judicial history used to determine these sanctions were made public via a Freedom of Information Act request by *The Daily Athenaeum*. Jared Serre, *Documents detail reported violations by Greeks*, THE DAILY ATHENAEUM (Nov. 15, 2018), available at http://www.thedaonline.com/news/documents-detail-reported-violations-by-greeks/article_36a4b338-e0b9-11e8-9b60-f758dfddd660.html.

¹⁹ *Id.*

²⁰ Email from Michael Mayer.

Fall 2015 to present.”²¹ These letters described sanctions on the fraternities including “Loss of recognition,” “Interim Suspension,” “Educational programming,” “Social Restrictions,” “Written warning concerning risky social behavior,” and various other requirements they must satisfy in order to reobtain their statuses as registered student organizations.²² The letters imposing the sanctions did not contain any information regarding the initiation of disciplinary processes, notice of underlying misconduct, or opportunities to contest or appeal the findings.²³

D. The Fraternities Disassociate from WVU

During the summer of 2018, the fraternities individually notified WVU of their intent to disassociate from the university.²⁴

After an August 21 meeting with Gee, Gordy Heminger, President and CEO of national Alpha Sigma Phi, gave a statement to *The Dominion Post* explaining why the WVU chapter was choosing to disassociate from university. According to Heminger, the chapter’s choice had to do with concerns over due process, explaining in relevant part:

We emphasized that the decision to withdraw recognition had nothing to do with any health and safety standard, new or otherwise. The reason the students felt the need to withdraw was because they were told on multiple occasions, by multiple WVU administrators, that student organizations have no due process rights and student organizations could be suspended without even holding a hearing or being given an appeal option.²⁵

In an open letter to its members dated October 11, 2018, the Executive Director and International President of Theta Chi indicated that the decision of the Alpha Kappa chapter at WVU to disassociate had to do with WVU’s “arbitrary processes devoid of fundamental due process.”²⁶

²¹ Letter from Matthew R. Richardson, Director of the Office of Fraternity & Sorority Life, to WVU Kappa Alpha Order Chapter (June 13, 2018) (on file with author). Richardson’s letters to the other four fraternities are virtually identical to this letter and are on file with the author.

²² *Id.*; 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>. The sanctions detailed in the report match those sent to the fraternities by Richardson.

²³ Letter from Matthew R. Richardson.

²⁴ David Beard, *Gee, WVU frats continue to work toward a solution*, THE DOMINION POST (Aug. 23, 2018), <https://www.dominionpost.com/2018/08/23/gee-wvu-frats-continue-to-work-towards-a-solution/>.

²⁵ *Id.*; see also Susan Svrluga, *‘Deliberate and reckless’: West Virginia University president warns parents about fraternities that severed ties*, THE WASHINGTON POST (Aug. 21, 2018), https://www.washingtonpost.com/education/2018/08/21/deliberate-reckless-west-virginia-university-president-warns-parents-about-fraternities-that-severed-ties/?utm_term=.af1f16ea1ca2.

²⁶ Open letter from Tait Martin, Theta Chi International President, and Michael Mayer, Theta Chi Executive Director, to Theta Chi fraternity members (Oct. 11, 2018) (on file with author).

II. Analysis

WVU's assertion, through Richardson, that student organizations are not entitled to any due process is at odds with clearly-established law. By punishing these fraternities without adequate notice or an opportunity to be heard, WVU violated their constitutional due process rights.

A. WVU Punished the Fraternities Without Providing Due Process

WVU's failure to afford the fraternities due process prior to imposing sanctions is inconsistent with its legal obligations and its own policies regarding student organizations.

1. *WVU is legally obligated to provide student groups with basic due process protections*

As state entities bound by the Fourteenth Amendment to the Constitution of the United States of America, public universities must afford student groups fundamental due process protection before taking disciplinary action against them. *See, e.g., Iota Xi Chapter v. Patterson*, 538 F. Supp. 2d 915, 924-25 (E.D. Va. 2008), *aff'd on other grounds*, 566 F.3d 138, 149 (4th Cir. 2009); *Sigma Chi Fraternity v. Regents of Univ. of Colo.*, 258 F. Supp. 515, 528 (D. Colo. 1966) (requiring university to provide fraternity with "adequate notice of opposing claims, reasonable opportunity to prepare and meet them in an orderly hearing adapted to the nature of the case and finally, a fair and impartial decision"); *Alpha Eta Chapter of Pi Kappa Alpha Fraternity v. Univ. of Fla.*, 982 So. 2d 55, 56-57 (Fla. Dist. Ct. App. 2008) (ordering university to reinstate fraternity due to numerous due process violations during disciplinary hearing).

Basic due process entails "notice and of a fair and impartial hearing" where "the parties must be given a fair opportunity to present their positions." *Sigma Chi Fraternity*, 258 F. Supp. at 528. It requires that student groups "be afforded a meaningful hearing" as well as "notice and a meaningful opportunity to be heard." *Iota Xi Chapter*, 538 F. Supp. 2d at 924-25 (internal citations and quotations omitted), *affirmed on other grounds*, 566 F.3d at 149.

In *Iota Xi Chapter*, the court found that a state university's notice was "deficient" because it failed to disclose to the fraternity one of the hazing incidents underlying its misconduct charges. *Id.* at 925.²⁷ As a result, the court found that the university failed to provide the fraternity with adequate notice. *Id.*; *see also Alpha Eta Chapter*, 982 So. 2d at 56-57 (ordering university to reinstate fraternity because university violated its own policies in refusing to allow fraternity to question adverse witness in suspension hearing.)

²⁷ The lower court determination that student organizations at public colleges have due process rights was affirmed on other grounds by the United States Court of Appeals for the Fourth Circuit—the federal circuit in which WVU sits. 566 F.3d at 138.

2. *WVU policies require it to provide student organizations with notice and an opportunity to be heard prior to punishment*

These fundamental due process rights emanate not only from the Fourteenth Amendment, but are guaranteed by WVU itself. WVU's Student Code of Conduct details specific procedural protections that must be provided to student groups prior to official university punishment.²⁸ For example, in terms of notice, student groups accused of misconduct "will be notified of the allegations in writing and given an opportunity to meet with the investigator to explain the organization's side of the incident prior to the issuance of the final investigative decision."²⁹ The code also affords groups "the opportunity to submit documents and other relevant evidence to the investigator and identify witnesses who may have relevant information."³⁰ It further describes how a "Hearing Adjudicator will schedule a time to meet and discuss the case with the student organization representative(s) following the investigation," which "[t]he student organization representative(s) will be given five (5) academic days to schedule."³¹ Finally, the provisions limit the authority to impose sanctions on student groups to the "Office of Student Conduct."³²

These provisions require WVU to afford student organizations accused of misconduct some form of notice and an opportunity to present their case prior to punishment. This section also includes provisions concerning the different types of sanctions, the appeals process, and a definition of a "Student Organization," indicating that WVU sought to provide specific procedures for addressing student organizational misconduct in its Student Code of Conduct.³³

B. WVU did not provide the fraternities notice or an opportunity to be heard before imposing sanctions

Notwithstanding its constitutional obligations and its own policies, WVU abandoned its students' rights, imposing new penalties not only for long-resolved cases, but for matters in which the students or their organizations had not been found responsible.

²⁸ WVU, *STUDENT CONDUCT CODE AND DISCIPLINE PROCEDURE FOR THE MAIN CAMPUS OF WEST VIRGINIA UNIVERSITY* 24-26 (Oct. 17, 2018), available at <https://studentconduct.wvu.edu/files/d/f0ae69b9-1461-45cb-81ee-40e48e2d978b/student-conduct-code-10-17-18-pdf.pdf> 24-29.

²⁹ *Id.* at 25.

³⁰ *Id.*

³¹ *Id.* at 26.

³² *Id.* at 1, 24.

³³ *Id.* at 24-29. Section 15.4 "Sanctions Applicable to Student Organizations" includes examples of an "Educational Sanction" under the type of punishments WVU may only impose after affording student organizations with its designated procedures. *Id.* at 27. Thus, WVU may not impose these sanctions on the fraternity without going through these procedures, regardless of how WVU classifies the punishments or process by which it arrived at them.

Upon issuing the “Reaching the Summit” report, WVU informed the fraternities that they were subject to penalties ranging from restriction of social events to suspension of official university recognition. No formal disciplinary charges were filed against the fraternities prior to the university imposing these punishments, nor were the fraternities given an opportunity to contest these determinations. As in *Iota Xi Chapter*, WVU’s failure to notify the fraternities of any disciplinary charges—or the conduct underlying those charges—renders the notice similarly deficient. Likewise, WVU’s abject failure to provide any form of hearing allowing the fraternities to explain themselves cannot be squared with its legal obligations or the WVU Student Conduct Code, both of which require WVU to provide an opportunity for the fraternities to confront the allegations against them. Additionally, WVU limits its authority to impose sanctions on student groups to the Office of Student Conduct, of which Richardson does not belong, rendering him without the jurisdiction to issue sanctions on the fraternities. These numerous violations of university disciplinary policy are not only cause for WVU’s determination to be annulled, but leave the university exposed to legal liability for its indefensible departure from its obligations to respect students’ well-established constitutional rights. See *Alpha Eta Chapter*, 982 So. 2d at 56-57.³⁴

This disregard of rudimentary due process principles is reflected by Richardson’s statement to Greek organization presidents that “Student orgs do not have due process rights . . . in theory I can just say goodbye.”³⁵ It was this erroneous statement, and the lack of adequate procedural protections, that prompted the fraternities to disassociate with WVU.

III. Conclusion

While WVU may take steps to change Greek organization culture on campus and address fraternity misconduct, it must do in a manner consistent with its constitutional obligations and disciplinary policies. We request that WVU rescind the working group’s sanctions on the fraternities and restore them to their statuses prior to the release of the “Reaching the Summit” report, including allowing these groups to re-associate with the university without additional punishment. Finally, we ask WVU to make clear that it will respect the due process rights of its student organizations.

We request a response to this letter by December 21.

Sincerely,

³⁴ Leaving aside the legal responsibilities abdicated by WVU, it is an affront to notions of fundamental fairness for WVU to dig up the “judicial history” of student groups and re-inflict new penalties after having already meted out punishment. No WVU policy allows it to re-open past cases of misconduct against student groups for the purpose of disciplining the groups for allegations settled as far back as fall 2014. This unearthing of adjudicated cases is odious to the prohibition on double jeopardy—a core principle of any fair system of adjudication.

³⁵ *WVU Greek Organization Presidents Meeting*.

A handwritten signature in cursive script that reads "Zachary Greenberg".

Zach Greenberg
Program Officer, Individual Rights Defense Program

A handwritten signature in cursive script that reads "Evan Cree Gee".

Evan Cree Gee
Assistant to the Executive Director

cc:

Matthew Richardson, Director of the Office of Fraternity & Sorority Life
Stephanie D. Taylor, General Counsel
Kevin J. Cimino, Deputy General Counsel