



April 19, 2019

Denise A. Battles
Office of the President
The State University of New York at Geneseo
Doty Hall 310
One College Circle
Geneseo, New York 14454

URGENT

Sent via Electronic Mail (president@geneseo.edu)

Dear President Battles:

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 by the threat to freedom of expression at the State University of New York at Geneseo posed by the announcement earlier this month that it would investigate two students involved in a social media post that referenced blackface. Geneseo's investigation is contrary to its students' constitutionally protected right to freedom of expression — rights which, as a public university, Geneseo is legally and morally bound to uphold. While the university may certainly criticize the speech at issue, it may not take any disciplinary action against the students and must immediately abandon its investigation into its students' clearly protected expression.

I. "Blackface" Snapchat Post by "Maddie" Leads to Anger and an Investigation

The following is our understanding of the facts. We appreciate you may have additional information to offer and invite you to share it with us.

On April 1, Snapchat user madness_r, or "Maddie," posted two images, in succession, to the social networking app.¹ The first depicted two women wearing what appear to be cosmetic

¹ Justin ラクサス (@lLifeAmazes_Jay), TWITTER (Apr. 2, 2019, 10:53 AM), https://twitter.com/lLifeAmazes_Jay/status/1113137418851553281

charcoal face masks and posing. The caption, apparently added by Maddie, reads “Blackface and sunsets with my bae.”² The second photo features a close-up of the two women, both wearing the charcoal masks, and the caption “Jk they’re facemasks.”³

On April 2, you sent a message to the Geneseo community identifying the women in the photos as Geneseo students and announcing an investigation. You wrote, in pertinent part:⁴

Overnight, the College received reports of two social media image postings showing two Geneseo students posing in what appears to be blackface. The reported behavior is deeply disturbing, reprehensible, and wholly inconsistent with the values of this College. Please know that the matter has the full attention of the College’s leadership. Members of the College administration were immediately notified, and the situation is currently under investigation.

The announcement did not reveal the students’ identities or provide further details about the investigation.

On April 4, Geneseo student newspaper *The Lamron* published multiple stories related to the controversy, including a report on your announcement and student reaction. In that report, *Lamron* reporters interviewed students upset over the posts and reported on an email another student sent to Geneseo administrators demanding the school discipline the students in the photos.⁵ That day, *The Lamron* also printed an opinion piece from another student criticizing Geneseo’s “lack of urgency. . . in regard to preventing racist acts,” and accusing Geneseo of “fail[ing] students by allowing racist acts to slide.”⁶

Also that day, *The Lamron* printed an interview with Maddie, explaining in an editor’s note that the paper “granted her request for her name to be withheld due to her fears of how people would use that information.”⁷ In the interview, Maddie tells *The Lamron* that police were involved shortly after the photos were posted:

The police came to my door, telling me that people didn’t [feel] safe and that just kills me.

² “Bae” is an acronym for “before anyone else” and is used as a term of endearment for a best friend or partner. See *Bae*, MERRIAM-WEBSTER (2019), <https://www.merriam-webster.com/dictionary/bae> (last visited Apr 17, 2019).

³ “Jk” is an acronym for “just kidding.” See *jk*, URBANDICTIONARY (2019), <https://www.urbandictionary.com/define.php?term=jk> (last visited Apr 17, 2019).

⁴ Malachy Dempsey, *Campus community roiled by student Snapchats referencing blackface*, THE LAMRON, Apr. 4, 2019, <https://www.thelamron.com/posts/2019/4/4/campus-community-roiled-by-student-snapchats-referencing-blackface>.

⁵ *Id.*

⁶ Maiah Walton, *Geneseo fails students by allowing racists acts to slide*, THE LAMRON, Apr. 4, 2019, <https://www.thelamron.com/posts/2019/4/4/geneseo-fails-students-by-allowing-racist-acts-to-slide>.

⁷ *Full interview with “Maddie” on the Snapchat posts*, THE LAMRON, Apr. 4, 2019, <https://www.thelamron.com/posts/2019/4/4/full-interview-with-maddie-on-the-snapchat-posts>.

[...]

The night it happened, I was studying in my room when the police showed up at my door. The ignorance part is that I didn't even register that [the Snaps] was why.

Maddie also commented on the nature of her subsequent contact with Geneseo administrators:

I talked with [Chief Diversity Officer] robbie routenberg and they kind of helped me get to a better place mentally. I've had a lot of interactions with people who don't like me at this point and I'm getting kind of getting good at it. . . I've had a lot of conversations [*sic*] with people who don't like me and I'm learning more about the impact that I had on people, which I was ignorant to. The fact that I haven't slept and haven't eaten isn't helping my ability to put words together... The [college] has stayed impartial. They don't want to be on my side and they, at least talking to me, don't want to be on others' side either. They just strictly want to find how to fix this. I have been extremely apologetic because I've realized how this has made [people] feel. It's more a matter of what's done is done, so let's pick up the pieces. . .

There has been no subsequent reporting on the nature or progression of Geneseo's investigation into the photos.

II. The First Amendment Forbids SUNY Geneseo from Retaliating Against Offensive, but Protected, Speech

Geneseo may not investigate or discipline its students for posting photos constituting protected expression to their personal social media accounts, even if others find them deeply offensive. Accordingly, Geneseo—a public university legally bound to respect the First Amendment rights of its students—must end any investigation into the posts.

A. Geneseo must not violate its students' First Amendment rights

As a threshold matter, it has long been settled law that the First Amendment is binding on public institutions of higher education such as Geneseo. *See Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the

lifeblood of academic freedom”). Geneseo may not punish students for speech protected by the First Amendment, as it threatens to do here.

B. Offensive speech is protected by the First Amendment

Geneseo may not, consistent with the First Amendment, prohibit allusions to the practice of blackface simply because many, most, or even all find it to be offensive.

The Supreme Court of the United States has repeatedly held that the First Amendment protects speech that challenges and offends. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”). *See also, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (noting that free expression “may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”). These principles extend not only to sober, scholarly debate, or to “informed and responsible criticism,” but also provide a right to “speak foolishly and without moderation.” *Cohen v. California*, 403 U.S. 15, 26 (upholding First Amendment right to wear jacket bearing the words “Fuck the Draft” in a courthouse hallway) (internal quotation omitted).⁸

For example, in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court of the United States ruled that freedom of expression protects even the most caustic, outlandishly offensive parody. In that instance, the First Amendment protected a mock advertisement purporting to interview Reverend Jerry Falwell, who described losing his virginity to his mother in an outhouse. And in *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011), the Court observed that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”

These principles are equally applicable and these precedents equally binding when students speak on a public university campus. *See, e.g., Papish v. Board of Curators of the Univ. of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 391, 393 (4th Cir. 1993) (finding that public university violated the First Amendment in punishing students for wearing blackface and holding an “ugly woman” contest, holding that “that the Fraternity’s skit, even as low-grade entertainment, was inherently expressive and thus entitled to First Amendment protection” and observing that the university “has available numerous alternatives to imposing punishment on students

⁸ In *Cohen*, the Supreme Court aptly observed that although “the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance,” that people will encounter offensive expression is “in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve.” 403 U.S. at 24–25.

based on the viewpoints they express”). Geneseo may not punish students for a reference to blackface, even if others in the community are upset or offended by it.

C. Investigations into protected speech impermissibly chill student expression

Although details of Geneseo’s investigation into the Snapchat posts remain unclear, the First Amendment is not violated only when an investigation culminates in the imposition of formal discipline. The impermissible chilling effect on First Amendment rights may precede the imposition of final, formal discipline, instead arising from the initiation, announcement, and maintenance of an investigation into speech.

The effect investigations have on free expression is reflected in substantial First Amendment jurisprudence, and courts have repeatedly ruled that official “inquiry alone trenches upon” freedom of expression. *Paton v. La Prade*, 469 F. Supp. 773, 778 (D.N.J. 1978) (student’s speech impermissibly chilled when anonymous request for information from a political organization resulted in being labeled a “subversive” and formally investigated by the FBI). In *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957), the Supreme Court noted that government investigations “are capable of encroaching upon the constitutional liberties of individuals” and have an “inhibiting effect in the flow of democratic expression.” Accordingly, several appellate courts have held that government investigations into protected expression violate the First Amendment. See *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000); *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988).

This includes the United States Court of Appeals for the Second Circuit, the decisions of which are binding on Geneseo. For example, the Second Circuit’s ruling in *Levin v. Harleston* is particularly illuminating. In *Levin*, The City College of The City University of New York launched an investigation into a tenured faculty member’s offensive writing on race and intelligence, announcing an *ad hoc* committee to review whether the professor’s expression—which the university president stated “ha[d] no place at [the college]”—constituted “conduct unbecoming of a member of the faculty.” 966 F.2d 85, 89 (2d Cir. 1992). The Second Circuit—the rulings of which are binding upon Geneseo—upheld the district court’s finding that the investigation constituted an implicit threat of discipline: the speech was protected, but the public maintenance of an investigation suggested that it could be disciplined, and the resulting chilling effect constituted a cognizable First Amendment harm.

Here, Geneseo’s investigation has apparently utilized its on-campus police officers to confront Maddie in her dormitory room. The university has likewise announced, in a message broadcast to all members of the community, that the offending image has the “full attention” of the institution’s leadership, and that the institution had initiated an “investigation” into the image. The chilling effect risked by dispatching law enforcement officers to the dormitory room of a student whose protected expression offends others cannot be understated. Announcing investigations into clearly-protected expression and dispatching law enforcement over offensive expression sets a chilling precedent.

III. Conclusion

The posts referencing blackface are protected by the First Amendment and the students involved in their posting must not be disciplined or investigated for protected speech.

To be sure, offensive expression is not free from consequence. “Maddie” has indicated that she has experienced social repercussions and difficult conversations with others who were offended by her expression. So, too, is Geneseo’s administration free to join members of its community in condemning or criticizing Maddie’s expression. These consequences are “more speech” responses to offensive expression. Investigations and the use of law enforcement to convey the possibility of formal discipline are not, and public anger cannot and must not lead to the subordination of Geneseo students’ expressive rights. By investigating speech that is plainly protected by the First Amendment, the university has unacceptably threatened the expressive rights of its students and faculty.

Geneseo must reverse this unwise and unconstitutional error by ending the investigation. We also ask that you clarify to Geneseo’s campus community that constitutionally protected speech will not be subjected to investigation or other disciplinary action in the future.

We request receipt of a response to this letter no later than the close of business on April 26, 2019.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alexandria Morey', with a stylized, looping end.

Alexandria Morey
Program Officer, Individual Rights Defense Program

cc:

Robbie Routenberg, Chief Diversity Officer
Eunisha Tucker, coordinator of LGBTQ+ Programs and Services
Lenny Sancilio, Dean of Students
Catherine White & Malachy Dempsey, Editors, *The Lamron*