



April 29, 2020

President Kristin G. Esterberg
State University of New York at Potsdam
Office of the President
705 Raymond Hall
44 Pierrepont Avenue
Potsdam, New York 13676

Sent via Electronic Mail (president@potdam.edu)

Dear President Esterberg:

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 for the state of students' constitutional rights at the State University of New York at Potsdam (SUNY Potsdam) in light of restrictions on students' ability to associate with off-campus, non-university affiliated organizations. By prohibiting students from affiliating with these groups, the university exceeds the lawful scope of its authority under the First Amendment. We call upon SUNY Potsdam to rescind these restrictions.

I. **SUNY Potsdam Bans Affiliation With Several Off-Campus, Non-University Affiliated Groups**

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, SUNY Potsdam must rescind its restrictions on its students' freedom of association.

During the Fall 2019 semester, the SUNY Potsdam Office of Student Conduct and Community Standards announced that "[s]tudents who pledge, join, accept membership, affiliate in any way, or seek to perpetuate a banned organization are subject to judicial referral and potential

suspension or expulsion.”¹ The announcement listed sixteen organizations as either “banned” or “unrecognized.”²

SUNY Potsdam’s Student Community Rights and Responsibilities Handbook defines an “organization” as “any persons enrolled as students at The College who are associated with each other and who are recognized as a collective grouping by a college entity, or by Student Government Association.”³ A “Greek Organization” is any “group that identifies as a fraternity or sorority and/or uses a new member education process (pledging, training, probationary members, etc.),”⁴ and a “Banned Organization” is any “group who met the definition of ‘organization,’ but who has permanently lost recognition by a college entity or by Student Government Association,” adding that “Banned Organizations are not permitted to participate, as an organization, in SUNY Potsdam sponsored activities.”⁵

SUNY Potsdam also prohibits “[a]ffiliating with any group that has been permanently banned by the College,” including “residing in facilities that are owned or controlled by” the organization and “joining, rushing, pledging or being involved in any activity that would normally be associated with being a member of such organization.”⁶

On April 8, 2020, Interim Dean of Students Eric Duchscherer sent a letter to the Delta Kappa Theta Fraternity, warning that “Banned Organizations” will be punished if they “continue to operate as an organization that meets the definition of a ‘Greek Organization’ . . . even if the organization reorganizes under a new name.”⁷

II. SUNY Potsdam Violates Students’ Freedom of Association

SUNY Potsdam’s restrictions on students associating with off-campus groups unaffiliated with the university are contrary to the university’s legal obligation as a public institution bound by the First Amendment.

A. *SUNY Potsdam is a state actor bound by the First Amendment.*

It has long been settled law that the First Amendment is fully binding on public colleges like SUNY Potsdam. *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“[O]ur cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state

¹ SUNY Potsdam, Office of Student Conduct and Community Standards, *Banned Greek Houses* (Fall 2019), https://s3.amazonaws.com/files.formstack.com/uploads/1675731/57533603/593613301/57533603_banned_greek_houses_f19.pdf.

² *Id.*

³ SUNY Potsdam, *Student Community Rights and Responsibilities Handbook* 9 (2019-20), <https://www.potsdam.edu/sites/default/files/inline-files/SUNY%20Potsdam%20Policy%20Handbook.pdf>.

⁴ *Id.*

⁵ *Id.* at 8.

⁶ *Id.* at 17.

⁷ Letter from Eric D. Duchscherer, SUNY Potsdam Interim Dean of Students, to the Delta Kappa Theta Fraternity (Apr. 8, 2020) (on file with author).

universities.”); *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 citations omitted).

B. *The First Amendment protects students’ right to associate with organizations unaffiliated with their university.*

The First Amendment guarantees freedom of association, which protects the “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *see also, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 888 (1982) (“[T]he First Amendment restricts the ability of the State to impose liability on an individual solely because of his association with another.”).

The right to associate extends to students enrolled in public universities, protecting their right to join and form student groups, including social associations. *See Evans v. Newton*, 382 U.S. 296, 298 (1966) (discussing “the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses”); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“[W]e have protected forms of ‘association’ that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members.”).

C. *SUNY Potsdam may not ban students from associating with non-university affiliated organizations.*

By banning students from associating with several “Greek Organizations” and “Banned Organizations,” the university restricts its students’ freedom of association in violation of its First Amendment obligations.

SUNY Potsdam’s power to regulate student organizations, including membership of those organizations, is limited by the university’s affiliation with these groups. Students groups at SUNY Potsdam voluntarily agree to comply with university policies in exchange for the benefits of affiliating with the university, such as access to campus resources and university funds. When these university-affiliated groups violate university rules, the university may punish them by revoking these privileges, including the right to recruit and accept new student members.

However, when a once-recognized organization is no longer affiliated with the university, but is otherwise lawfully organized, that group stands on equal footing with any other group in the broader Potsdam community. A university can no more prohibit association with a formerly-recognized fraternity than it can bar membership in the local Elks Club or bowling league. SUNY Potsdam must allow its students to exercise their First Amendment right to join these

formerly affiliated groups, just as it would allow them to join any other organization unrecognized by and unaffiliated with the university.

D. *SUNY Potsdam’s restrictions on “affiliation” and “perpetuation” are unconstitutionally vague.*

In addition to the impermissible burden on associational freedom, SUNY Potsdam’s announcement that students may not “affiliate in any way” or “seek to perpetuate” disfavored groups is also an unconstitutionally vague restriction, failing to adequately warn students about what activities are prohibited.

Regulations must “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,” or else they are unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). “These concerns apply with particular force where the challenged statute affects First Amendment rights.” *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163, 1178 (E.D. Wis. 1991). State university rules that do not give “adequate warning of the conduct which is to be prohibited” fail to comport with due process. *Id.*; see also *Dambrot v. Central Michigan University*, 55 F.3d 1177, 1184 (6th Cir. 1995) (finding university racial harassment policy prohibiting “negative” and “offensive” speech unconstitutionally vague and overbroad).

SUNY Potsdam defines “affiliation” as “being involved in any activity that would normally be associated with being a member of such organization.”⁸ This definition and the phrases “affiliate in any way” and “seek to perpetuate” provide no guidance as to what activities are prohibited. This issue is compounded by the private, social nature of many Greek organizations’ rituals and customs. Because these organizations are often defined by its members’ social relationships, the line between formal and informal relationship is not always clear, and SUNY Potsdam’s prohibition—“affiliate in any way”—does not endeavor to distinguish between formal affiliation and common social interactions. This ambiguity will leave a reasonable person confused as to what activities fall under this policy.

The ambiguities inherent in these restrictions are manifold. What threshold must be reached for a group activity to qualify as normally associated with the group? Does this restriction encompass mundane organizational activities such as group meals, library hours, or walking to class together? Or is it limited to official group events such as leadership meetings and new member initiation? Are students expected to discern the regular practices of *sixteen* different groups in order to avoid partaking in such activities?⁹

⁸ *Student Handbook*, *supra* note 3, at 17.

⁹ For example, will the university ban students from wearing sixteen iterations of Greek letters, uttering mottos and slogans of sixteen different fraternities and sororities, and displaying sixteen different organizational color schemes and sigils? If so, such restrictions would be content-based and presumptively unconstitutional. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 25 (1971) (punishment for wearing a jacket bearing the slogan “Fuck the Draft” was an unconstitutional content-based determination).

The vagueness of these restrictions will cast an impermissible chilling effect on a range of activity embraced by the First Amendment. Students may justifiably self-censor rather than show support for delinquent groups on social media,¹⁰ in *The Racquette*,¹¹ or through their Student Government Association, in order to avoid possible suspension or expulsion.¹² Likewise, students may rationally refrain from collaborating with group members for class projects, intramural sports teams, and other formal or informal events because it could be considered affiliation in “any way.” Such a result is untenable at a university bound by the First Amendment.

III. **SUNY Potsdam Must Lift Its Ban on Associating With Non-University Affiliated Organizations**

SUNY Potsdam is free to discourage students from associating with disfavored groups, such as by informing students of the potential dangers of these groups. But efforts to limit affiliation may not infringe on students’ First Amendment rights, which, as a public university, SUNY Potsdam must uphold. Accordingly, we call on SUNY Potsdam to rescind these restrictions.

We request receipt of a response to this letter no later than the close of business on May 12. If you need additional time to respond in light of strains created by the COVID-19 crisis, please don’t hesitate to let us know when you expect to be able to respond.

Sincerely,



Zachary Greenberg
Program Officer, Individual Rights Defense Program

Cc:

Eric D. Duchscherer, Interim Dean of Students
Patrick L Meldrim, Director of Student Conduct and Community Standards
Sandra Casey, General Counsel-in-Charge, SUNY Office of the General Counsel

¹⁰ As the Supreme Court has observed, “in the past there may have been difficulty in identifying the most important places . . . for the exchange of views,” but the answer today is “clear”: “It is cyberspace . . . and social media in particular.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Thus, “social media is entitled to the same First Amendment protections as other forms of media.” *Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 18-1691-cv, 2019 U.S. App. LEXIS 20265, at *21 (2nd Cir. 2019).

¹¹ *The Racquette* is SUNY Potsdam’s student newspaper. *The Racquette*, *About*, FACEBOOK (April 20, 2020), https://www.facebook.com/pg/The-Racquette-613419675536059/about/?ref=page_internal.

¹² *Banned Greek Houses*, *supra* note 1.