



January 8, 2021

President Harvey G. Stenger
Binghamton University, State University of New York
Office of the President
P.O. Box 6000
Binghamton, New York 13902

Sent via Electronic Mail (president@binghamton.edu)

Dear President Stenger:

As you may recall from past correspondence,¹ 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 SUNY Binghamton's proposal to punish Greek organizations whose members are accused of sexual assault before affording these student organizations notice and a reasonable opportunity to contest the allegations. While we have no doubt about the need to confront and redress sexual assault, harassment, and discrimination, the plan as proposed would violate the core due process rights of these student groups. Accordingly, we call on SUNY Binghamton to revise any proposed policy such that it comports with the institution's legal obligations.

I. SUNY Binghamton Proposes to Punish Greek Organizations "Connected In Any Way" To Accusations of Sexual Assault Without Providing Due Process

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

¹ FIRE wrote to you in 2018 concerning a police investigation into students posting and distributing flyers on campus and again in 2019 concerning reports that the university delayed recognition of a student chapter of Young Americans for Freedom. Both of these incidents were resolved in favor of students' rights, and we hope that you will reach a similar resolution here.

are substantially accurate, SUNY Binghamton’s proposal would violate its commitment to upholding its students’ rights and its legal obligations as a public institution bound by the Constitution.

On July 14, 2020, your office released a statement listing a series of proposals to address sexual assault on campus. One of these proposals specifically concerned Greek organizations:

We will suspend campus recognition of Greek life organizations that are connected in any way to a sexual assault case, immediately at the time that the sexual assault is reported, with permanent removal of recognition to follow an investigation supporting the report.²

On September 30, SUNY Binghamton reiterated its intention to implement this proposal.³ Almost six months after it was first announced, we are not able to locate any formal policy setting forth the parameters of this proposal.

II. SUNY Binghamton’s Proposed Policy Would Violate the Due Process Rights of Student Organizations

There is no doubt that SUNY Binghamton may—and legally must—take action to address specific instances of sexual assault, including through interim measures designed to remedy immediate threats to safety or security. In meeting these considerable and important interests, SUNY’s actions must be consistent with its constitutional obligations to uphold the rights of students and student organizations to procedural due process and freedom of association. Any proposal mandating automatic suspension of student organizations for being “connected in any way” to allegations of sexual assault, or requiring the permanent removal of university recognition without a hearing, will violate the due process rights of these organizations.

Public universities must afford student groups basic due process protections before taking disciplinary action against them.⁴ Fundamental due process entails “notice and . . . a fair and

² President Harvey Stenger, Office of the President, SUNY Binghamton, *Actions to be taken to address sexual assault policies at Binghamton University* (Jul. 14, 2020), https://binghamton.edu/president/statements.html?fbclid=IwAR0zwyLJSQqGOaqSaqAkDK-58t3haFNXF3Vc_9boQThU1SuHckFu7xWhZc.

³ SUNY Binghamton, *CAMPUS UPDATE ON SEXUAL ASSAULT POLICIES, PROGRESS* (Sept. 30, 2020), <https://www.binghamton.edu/news/story/2683/campus-updated-on-sexual-assault-policies-progress>.

⁴ *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).

impartial hearing” where “the parties must be given a fair opportunity to present their positions.”⁵ It requires that student groups “be afforded a meaningful hearing” as well as “notice and a meaningful opportunity to be heard” prior to imposing punishment.⁶

These core due process rights not only emanate from the Constitution but also are guaranteed by SUNY Binghamton itself. Its Student Code of Conduct—which explicitly applies to student organizations⁷—provides:

[For c]ases involving allegations of sexual assault . . . [c]onduct proceedings are governed by the procedures set forth in the Binghamton University Code of Student Conduct as well as federal and New York state law, including the due process provisions of the United States and New York state constitutions.⁸

The Code of Student Conduct also guarantees student groups “[t]he right to an investigation and process conducted in a manner that recognizes the legal and policy requirements of due process (including fairness, impartiality and a meaningful opportunity to be heard).”⁹

Additionally, the Code of Student Conduct details specific procedural protections that must be provided to student groups before university punishment, including notice of the charges and specific factual allegations, an opportunity to be heard and present evidence, and the right to appeal adverse findings.¹⁰ SUNY Binghamton’s procedures for adjudicating student group misconduct represent a laudable commitment to uphold student due process rights.

Consistent with this commitment, SUNY Binghamton may not punish its student groups upon merely receiving a *report* of misconduct by one or more of its members. The risks to students’ rights to due process and freedom of association are particularly pronounced in light of the broad scope of the proposal, which applies to “organizations that are connected *in any way* to a sexual assault case.” Under its plain language, the proposal would require the suspension of any Greek organization whose *member* is accused of sexual assault, even if the organization otherwise has no involvement in the member’s alleged criminal conduct. Further, as SUNY Binghamton’s policies applying to *individuals* charged with sexual assault

⁵ *Sigma Chi Fraternity*, 258 F. Supp. at 528.

⁶ *Iota Xi Chapter*, 538 F. Supp. 2d at 924–25 (internal citations and quotations omitted), *affirmed on other grounds*, 566 F.3d at 149.

⁷ SUNY BINGHAMTON, CODE OF STUDENT CONDUCT 15 (2020-21), <https://www.binghamton.edu/student-handbook/pdfs/accessible-version-of-student-code-of-conduct-2020-21.pdf> (“The University conduct system handles charges brought against any University student or student organization for alleged infractions of the Code of Student Conduct.”).

⁸ *Id.* at 17–18.

⁹ *Id.* at 17.

¹⁰ *Id.* at 18–19.

recognize, interim suspensions must provide an opportunity for a prompt review of the need for and terms of any interim measure.¹¹

Nor may the university permanently remove official recognition of these groups before providing them with a meaningful opportunity to contest the allegations.¹²

Rather than dispense with fundamental due process to address campus sexual assault, FIRE implores SUNY Binghamton to recognize the value in affording student groups robust due process protections. The goal of these procedures is not to shield accused students from accountability, but to ensure that disciplinary hearings reach results based on an accurate and impartial presentation of the facts.¹³ This truth-seeking function is the crux of why due process must be upheld, even—or especially—when the allegations concern serious, and potentially criminal, misconduct. Accordingly, adjudicating sexual misconduct allegations in a manner consistent with students’ rights is in the best interest of the entire SUNY Binghamton community.

III. SUNY Binghamton’s Plan to Address Sexual Assault Must Respect Due Process

FIRE calls on SUNY Binghamton to ensure that its plan to address sexual assault adheres to its written due process policies affording students, and student organizations, an opportunity to be heard prior to punishment.

We request receipt of a response to this letter no later than the close of business on January 22, 2021

Sincerely,



Zachary Greenberg
Senior Program Officer, Individual Rights Defense Program
SUNY Binghamton, Class of 2013

Cc: Brian Rose, Vice President for Student Affairs

¹¹ *Id.* at 27.

¹² 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).

¹³ See *Mathews*, 424 U.S. at 344 (“[D]ue process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.”); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring) (“The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”).

Barbara Westbrook Scarlett, Associate Counsel