



## Foundation for Individual Rights in Education

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October 29, 2008

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### URGENT

Alan Charles Kors  
CO-FOUNDER AND  
CHAIRMAN EMERITUS

Sent via U.S. Mail and Facsimile (607-777-2533)

Dear President DeFleur:

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The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, [www.thefire.org](http://www.thefire.org), will give you a greater sense of our identity and activities.

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FIRE is concerned about the threats to freedom of expression, freedom of conscience, and due process posed by Binghamton University's (BU's) punishment of graduate student Andre Massena after Massena posted flyers that called the Binghamton Housing Authority (BHA) "inhumane" and noted that the director of the BHA teaches social work at BU.

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

On August 25, 2008, Massena, a student in BU's Master in Social Work (MSW) program in the Department of Social Work, posted the enclosed flyer on the BU campus under the pseudonym "JUSTICESPEAKS." The flyer told the story of a woman and her children who had been evicted from their home by the Binghamton Housing Authority. The flyer stated:

This is the treatment many victims of BHA have faced and will continue to face. **Binghamton Housing Authority** is the RESPONSIBLE party for this form of INHUMAN practice. Binghamton Housing's Director holds a MASTERS degree in social work and is currently teaching social work at

**BINGHAMTON UNIVERSITY.** Please **CALL** Binghamton Housing Authority and the Social Work Department at the university to let them know what you think.

BHA: 607-723-9491

Binghamton University Social Work department: 607-777-5999 [*Emphasis in original.*]

While he is not mentioned by name, the flyer was evidently directed at David K. Tanenhaus, Executive Director of the BHA. About one week after posting the flyer, Massena received a notice dated September 2 and titled “Written Plan for Andre Massena” (enclosed). The plan, apparently written by professor Diane R. Wiener, informed him of “[s]pecific actions to be undertaken” and “the dates by which these actions must be completed.” He was required to withdraw immediately from all of his fall 2008 MSW courses and take “a two-semester leave of absence...in order to reflect upon his readiness to enter the field of social work as a professional practitioner, given his actions during late August, 2008, and the likely as well as possible consequences (both immediate and long-term) of his actions to various individuals, the Dept. of Social Work, Binghamton University, the Greater Binghamton community, and his own professional development.” The letter did not even guarantee his reinstatement in the program after the suspension; instead, Massena’s request to return would be contingent on “departmental approval.”

The involuntary leave of absence was only the beginning of the onerous requirements that the Department of Social Work demanded of Massena—requirements that could only be intended to reduce Massena to a posture of abject groveling. For instance, the plan required of Massena “[a] formal apology, in writing and/or verbally...to all parties concerned by September 30, 2008.” Massena was not allowed to apologize solely to Professor Tanenhaus; indeed, he was not even to be allowed to decide who else should receive apologies. Instead, the plan stated that “Dr. [Laura] Bronstein and Dr. Wiener will discuss this ‘list’ [of those needing apologies] with Mr. Massena to be sure it is comprehensive.”

Massena was also ordered to write, by September 30, a formal statement of retraction that would be sent

to the President of Binghamton University, the Binghamton University Dept. of Social Work, and the Binghamton Housing Authority, indicating that he [Massena] does not agree with, and regrets the sentiments expressed in the following statement, which he promoted, initially, by distributing posters/leaflets at the University Downtown Center that said: ‘We will in no way, shape, or form apologize for any harm or inconvenience this poster may cause Binghamton Housing Authority or Binghamton University and their affiliates.’

The possibility that Massena might not, in good conscience, be sorry that he brought attention to what he saw as injustice at the BHA—even though his actions may have caused the BHA or BU “inconvenience”—does not appear to have been allowed for in the “Written Plan.”

However humiliating, disproportionate, and inappropriate, these punishments were seemingly insufficient for the Department of Social Work, which also decided to require Massena to actively work to minimize the impact that protests like his would have on the department's personnel. Massena was to "make every effort possible and...inform Profs. Bronstein and Wiener of his efforts to end the process whereby students, service providers and community members approach the Dept. of Social Work in an effort to alleviate 'wrong' they may see as occurring at the Binghamton Housing Authority. Documentation of such actions will be submitted by September 30, 2008."

By the same date, the plan required Massena to "acknowledge verbally to Dr. Bronstein and Dr. Wiener that he understands that he is entitled to his opinions, and that taking responsibility for the harm that his actions have and may have caused is not the same as having these opinions." In plain English, this disturbing statement simply means: "While we can't actually force you to think the way we want, we can certainly force you to pretend that you do and to act accordingly."

Finally, the plan required Massena to complete a "10-12 page critical reflection paper" by May 8, 2009, on the subject of "effective professional strategies in the ethical practice of 'macro' social work in the early 21st century."

The plan required Massena's signature and had places for signatures from Bronstein and Wiener.

After receiving this letter, Massena appealed his punishment at an "Advancement Committee Hearing" in the Department of Social Work on September 17. In a September 23 e-mail outlining the ruling of the Advancement Committee, the committee (Professors Josephine Allen, Sunha Choi, and Dennis Chapman) upheld Massena's suspension without a guaranteed return, and it upheld the requirement to write the paper. The Advancement Committee left unclear whether it had upheld the plan of coerced apologies and coerced repudiation of his views and statements on the BHA matter.

According to Massena, the Advancement Committee had focused on Massena's placing of the flyer inside one building in particular, the University Downtown Center. According to Massena, it was alleged that he entered the building under false pretenses and lied to University Police officer Matthew Rossie and others about having posted the flyer. Even after the evidence showed that Massena was not guilty of these alleged offenses, Massena was alleged to be guilty of "lying by omission" for not spontaneously revealing to the police that he had posted the flyer in the building.

Massena immediately appealed the ruling of the Advancement Committee to BU's College of Community and Public Affairs so that he could continue attending classes. The hearing of this appeal has not yet been scheduled.

On October 24, Massena received a letter from Milton D. Chester, Director, Office of Judicial Affairs, dated October 20. The letter stated Chester had "received a report that you may have violated the University posting policy when allegedly posting flyers at the University Downtown Center." The letter required Massena to schedule a "meeting" to "discuss your involvement in this incident." The meeting has been scheduled for Monday, November 3, at 4:00 PM.

The facts of this case are simply horrifying for several reasons.

First, Massena's flyer consisted solely of political speech, the protection of which was arguably the core motivation for the First Amendment to the United State Constitution. The Supreme Court has held that "speech concerning public affairs is more than self-expression; it is the essence of self-government," reflecting "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (internal quotations omitted). Elsewhere, the Court has declared, "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Advocating strongly against a governmental organization and its leadership, such as the BHA and its executive director, is entirely protected political speech of specific concern to members of the BU community (especially the Department of Social Work) and the City of Binghamton. BU, a public university, cannot lawfully punish a student for embarrassing the BHA, its director, or the university as the result of such protected expression.

In addition, the First Amendment makes no exception for interpretations of "ethics" policies, including the National Association of Social Workers Code of Ethics, that restrict the right to core political speech, even if such speech roils a campus in controversy. While Massena's flyer might offend some members of the campus community, it is unquestionably protected expression under the First Amendment—and no public university policy may circumvent this protection. The principle of freedom of speech does not exist to protect only non-controversial speech; indeed, it exists precisely to protect speech that some members of a community may find controversial or offensive. The Supreme Court stated in *Texas v. Johnson*, 491 U.S. 397, 414 (1989), that "[i]f 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." Similarly, the Court wrote in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) that "the 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.'"

Second, several of the requirements in the "Written Plan" are particularly heinous examples of coerced speech in violation of Massena's right to freedom of conscience. The plan requires "[a] formal apology, in writing and/or verbally...to all parties concerned." The plan requires "a formal statement of retraction...indicating that [Massena] does not agree with, and regrets the sentiments" he expressed on the flyer regarding the effects of his flyer. It requires that Massena "make every effort possible...to end the process whereby students, service providers and community members approach the Dept. of Social Work in an effort to alleviate 'wrong' they may see as occurring at the Binghamton Housing Authority." It requires that Massena acknowledge that statements of his opinions, such as those on this flyer, are "actions" that cause unacceptable "harm."

All of these requirements seriously and egregiously violate Massena's freedom of conscience. Further, these are unconstitutional punishments, for they force Massena to engage in public expression with which he disagrees. Along with the right to speak freely, the First Amendment protects speakers from being compelled to make statements against their will. No public institution of higher education may lawfully force students to make statements in which they do not believe. As Supreme Court Justice Robert Jackson wrote more than sixty years ago in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), "[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Consistent with its First Amendment obligations, BU may not compel Massena to issue the statements demanded here. Freedom of conscience is not merely a First Amendment right; it is central to respect for human freedom. That the Department of Social Work would show such severe and ongoing disrespect for Massena's freedom of conscience is utterly incompatible with its responsibility to the public trust.

Third, Chester's letter violates Massena's constitutional right of due process by failing to specify which posting policy Massena allegedly violated. Among other things, the policy in BU's *2008–2009 Student Handbook* restricts postings to bulletin boards, includes size restrictions, and requires that official university groups register contact information with the director of the University Union. Without telling Massena which part of the policy he allegedly violated, Massena cannot properly prepare for a meeting. Instead, BU seems to be fishing for a more specific violation.

Moreover, no part of the posting policy in BU's *2008–2009 Student Handbook* prohibits anonymous or pseudonymous speech. This is as it should be, because anonymous speech is protected by the First Amendment—an unsurprising fact, considering that it figured prominently in the founding of our nation. Indeed, the Supreme Court has ruled that "[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible... Accordingly, an author's decision to remain anonymous... is an aspect of freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341–342 (1995). Requiring any disclosure of authorship violates the First Amendment. Further, there is certainly no requirement under the law that students inform the police before posting flyers, and any such requirement would certainly violate Massena's right to freedom of expression.

FIRE requests that BU immediately terminate its violations of Massena's constitutional rights. BU must acknowledge that Massena is free to criticize public officials, public entities such as the BHA, and even Binghamton University itself without punishment. BU must withdraw its severe punishment of Massena for his protected speech. Finally, the Office of Judicial Affairs must specify its charge against Massena or drop its investigation, recognizing that Massena may not be prosecuted for protected speech, including anonymous or pseudonymous speech.

FIRE hopes to resolve this situation amicably and swiftly. We will continue to pursue this matter with all of our resources, however, until we are satisfied that justice has been served.

I have included a signed FERPA waiver from Andre Massena.

We request a response regarding these urgent matters prior to Massena's "meeting," currently scheduled for 4:00 PM on November 3, 2008.

Sincerely,



Adam Kissel  
Director, Individual Rights Defense Program

cc:

Milton D. Chester, Director of Judicial Affairs, Binghamton University

Patricia W. Ingraham, Founding Dean, College of Community and Public Affairs, Binghamton University

Laura Bronstein, Chair, Department of Social Work, Binghamton University

Diane Wiener, Assistant Professor, Department of Social Work, Binghamton University

Josephine A.V. Allen, Professor, Department of Social Work, Binghamton University

Dennis Chapman, Assistant Professor, Department of Social Work, Binghamton University

Sunha Choi, Assistant Professor, Department of Social Work, Binghamton University

David Tanenhaus, Executive Director, Binghamton Housing Authority

Stanley Gluck, Field Instructor, Opportunities for Broome

Encl.