FIRE
Foundation for Individual Rights in Education

March 27, 2015

Dr. Steven Knapp
Office of the President
George Washington University
Rice Hall
2121 I Street, NW
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Washington, DC 20052

URGENT

Sent via U.S. Mail and Electronic Mail (sknapp@gwu.edu)

Dear President Knapp:

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, thefire.org, will give you a greater sense of our identity and activities.

FIRE is deeply concerned about the threat to freedom of expression at George Washington University (GWU) presented by the interim suspension of and numerous conduct charges levied against student [redacted] on the basis of his placement of a souvenir swastika from India on a residence hall bulletin board. These disciplinary actions contradict GWU's promises of free expression and unacceptably chill speech in the GWU community, ultimately damaging the free flow of information and the robust, open debate that GWU claims to value. We call on GWU to affirm its commitment to freedom of expression and rescind the charges against [redacted] immediately.

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

On March 16, 2015, [redacted] placed a small bronze swastika on a fourth floor bulletin board at International House, where he resided with his fraternity brothers from Zeta Beta Tau (ZBT), a predominantly Jewish fraternity. [redacted], himself Jewish, had purchased the swastika while visiting India over spring break, where he learned of the symbol's ancient origins as a symbol of good luck and success, a history that predates by millennia its use as an icon of Nazi Germany. [redacted] asserts that he purchased the icon in

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order to educate his friends on the history and origins of the swastika and to empower them in light of a recent incident in which an unknown vandal had drawn three swastikas on the walls of International House.

After having walked around the fourth floor of International House seeking a classmate with whom to discuss the souvenir, [redacted] placed the swastika on the bulletin board at approximately 10:00 in the morning. [redacted] remained in the vicinity in order to engage in dialogue with anyone who noticed the symbol on the board. A short while later, [redacted] left the area to eat breakfast with friends. While he was eating breakfast, a member of ZBT noticed the swastika hanging from the bulletin board and called the GWU Police Department, who gathered the swastika as evidence and filed a report. When [redacted] returned from breakfast, he received a message from the fraternity referencing the swastika and immediately contacted the ZBT president. [redacted] informed him that he was responsible for the swastika and that it had not been an anti-Semitic incident.

The GWU Police Department was promptly notified that [redacted] had come forward as the individual who placed the swastika on the bulletin board. GWU police brought [redacted] in for questioning, where he gave a written statement explaining how he came to possess the swastika, his purpose in hanging it on the bulletin board, and the sequence of events that had transpired that morning.

Later that day, you issued a public statement informing the GWU community that the university had not only begun its own investigation, but had also referred the incident to the Metropolitan Police Department for investigation as a "hate crime." You further stated that "the swastika has acquired an intrinsically anti-Semitic meaning, and therefore the act of posting it in a university residence hall is utterly unacceptable. . . . We must work together to guarantee that all our students are safe from expressions of bigotry and hatred."

Two days later, on March 18, GWU Vice Provost and Dean of Student Affairs Peter Konwerski informed [redacted] via letter that he was suspended from the university on an interim basis pending the resolution of five disciplinary charges stemming from the swastika incident. The terms of the interim suspension include temporary eviction from university housing, and [redacted] is presently prohibited from attending classes or activities and from entering university property.

Konwerski's letter charges [redacted] with the following violations:

- **11(h) – Interfering with University Events –** Interfering with any normal university or university-sponsored events, including but not limited to studying, teaching, research, and university administration, fire, police, or emergency services.

- **11(q) – Violation of Law –** Violation of federal and/or local law . . . .

- **11(o) – Regulation Violation –** Any violation of other published university regulations including but not limited to . . . the Residential Community Conduct Guidelines (whether the student lives in resident or not) and other lease agreements with the university . . . .

    - **Residential Community Conduct Guidelines I.1.C – Chronic Misbehavior –** A resident establishes an unacceptable pattern of misconduct when he or she frequently violates university policy, although individual offenses might be minor. A pattern of recalcitrance, irresponsible conduct or manifest immaturity may be interpreted as a significant disciplinary problem.

- **11(s) – Disorderly Conduct -** . . . Acting in a manner that annoys, disturbs, threatens, endangers, or harasses others; disrupting, obstructing or interfering with the activities of others . . . .

- **11(u) – Discrimination –** Committing any of the above acts because of a person's race, color, religion, sex, national origin, age, disability, veteran status, sexual orientation, or gender identity or expression.

Included with the disciplinary charges was a copy of District of Columbia Code § 22-3312.02, titled "Defacing of burning cross or religious symbol; display of certain emblems," which serves as the foundation for the "Violation of Law" charge. This code provision prohibits, in part, the placement or display of "a Nazi swastika" on any public property and certain private property,

> where it is probable that a reasonable person would perceive that the intent is:
>
> [. . .]
>
> **(3)** To threaten another person whereby the threat is a serious expression of an intent to inflict harm; or
>
> **(4)** To cause another person to fear for his or her personal safety, or where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability.

Konwerski's letter further informed [redacted] that he may face additional charges as the university's investigation proceeds.

GWU is a private university and thus not legally bound by the First Amendment. Nevertheless, it is both morally and contractually bound to honor the explicit, repeated,

and unequivocal promises of freedom of expression it has made to its students. For example, the *Guide to Student Rights and Responsibilities* proclaims: "The George Washington University is committed to the protection of free speech, the freedom of assembly, and the safeguarding of the right of lawful protest on campus." The same policy document explains why GWU has committed to upholding the principles of free speech on campus:

> Academic institutions exist for the transmission of knowledge, the pursuit of truth, the development of students, and the general well-being of society. Free inquiry and free expression are indispensable to the attainment of these goals. As members of the academic community, students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth.

Freedom of speech does not exist to protect only non-controversial expression; it exists precisely to protect speech that some members of a community may find controversial or offensive. The Supreme Court of the United States stated in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) that speech "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." The Court reiterated this fundamental principle in *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011), proclaiming 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."

GWU's heavy-handed and punitive overreaction is at odds with these principles and unacceptably chills the expressive rights of GWU students, which the university has pledged to protect. We request that you immediately rescind the disciplinary charges against [redacted].

We will discuss each in turn.

The "Violation of Law" charge is misplaced for numerous reasons. Preliminarily, it is flatly inappropriate for GWU to adjudicate the question of whether a criminal statute has been violated. As should be obvious, GWU lacks the requisite procedures, resources, and expertise to make such a decision, which is properly the purview of a court of law. Further, it is fundamentally unfair to force a student to choose between mounting a thorough and complete defense to campus disciplinary charges or remaining silent for fear that any statements made in so doing could be used in a future criminal prosecution. Students who are convicted of violating the law may reasonably be punished under the conduct code. But it is unconscionable for the university to assert jurisdiction over criminal matters and place the accused student in such a manifestly unfair and untenable position.

Even if such a disciplinary charge were proper, [redacted] expression could not possibly have violated the code provision at issue. Foremost, D.C. Code § 22-3312.02 prohibits by its

own plain terms the placement or display of a "*Nazi* swastika." (Emphasis added.) Yet it appears beyond dispute that the swastika in question was not a Nazi swastika. The item was purchased in a country with a history of using the symbol for thousands of years before Nazi Germany's existence. The swastika was not placed at the 45-degree angle common to the Nazi usage, nor did it contain any other accompaniment that would identify it as a symbol of Nazi Germany, such as the colors of the Nazi flag or other emblems of Nazi Germany. Neither the law nor GWU may ignore thousands of years of history and declare all uses of the swastika to be presumptively related to Nazi Germany. In this respect, it is notable and ironic that this charge against [redacted] appears to unintentionally support the very point he was attempting to make in the first place.

Nor did [redacted] engage in the type of threat or intimidation contemplated by the D.C. Code. The mere display of a swastika, even in the presence of those whom it would shock and offend the most, is not a serious expression of an intent to do harm, nor is it reasonable to conclude that such a display would cause any reasonable person to fear for their safety. Indeed, when the National Socialist Party of America sought to march through Skokie, Illinois—a village in which one in six residents was a Holocaust survivor—an injunction barring the display of the Nazi swastika was struck down as a violation of the First Amendment:

> Nor can we find that the swastika, while not representing fighting words, is nevertheless so offensive and peace threatening to the public that its display can be enjoined. We do not doubt that the sight of this symbol is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display. Yet it is entirely clear that this factor does not justify enjoining defendants' speech.

Village of Skokie v. National Socialist Party of America, 373 N.E.2d 21, 24 (Ill. 1978). If the law cannot prohibit the display of a Nazi swastika in the presence of those who witnessed the murder of their family and friends in Nazi Germany, it certainly may not declare that the display of a swastika is by its very nature an unprotected threat or intimidation. There is nothing to suggest that any reasonable person would fear for their safety simply because they saw a swastika—no matter how offensive they may find the symbol.

It also bears noting that the constitutionality of D.C. Code § 22-3312.02 is highly suspect, at best. As noted above, to the extent that the code is interpreted as effectively preventing the display of the swastika in the presence of those who find it abhorrent, it is inconsistent with decades of First Amendment jurisprudence. Furthermore, the code establishes a broader definition of prohibited "intimidation" than Supreme Court precedent allows. The Supreme Court has defined constitutionally proscribable intimidation as speech "where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Virginia v. Black*, 538 U.S. 343, 360 (2003). But whereas the Court's definition requires intent on the part of the speaker, the D.C. ordinance prohibits display of a swastika where a reasonable person would *perceive* that the speaker intended to place the victim in fear for their "personal safety." Because the D.C. Code

prohibits speech based on the perception of the speaker's intent rather than the speaker's actual intent, it proscribes more speech than the First Amendment permits. *See Black*, 538 U.S. at 366–67 ("It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. . . . The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.").

Next, [redacted]'s expression constitutes neither "Interference With University Events" nor "Disorderly Conduct" under GWU's policies. The fact that some found the swastika's display in International House offensive and troubling does not support GWU's apparent conclusion that the mere act of placing the swastika on the bulletin board is inherently disruptive to university operations, nor can the manner of its placement legitimately be characterized as disorderly in and of itself. While these two charges may be properly applied to regulate *conduct* that is objectively disruptive or disorderly, they are wholly unsuitable for the regulation of *speech* the overall effect of which depends on the subjective reaction of its audience. Punishing speech because of the subjective offense taken by listeners betrays GWU's commitments to free expression, and such punishments have been rejected by the Supreme Court as unconstitutional. *See, e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) ("Speech cannot be financially burdened, *any more than it can be punished or banned*, simply because it might offend a hostile mob.") (emphasis added). *See also Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 150 (D.C. Cir. 1990) ("[I]t has long been held that 'a hostile audience is not a basis for restraining otherwise legal First Amendment activity. . . .'") (internal citations omitted). Punishing student expression as "interference" or "disorderly conduct" simply because it may upset others will chill student expression at GWU, leaving freedom of expression at the mercy of the most sensitive members of the university community, no matter how unreasonable they may be. Such a chill is unacceptable at a university claiming to value freedom of expression, as GWU does.

The charge of "Discrimination" relies on the above charges as underlying offenses. Because each of these other charges against [redacted] fails to withstand scrutiny, it is evident that the charge of "Discrimination" must be dismissed as well. To the extent that the confluence of the allegations of disorderly conduct and discrimination charges effectively provide the basis for a discriminatory harassment charge, however, it is important to note how this charge comports with relevant Supreme Court precedent and federal guidance.

In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court set forth a strict definition of student-on-student (or peer) harassment. In order for student conduct (including expression) to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected status, (3) directed at an individual, and (4) "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id.* at 650. By definition, this includes only extreme and typically

repetitive behavior—conduct so serious that it would prevent a reasonable person from receiving his or her education. The Department of Education's Office for Civil Rights (OCR), the federal agency responsible for implementing and enforcing federal anti-discrimination laws on our nation's campuses, made clear in its 2001 *Revised Sexual Harassment Guidance* that its definition of harassment is "consistent" with and "intended to capture the same concept" as the Court's definition in *Davis*.

Further, in a July 28, 2003, "Dear Colleague" letter sent to the presidents of public and private universities nationwide, former OCR Assistant Secretary Gerald S. Reynolds made clear to colleges that "in addressing harassment allegations, OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR." Reynolds further cautioned:

> Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program.

A 2010 "Dear Colleague" letter regarding bullying from former OCR Assistant Secretary Russlynn H. Ali explicitly reaffirmed the 2003 "Dear Colleague" letter's understanding of the relationship between the First Amendment and harassment. On April 29, 2014, Assistant Secretary Catherine E. Lhamon issued guidance again clarifying that "the laws and regulations [OCR] enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution," and stating that "when a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers."

OCR's repeated warnings should make plain to GWU the inappropriateness of charging [redacted] with discrimination. Upsetting though [redacted] expression may have proved to some or even many, this isolated incident does not come close to creating a hostile educational environment for students or in any way crossing the threshold from protected expression into discriminatory conduct. GWU ignores OCR's guidance in claiming to the contrary.

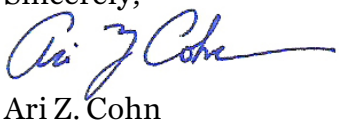
Finally, to the extent that this incident is the basis for the charge of "Chronic Misbehavior" under the *Residential Community Conduct Guidelines*, this charge should likewise be rescinded because the substantive charges are improper and must be dismissed.

FIRE is aware that, in light of recent events at George Washington University and at other campuses across the country, your administration may be facing significant pressure to take swift and harsh action in response to any speech that can be interpreted as prejudiced or hateful. But that pressure cannot and must not lead to the subordination of GWU students' expressive rights, the principles of free speech essential to the university's mission, or common sense.

Your university may not lay claim to the intellectual vitality that results from freedom of expression while simultaneously indicating to its students that attempting to spark dialogue on uncomfortable topics will be met with severe punishment and potential criminal investigation. **We urge you to rectify this grave mistake immediately and dismiss the charges against [redacted].**

FIRE is committed to using all of the resources at our disposal to see this matter through to a just conclusion. We request a response to this letter by April 3, 2015.

Sincerely,



Ari Z. Cohn
Program Officer, Legal and Public Advocacy

cc:
Peter Konwerski, Vice Provost and Dean of Student Affairs
Steven Lerman, Provost and Executive Vice President, Academic Affairs
Gabriel A. Slifka, Director, Office of Student Rights & Responsibilities
Frank Demes, Interim Chief, George Washington University Police Department