



April 29, 2022

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URGENT

Sent via U.S. Mail and Electronic Mail (lindsay.kendrick@nyu.edu)

Dear Dean Kendrick:

The Foundation for Individual Rights in Education, a nonpartisan nonprofit dedicated to defending freedom of expression and other essential liberties on America's college campuses, is concerned by New York University School of Law's (NYU Law's) apparent investigation into an email sent by the campus chapter of Law Students for Justice in Palestine (LSJP). The email at issue, which other students criticized as anti-Semitic, may be deeply offensive to some, but remains protected under NYU's strong promises of free expression, and accordingly may not be punished and thus should not be the subject of speech-chilling investigation.

I. NYU Law Announces Investigation into Controversial LSJP Email

The following reflects our understanding of the pertinent facts, though we appreciate you may have additional information and invite you to share it with us.

On April 7, 2022, NYU Law's Students for Israel emailed NYU Law students condemning terror attacks in Israel, writing, in part, "Few countries have faced as much violence, hatred, and delegitimization as the State of Israel."¹ The statement additionally said: "The Middle East is big enough for all its indigenous peoples to enjoy self-determination, security, and prosperity. Do not give credence to those, including in our Law School, who say otherwise."² On April 11, LSJP responded by email to argue the Students for Israel's statement contained

¹ Email from Law Students for Israel to NYU Law Community (Apr. 7, 2022, 3:19 PM) (on file with author).

² *Id.*

“blatant inaccuracies, fallacies, and misrepresentations.”³ LSJP’s response included statements to which some students and members of the media objected, including “Israel is not a ‘victim’ that needs saving from Palestinian ‘terror’” and “[f]raming is everything and the Zionist grip on the media is omnipresent.”

Eleven other student groups responded to the statement expressing support for LSJP’s statement. Other students allegedly filed harassment complaints, leading the university to announce on April 12 an investigation into the complaints “as required by [NYU] policies.”⁴

On April 13, the Jewish Law Student Association (JLSA) held a town hall to discuss LSJP’s email and the harassment allegations. Three Jewish members of LSJP asked leadership of the JLSA if they could attend the town hall, but those students say they were encouraged by JLSA not to attend. In response, those students asked you to meet to discuss why they were discouraged from attending the JLSA town hall. During the April 18 meeting, you apparently did not address LSJP’s concerns and instead informed the students about the investigation into LSJP’s email. You asked the students to provide statements as part of the investigation.

The *Washington Free Beacon* alleges NYU’s 2020 settlement agreement committing to prevent discriminatory harassment against Jewish people requires the university to punish the students in LSJP so as not to risk the university’s federal funding.⁵

II. NYU’s Promises of Free Expression Preclude Investigating Protected Speech

As a private institution, NYU Law is not bound by the First Amendment. However, the university explicitly guarantees students rights to free expression and thus may not punish the exercise of those rights.

In its academic freedom policy, NYU establishes the university as “a community where the means of seeking to establish truth are open discussion and free discourse.”⁶ It further asserts that the university “thrives on debate and dissent, which must be protected as a matter of academic freedom within the University, quite apart from the question of constitutional rights.” Additionally, the policy recognizes “that a critically engaged, activist student body contributes to NYU’s academic mission” and “[f]ree inquiry, free expression, and free association enhances academic freedom and intellectual engagement.” Because NYU promises its students freedom of expression, applications of the First Amendment’s

³ Email from NYU Law Students for Justice in Palestine to NYU Law Community (Apr. 11, 2022, 10:08 AM), available at <https://freebeacon.com/wp-content/uploads/2022/04/NYU-Law-School-Groups-Endorse-Palestinian-Terrorism.pdf>.

⁴ Email from Trevor Morrison, Dean, NYU Law, to NYU Law Community (Apr. 12, 2022, 9:43 AM) (on file with author).

⁵ Aaron Sibarium, *Under Federal Scrutiny, NYU Law School Faces Uproar Over Anti-Semitism*, WASH. FREE BEACON (Apr. 13, 2022, 5 AM), <https://freebeacon.com/campus/under-federal-scrutiny-nyu-law-school-faces-uproar-over-anti-semitism>.

⁶ Academic Freedom, Demonstration, and Protest, UNIV. STUDENT CONDUCT POLICY, NEW YORK UNIV. (Aug. 16, 2021), <https://www.nyu.edu/about/policies-guidelines-compliance/policies-and-guidelines/university-student-conduct-policy.html>. NYU Law is a school within NYU and thus must comply with the university’s policies, including its commitments guaranteeing students expressive freedoms.

guarantee of “the freedom of speech” inform what students expect the university’s promises will mean in practice.

A. NYU’s Commitments to Free Expression Preclude the University from Punishing Students for Protected Expression

A commitment to free speech presupposes that some on campus may take offense to an expressed viewpoint, but the “bedrock principle underlying” free speech is that it may not be limited “simply because society finds the idea itself offensive or disagreeable[.]”⁷ It is this counter-majoritarian principle that protects “insulting, and even outrageous, speech in order to provide adequate breathing space” for public debate,⁸ recognizing those with authority “cannot make principled distinctions” between what speech is sufficiently offensive or inoffensive to suppress.

This principle is particularly important in higher education, where the exchange of views may sometimes be caustic, provocative, or inflammatory. Consider, for example, a student newspaper’s use of a vulgar headline (“Motherfucker Acquitted”) and a front-page “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.”⁹ These words and images—published at the height of the Vietnam War—were no doubt deeply offensive to many at a time of deep polarization and unrest. Yet, as the Supreme Court held, “the mere dissemination of ideas,” however “offensive” to others, “may not be shut off in the name alone of ‘conventions of decency.’”¹⁰

This calculus does not vary for speech that “concern[s] sensitive topics” like the highly debated Israeli-Palestinian conflict, “where the risk of conflict and insult is high.”¹¹ While FIRE is aware of NYU’s 2020 settlement agreement with the Department of Education’s Office of Civil Rights (OCR), that agreement does not require the university to investigate protected expression, which includes LSJP’s statement at issue and which undoubtedly includes the vast majority of controversial and/or “offensive” expression by student supporters of both sides of the issue. OCR itself has made clear that a university’s important legal obligations to address discriminatory harassment do not obligate it to censor expression absent “something beyond the mere expression of views, words, symbols or thoughts” that others find offensive.¹² To the contrary, the freedom of expression that NYU promises “embraces [the] heated exchange of views” in this context, and “desire to maintain a sedate academic environment does not justify limitations on a teacher’s freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms.”¹³

⁷ *Snyder v. Phelps*, 562 U.S. 443, 458 (2011), citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

⁸ *Boos v. Barry*, 485 U.S. 312, 322 (1988) (cleaned up).

⁹ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹⁰ *Id.*

¹¹ *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2009).

¹² U.S. Dep’t of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

¹³ *Id.*

B. LSJP's Statement Does Not Constitute Discriminatory Harassment as Defined by Davis

The university cannot justify investigating LSJP's email by claiming it amounts to harassment because, given NYU's promises of free expression, harassment "must include something beyond mere expression of views, words, symbols or thoughts that some person finds offensive."¹⁴ In *Davis v. Monroe County Board of Education*, the Supreme Court set forth a clear definition of student-on-student (or peer) harassment.¹⁵ For student conduct (including expression) to constitute actionable harassment, it must be (1) unwelcome, (2) discriminatory on the basis of a protected status, and (3) "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school."¹⁶

Here, although some may consider LSJP's statements unwelcome and discriminatory with regard to religion or national origin, there is no credible argument the posts were "so severe" or "pervasive" that they "deprive[d]" other students of access to educational opportunities. LSJP's email responded to statements by Law Students for Israel, criticizing their arguments and expressing LSJP's opinion on the contentious issue of the Israeli-Palestinian conflict.

C. Investigations Alone Can Violate Free Expression, Even Without Formal Punishment

NYU must forgo or terminate investigation, because even if NYU finds in favor of LSJP, the investigation itself violates the university's promises of expressive freedom. On this point, the question is not whether formal punishment is meted out, but whether the institution's actions in response "chill a person of ordinary firmness."¹⁷

Investigations into protected expression may satisfy this standard.¹⁸ For example, a public university met this standard in launching an investigation into a tenured faculty member's offensive writings on race and intelligence through an *ad hoc* committee to review whether the professor's expression—which university leadership said "ha[d] no place at" the college—constituted "conduct unbecoming of a member of the faculty."¹⁹ Analyzing the professor's constitutional challenge, the United States Court of Appeals for the Second Circuit held the investigation itself constituted an implicit threat of discipline, and the resulting chilling effect caused cognizable First Amendment harm.²⁰ Once it is clear that speech in question is protected, as it clearly is here regardless of whether or not it is anti-Semitic, the investigation must end.

¹⁴ U.S. Dep't of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec'y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

¹⁵ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

¹⁶ *Id.* at 650.

¹⁷ *Hous. Cmty. Coll. Sys. v. Wilson*, 212 L. Ed. 2d 303, 311 (2022).

¹⁸ *See, e.g., Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992).

¹⁹ *Levin*, 966 F.2d at 89.

²⁰ *Id.* at 89–90.

To be clear, the same is true for any complaints about protected expression that have been or may be filed against Students for Israel, JLSA, or its members on the basis that they are anti-Arab or anti-Muslim. While NYU Law has many approaches it may take to address the concerns of its students or to encourage productive debate on controversial issues, chilling or punishing the expression it promises to protect is simply not one of them.

Here, NYU’s student disciplinary procedures²¹ include significant potential sanctions ranging from censure to suspension or expulsion—each of which meets the ordinary firmness test²²—and the investigation sends the message that the university may punish speech similar to LSJP’s in the future. A quick, preliminary review of LSJP’s email is all that is necessary to confirm it consists of protected speech, obviating the need for any investigation, or reason to even notify the students that an inquiry (and summary disposition) of the complaint occurred.

D. NYU Is Not Required to Investigate by Its 2020 Settlement Agreement with the Office for Civil Rights

NYU’s settlement agreement with OCR does not—and cannot—require NYU to investigate expression otherwise protected by the First Amendment. While the agreement required, among other things, that NYU amend its policies to prohibit discrimination based on shared ancestry and ethnic characteristics, and that it release a statement from its president that the university “does not tolerate acts of discrimination or harassment,” the agreement does not require NYU to investigate protected expression. OCR, in fact, cannot require NYU to investigate or punish protected expression, as it is itself a governmental body bound by the Constitution.²³

III. Conclusion

Although some may have been offended by LSJP’s statement, it is protected by NYU’s promises of student expressive freedoms. This principle does not, and has not, shielded LSJP from every consequence from its expression—including criticism by students, faculty, the broader community, and the university itself. Such criticism is a form of “more speech,” the remedy to offensive expression endorsed by the principles of free expression.²⁴ NYU itself is limited, however, in the types of consequences it may impose on speech to which it guarantees protection.

²¹ NEW YORK UNIV., ACADEMIC POLICIES, <https://www.law.nyu.edu/academicservices/academic-policies/formal-student-discipline-informal-resolution-of-concerns-complaints/formal-procedures> (last visited Apr. 25, 2022).

²² *Speech First, Inc. v. Fenves*, No. 19-50529, 2020 U.S. App. LEXIS 34087, at *28–30 (5th Cir. Oct. 28, 2020).

²³ *Equity in Ath., Inc. v. Dep’t of Educ.*, 639 F.3d 91 (4th Cir. 2011) (Analyzed whether the Department of Education’s Title IX regulations were Constitutional).

²⁴ *Whitney v. California*, 274 U.S. 357, 377 (1927).

We request a response to this letter no later than close of business May 6, 2022, explaining the basis for NYU's investigation into LSJP's expression and, if based solely on LSJP's protected speech, confirming the investigation has terminated without formal punishment.

Sincerely,



Sabrina Conza
Program Officer, Individual Rights Defense Program

Cc: Trevor Morrison, Dean, NYU Law