



Foundation for Individual Rights in Education

601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • F 215-717-3440 • fire@thefire.org • www.thefire.org

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December 8, 2006

President William Brody
Johns Hopkins University
Office of the President
242 Garland Hall
3400 N. Charles Street
Baltimore, Maryland 21218

Sent via U.S. Mail and Facsimile (410-516-6097)

Dear President Brody:

FIRE sincerely appreciates Vice President and General Counsel Stephen S. Dunham's response to our letter of November 28 regarding Justin Park (attached). I write to address several of the specific points in that letter.

Dunham writes that "the University's vision includes an academic community where the exchange of ideas thrives, where activities are open and non-discriminatory, and where individuals respect the rights of others and are treated with dignity and respect. To achieve these goals we have policies and procedures in place, including relating to student conduct and fraternities."

This statement indicates quite clearly that Johns Hopkins does not afford its students the same free speech rights to which they would be legally entitled at a public university, since almost all speech that is "disrespectful" is nonetheless constitutionally protected. Private universities have the right to disregard the constitutional protection of free speech if they so choose. While we, of course, encourage private universities to grant their students the right to free speech, we demand only truth in advertising. If a private university makes absolutely public and clear that it places other values above the right to freedom of speech, FIRE does not challenge that university for abrogating the free speech rights of its students, whom we assume to have consented to such policies. For an example of such a school, see Brigham Young University (BYU), whose policies explicitly state that free expression at BYU "must be a matter of reasonable limitations," and clearly set forth those limitations so that students are not confused about what they can and cannot say.

If limiting free speech to ensure respect is in fact Johns Hopkins' goal, then rather than advertising the university as a "forum for the free expression for ideas," we

respectfully request that Johns Hopkins repudiate its previous promises of free expression and rewrite its promotional materials to reflect the fact that students and faculty do not have the right to unfettered free speech at the university. If Johns Hopkins does not guarantee its students free speech, the university must inform parents, students, donors, and alumni of this policy, as those individuals almost certainly believe that students and faculty at Johns Hopkins enjoy at least the same rights as they would at any community college. Obviously, many prospective parents and students might be reluctant to commit to an institution where one's entire academic career can be jeopardized by making a joke, and they have a right to know about this risk.

Private colleges have the right to define their identities, but they do not have the right to promise rights to students and then break those promises when they become inconvenient. Making essential promises that you do not intend to fulfill in order to induce someone to spend money on a product or service is fraud, and even private colleges do not have the right to defraud. If Johns Hopkins wishes to drastically narrow the freedoms it offers students to those far smaller than what public college students enjoy, it simply must inform its current, former, and future customers and donors that Hopkins does not permit speech that would be clearly protected under the First Amendment.

Dunham also corrects an apparent factual misstatement in our letter, explaining that Director of Greek Affairs Robert Turning asked the fraternity to remove the invitation of his own accord, and not at the request of any student group. We are willing to accept this as true. However, the fact that Mr. Turning was policing the non-university website Facebook.com for offensive material—even in the absence of student complaints—causes us even greater concern than the facts as we previously understood them. We believe it is entirely inappropriate for a university official to police students' off-campus writings in search of potential disciplinary violations. Such a practice represents an invasive return to the *in loco parentis* approach to college administration that college students heroically challenged and defeated decades ago. It also demonstrates a shockingly low institutional respect for the autonomy and privacy of your students. The fact that the off-campus, non-university activities of Johns Hopkins students will be monitored by university administrators is another unpleasant truth that Hopkins' promotional materials have a responsibility to disclose.

Dunham also writes that “nothing about the University's policies and procedures or the specific findings that were made violate anyone's right to free speech.” This is simply not true. The expression contained in Justin Park's two invitations falls squarely within the realm of “free speech,” by which we mean speech that would be constitutionally protected in society at large. Legally, there is no question whatsoever that Justin's speech would be protected as free expression under the First Amendment outside the confines of Johns Hopkins University.

The right to free speech includes the right to say things that are deeply offensive to many people. As the U.S. Supreme Court has plainly stated, “[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Street v. New York* (1969). Federal courts have echoed this holding in the educational context. In striking down a harassment policy at a high school, the Third Circuit Court of Appeals held that there is “no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive.” *Saxe v. State College*

Area School District (2001). Similarly, in invalidating on First Amendment grounds a harassment policy at the University of Michigan, a federal district court held that the university could not “proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.” *Doe v. University of Michigan* (1989).

In light of the overwhelming legal precedent, to say that punishing a student for merely posting a satirical invite does not “violate anyone’s right to free speech” is grossly inaccurate. If Johns Hopkins decides to repudiate its promises of free speech, then it need not protect free speech, but it must recognize that its actions do in fact constitute a violation of the right to free speech that would be guaranteed at a public university or in society at large.

Further, Dunham writes that “the University has a right to seek to establish an educational environment that is free of harassment....” That is absolutely correct. However, Justin Park’s conduct bears no relationship to the actual offense of “harassment,” and the university is setting a very dangerous precedent by punishing a student for meeting its own arbitrary definition of what is actually a legal term—a definition that explicitly contradicts clear statements of the U.S. Supreme Court and the federal Department of Education.

The Supreme Court has defined harassment as conduct “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis v. Monroe County Board of Education* (1999). And in 2003, the Department of Education’s Office for Civil Rights (OCR) issued a letter to universities clarifying that “the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the [harassment] statutes enforced by OCR.”

Justin Park’s Facebook invitations—offensive as they may be to some—do not even approach the stringent criteria necessary to establish a claim of harassment.

The same is true for the university’s characterization of Park’s conduct as “intimidation.” The U.S. Supreme Court, in the case of *Virginia v. Black* (2003), investigated the constitutionality of a Virginia statute that labeled all cross burnings “intimidating.” The Court probed the legal definition of “intimidating” and found that: “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, 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.”

In order to be “intimidating,” therefore, Park’s speech must be such that it would cause a reasonable person to have legitimate cause to fear for his or her life or physical safety. It is simply implausible to argue that any reasonable person believed that an eighteen-year-old college student’s satirical Halloween party invitation was meant as a warning from Park that he intended to harm or kill them. Hopkins’ use of the term “intimidation” dangerously trivializes a very serious crime, the force of which should never be diluted in the name of current convenience.

Finally, and perhaps most importantly, in all of this debate and discussion over Justin’s case, we are concerned that the basic facts of the case have been obscured. Justin Park is a brilliant student who started at Johns Hopkins University at age 15. To our knowledge, he has had no previous

disciplinary problems. Like students across the country, he posted an invite to a themed Halloween party using slang and jokes from popular music and television programs. He was found guilty of a number of serious offenses, kicked off of campus entirely for a year, and sentenced to hundreds of community service hours, despite the fact he had already apologized for his actions. The university's actions here threaten to ruin a promising student's career and to cement Hopkins' reputation as the school where an insensitive joke can mean the end of all of a student's hard work. This is not fair, this is not right, and this is not the way we deal with speech that offends us in a free society. By teaching students that they have a right not to be offended, and that expression will only be tolerated so long as it is agreeable, you do your students a grave disservice and fail to prepare them to be active participants in a pluralistic democracy.

We hope that Johns Hopkins will reaffirm its commitment to the values of free expression, due process, and free speech, and trust in the open discussion and dialogue to handle instances of "offensive" speech.

FIRE remains committed to seeing this matter through to a just and moral conclusion. I invite your response, and hope that this matter can be resolved through reasoned dialogue.

Sincerely,



Greg Lukianoff
President

cc:

Robert Turning, Director of Greek Affairs, Johns Hopkins University

Dorothy Sheppard, Associate Dean of Students, Johns Hopkins University

Caroline Laguerre-Brown, Associate Director for Compliance and Conflict Resolution, Johns Hopkins University

Dennis O'Shea, Executive Director of Communications and Public Affairs, Johns Hopkins University

Susan Boswell, Dean of Students, Johns Hopkins University

Ralph Johnson, Assistant Dean of Students, Johns Hopkins University

Linda Robertson, Vice President for Government, Community and Public Affairs, Johns Hopkins University

Stephen Dunham, Vice President and General Counsel, Johns Hopkins University

Greg Harbaugh, President and Chief Executive Officer, Sigma Chi Foundation

Christopher Manshio, Director of Leadership Development and Alumni Cultivation, Sigma Chi Foundation

Charles L. Watson, Chairman, Sigma Chi Foundation

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