



## Foundation for Individual Rights in Education

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October 26, 2012

President Deborah F. Stanley  
State University of New York at Oswego  
Office of the President  
706 Culkin Hall  
Oswego, New York 13126

*Sent via U.S. Mail and Facsimile (315-312-5438)*

Dear President Stanley:

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](http://thefire.org), will give you a greater sense of our identity and activities.

FIRE is deeply concerned by the severe threat to freedom of speech posed by the State University of New York at Oswego's (SUNY Oswego's) suspension of a student based on the allegation that emails sent regarding a university official constituted defamation, harassment, intimidation, or threats. These charges are utterly without merit and must be dismissed immediately in accordance with SUNY Oswego's legal and moral obligations under the First Amendment.

This is our understanding of the facts. Please inform us if you believe we are in error. Alexander Myers, an exchange student at SUNY Oswego from Australia, is enrolled this semester in Journalism 309 ("Advanced Newswriting/Reporting"). Myers was also serving as an intern in SUNY Oswego's Office of Public Affairs, and has written a number of "Campus Updates" for the division. In writing the "Campus Updates," Myers has contacted and interviewed several members of the SUNY Oswego community.

For a Journalism 309 course assignment, Myers was required to write a profile of a public figure, and chose to write about SUNY Oswego hockey coach Ed Gosek. While researching the assignment, Myers contacted Cornell University hockey coach Michael Schafer. On October 17, 2012, at 2:26 p.m., Myers emailed Schafer the following:

My name is Alex Myers, I work for the Office of Public Affairs at SUNY Oswego.

I am currently writing a profile on Oswego State Hockey head coach Ed Gosek and was hoping to get a rival coaches view on Mr Gosek.

If you have time would you mind answering the following questions.

1. How do you find Mr Gosek to coach against?
2. Have you had any interactions with Mr Gosek off the ice? If so how did you find him?
3. What is your rivalry like between your school and Oswego State?

Be as forthcoming as you like, what you say about Mr Gosek does not have to be positive.

Myers sent this same email to Canisius College hockey coach Dave Smith and SUNY Cortland club hockey coach Mike Giordano. Smith responded at 3:15 p.m., stating that Canisius did not play SUNY Oswego in hockey but that “As a person Ed is one of the finest human beings on the planet. He is caring, focused and an intelligent hockey man.” Giordano did not respond.

Schafer replied to Myers at 3:36 p.m.:

My interactions with ed gosek have all been off ice as we are div 1. He is one of the best guys in college hockey. Your last line of saying your comments don't need to be positive is offensive.

Myers responded to Schafer at 4:15 p.m., apologizing for any misunderstandings:

I apologise if you were offended by my last line.

I was simply letting you know that this piece I am writing is not a ‘puff’ piece about Mr Gosek.

I appreciate you taking time out of your day to reply to my email.

On the morning of October 18, Myers was summoned to a meeting with Office of Public Affairs Writer/Editor Jeff Rea and asked to explain the emails. Myers reports that he apologized for any impression created that he had been pursuing the assignment and contacting the officials on assignment from the Office of Public Affairs, and explained his error by noting that he was in the habit of contacting interview subjects as a representative of the public affairs office.

That evening, Myers received a letter in which you notified him that he was being placed under interim suspension beginning at 6:00 p.m. on October 19, by which time he would be required to move out of his room in SUNY Oswego's Hart Hall. Under the terms of the interim suspension, according to your letter, Myers was also to be banned from all campus facilities unless he had

received explicit administrative approval to be present on campus. You also informed him that he might be subject to arrest if seen on campus without permission.

Myers was given a Statement of Charges along with your letter, alleging two violations of SUNY Oswego's Code of Student Rights, Responsibilities and Conduct. Myers was charged with "dishonesty," which per SUNY Oswego policy encompasses conduct including "academic dishonesty," "knowingly furnishing false information to the College," and "forgery." He was also charged with "[d]isruptive behavior," which encompasses conduct including "harassment," "intimidation," "threats," "conduct which inhibits the peace or safety of members of the College community," and "retaliation, harassment or coercion." The Statement of Charges clarifies the exact nature of SUNY Oswego's basis for bringing conduct charges by noting, "Specifically: Campus network resources may not be used to defame, harass, intimidate, or threaten another individual or group." The description of the incident in this statement makes particular note of Schafer's reply that he found Myers' line of phrasing "offensive."

On October 25, the Office of Public Affairs terminated Myers' internship. Myers has been granted permission to remain in his room in Hart Hall, and is able to continue attending classes and is granted limited access to campus facilities, but still faces a hearing on both charges on Monday, October 29.

Categorizing Myers' emails as possible defamation, harassment, intimidation, or threats is indefensible. By punishing Myers for protected speech, SUNY Oswego has violated the First Amendment.

That the First Amendment is fully binding on public universities like SUNY Oswego is settled law. See *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities"); *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'"). Additionally, speech may not be punished merely because some or even many may find it to be offensive or disrespectful. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If 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."); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) ("[T]he 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.'"); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

Further, it is abundantly clear that Myers' emails do not cross the threshold for any of the categories of unprotected speech SUNY Oswego has alleged. First, defamation, a narrow

exception to the First Amendment that carries a specific legal definition, requires that the speaker make a knowingly false statement with the intent to injure the reputation of its target. But not only does Myers' email not make *any* false statements about Gosek, it doesn't make any factual statements about Gosek of any kind. Myers' brief email simply encouraged other coaches to speak freely about their interactions with Gosek, regardless of whether their experiences were positive. That Myers' email invited a frank and honest assessment of Gosek in no way brings it into the realm of defamation as defined under the law.

Nor does Myers' email constitute harassment. In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999), the Supreme Court fashioned a definition of student-on-student harassment in the educational setting that should guide SUNY Oswego here. In *Davis*, the Court defined harassment as conduct that is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." By definition, this includes only extreme and usually repetitive behavior—behavior so serious that it would prevent a reasonable person from receiving his or her education. The standard for determining student-employee harassment should be *at least* as stringent as the standard set in *Davis*, given the relative position of power and influence Gosek, an athletic coach, enjoys compared to Myers, a student. Yet Myers' emails clearly come nowhere close to even meeting the *Davis* standard.

Finally, threats and intimidation also have clear legal definitions, by which SUNY Oswego must abide. The Supreme Court has defined "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). Likewise, *Virginia v. Black* states that "[i]ntimidation 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." *Id.* at 360. A simple reading of the Supreme Court's guidance readily dispels any notion that Myers' emails constitute either threats or intimidation.

In light of such clear legal precedent, by which SUNY Oswego is legally bound, it is deeply troubling that the university has decided that it has any basis to investigate Myers' emails on these grounds at all. Myers' emails were not directed at Gosek, did not threaten violence of any kind against him, and did not make any malicious, knowingly false statements about him. Students at SUNY Oswego will be rightly shocked to learn of the low bar the university has set for reporting and punishing student expression as either defamatory, threatening, intimidating, or harassing. Speech at SUNY Oswego will be dramatically chilled, as students will have very real reason to refrain from being too critical of their professors, university administrators, or fellow students for fear that their words may find their way back to the administration. Student journalists at SUNY Oswego will find themselves at particular risk, given that they are frequently in the position of asking uncomfortable questions in the pursuit of uncomfortable truths. Under SUNY Oswego's unconstitutional distortion of clearly established legal precedent, student journalists could easily find themselves investigated and punished for fulfilling their journalistic duties. This result is unacceptable at a public university.

To be clear: SUNY Oswego's allegation that Myers' emails could constitute defamation, threats, intimidation, or harassment is without merit, and all charges stemming from this allegation must be dismissed.

Regardless of the legitimacy of the remaining "dishonesty" charge, the punishment Myers has received in addition to the loss of his position has been vastly disproportionate to the seriousness of any offense committed. Indeed, it is stunning that SUNY Oswego determined that preemptively placing Myers on interim suspension without a hearing, banning him from campus, and forcing him out of his residence hall was at all appropriate in these circumstances. SUNY Oswego's Code of Student Rights, Responsibilities and Conduct notes that interim suspension may be employed only when "the continued presence of the student would constitute a threat to the safety of persons or property on College premises, would pose a threat of disruption to the conduct of College activities or constitute a significant interference with the educational purposes of the College." This is not the case with Myers, as should have been readily apparent to any reasonable administrator. Due process dictates that any punishment levied against Myers for this incident must be consistent with how SUNY Oswego prosecutes such allegations. That SUNY Oswego has given Myers treatment better reserved for those students who pose legitimate, immediate, and serious threats to the community raises serious due process concerns.

To the extent that Myers' punishment has been premised on SUNY Oswego's claim that his emails constituted unprotected speech, FIRE asks that Myers' punishment be reversed immediately, and that SUNY Oswego make clear that its students will never face disciplinary consequences on the basis of such protected expression as Myers' emails. We are prepared to use all resources at FIRE's disposal to bring this matter to a fair and just conclusion. Please spare SUNY Oswego the embarrassing prospect of publicly fighting a losing battle against the Bill of Rights.

We have enclosed a signed FERPA waiver from Alexander Myers, permitting you to freely discuss his case with FIRE. Because of the urgency of this matter, we request a response no later than November 2, 2012.

Sincerely,



Peter Bonilla

Associate Director, Individual Rights Defense Program

Encl.

cc:

James Scharfenberger, Dean of Students

Lisa M. Evaneski, Assistant Dean of Students for Judicial Affairs

Julie Harrison Blissert, Director of Public Affairs