



## 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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October 11, 2007

Chancellor Sean O'Keefe  
Office of the Chancellor  
Louisiana State University  
156 Thomas Boyd Hall  
Baton Rouge, LA 70803

*Sent via U.S. Mail and Facsimile (225-578-5982)*

Dear Chancellor O'Keefe:

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.

FIRE is concerned about the threat to due process posed by Louisiana State University's (LSU's) handling of Code of Student Conduct charges against student Terrance Esfeller. In addition to violating Esfeller's due process rights, LSU has threatened Esfeller with further charges for permitting LSU's school newspaper, *The Daily Reveille*, to access his disciplinary records.

This is our understanding of the facts. Please inform us if you believe we are in error. On or about November 12, 2006, Esfeller's ex-girlfriend, a fellow LSU student, filed a report with the LSU Police charging Esfeller with harassment. On November 22, the LSU Office of Judicial Affairs wrote Esfeller a letter charging him with four violations of the Code of Student Conduct, including "extreme, outrageous or persistent acts, or communications that are intended or reasonably likely to harass, intimidate, harm, or humiliate another" (5.2.B.23).

Following an investigation, Associate Dean of Students and Director of Judicial Affairs Eric Norman informed Esfeller on January 8, 2007, that he had been found guilty of having violated the Code of Student Conduct, section 5.2.B.23. That same day, Esfeller signified his intent to appeal the ruling and asked for his case to be referred to a hearing panel, pursuant to section 7.4 of the Code of Student Conduct.

On or about January 15, *The Daily Reveille* secured permission from Esfeller to access his disciplinary records, but the newspaper's request was denied by Associate Dean Norman. In his letter to Esfeller on January 19, Norman attempted to keep the materials in Esfeller's file out of public view by threatening him with additional charges:

The attempt to make public this information could be interpreted as "an attempt to intimidate, harass, or unduly influence a potential witness, complainant, hearing panel member, or university administrator", which is a violation of the Code of Student Conduct 5.2.B.18. As such, any attempt to make this matter public may result in additional charges.

On March 5, Assistant Director of Judicial Affairs Rosemary Blum notified Esfeller that she was conducting a follow-up investigation, separate from his appeal to the hearing panel. On or about March 27, Blum notified Esfeller that she had found him in violation of the Code of Student Conduct. After Esfeller asked about the specific charges of which he had been found guilty, Blum wrote him on April 9, stating that he was guilty of violating section 5.2.B.23, but not stating that she had found him guilty of the other three charges listed by Norman. She recommended that Esfeller continue to have no further contact with his ex-girlfriend, complete an anger management course, and be placed on warning probation through August 1, 2008.

Esfeller appealed Blum's decision, and on July 27, an appeal hearing was held in Esfeller's absence, even though he had notified LSU that he was unable to secure time off from his summer job to attend the hearing. Esfeller claims that during this hearing, LSU violated his due process rights. According to the transcript of the hearing, E. William Wischusen, the chair of the hearing panel, said, "You can argue the Constitution all day long but you gotta realize this is not a legal proceeding" (p. 3). The hearing panel tried Esfeller in absentia, finding him guilty of all four original charges, not just the one charge listed in Blum's letter. The panel sentenced him to disciplinary probation until he completed an anger management course, after which time he would be on warning probation until graduation.

Esfeller appealed again on August 13 to Vice Chancellor of Student Life and Academic Services F. Neil Mathews. Mathews denied Esfeller's appeal in a letter on September 21, stating, "[I] do not find clear and convincing new evidence justifying referral back to the hearing panel for reconsideration or the establishment of a new hearing panel." Mathews notified him that he was now officially placed on academic probation until completion of the anger management course.

Esfeller appealed to you on September 26, following Code of Student Conduct section 10.4 regarding serious procedural errors and/or the abuse of discretionary authority. Among other things, he argues the following:

- (1) Esfeller told the Office of Judicial Affairs that he was unable to appear on July 27 due to exceptionally compelling circumstances, and Mathews thus did not appropriately rule that a new hearing be scheduled (Code of Student Conduct 7.7).
- (2) Although the Code of Student Conduct permitted the July 27 hearing to occur in absentia, adequate opportunity for Esfeller to be heard was easily available by permitting the participation of Donald Hodge, who held his power of attorney, or by

holding the hearing in the fall of 2007 rather than the summer; thus, failing to so provide violated his right to procedural due process.

- (3) Esfeller suffered unequal treatment. In previous similar matters, according to his appeal, “students were given disciplinary warning for a semester. The punishment of disciplinary probation until completion of an anger management course with the Office of Psychological Services is above and beyond that of previous punishments handed down by this office.”

Esfeller argues that Mathews should not merely have looked for “new evidence,” but also had an obligation to consider these alleged due process violations raised by Esfeller’s appeal.

As a public institution, LSU is bound by the First, Fifth, and Fourteenth Amendments to the Constitution. LSU’s Code of Student Conduct does not and cannot in any way trump the U.S. Constitution or the Bill of Rights.

The university’s attempt to prevent Esfeller from taking his case public lacks any legal justification. While LSU is bound by the Family Educational Rights and Privacy Act (FERPA) not to reveal certain information to certain parties, it has no authority to prevent a party to a disciplinary hearing from revealing details about his participation in that hearing. There is also no basis in law or logic for the university’s decision that permitting *The Daily Reveille* to report on the same information that is available to the hearing panel and appropriate university administrators would unduly influence those officials. Even if there were, it would not matter, because it is still unconstitutional to place a prior restraint on a newspaper, even if the article might be found harassing or intimidating. *New York Times Co. v. United States*, 403 U.S. 713 (1971). Moreover, threatening Esfeller with additional charges in order to prevent him from taking his case public is a violation of Esfeller’s First Amendment right to freedom of speech. See, e.g., *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93 (3d Cir. 1988); *Kemner v. Monsanto Co.*, 112 Ill. 2d 223 (Ill. Sup. Ct. 1986). In fact, the Fifth Circuit, which includes Louisiana, has specified that the analogous standard for such a restriction in a court of law is a very difficult one to meet: the trial court must demonstrate that “there is a ‘substantial likelihood’ . . . that extrajudicial commentary by trial participants will undermine a fair trial,” and even then the order must be “narrowly tailored and the least restrictive means available.” *U.S. v. Brown*, 218 F.3d 415, 428 (5th Cir. 2000). Justice is better served when it is exercised in the public eye.

The Fourteenth Amendment to the U.S. Constitution stipulates that “[n]o state . . . shall deprive any person of life, liberty, or property without due process of law.” In the educational context, the U.S. Supreme Court has determined that due process is necessary before a state educational institution denies a student of his or her interests in liberty or property. *Goss v. Lopez*, 419 U.S. 565 (1975). The Supreme Court in that case determined that suspension or expulsion and accompanying notations in school files constituted a deprivation of liberty and property interests and therefore could not be issued without elementary due process protections such as notice, a hearing, and the right to confront the evidence. *Id.* at 581. The Court also said that “[t]he Due Process Clause . . . forbids arbitrary deprivations of liberty. ‘Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,’ the minimal requirements of the Clause must be satisfied.” *Id.* at 574 (internal citations omitted).

LSU's punishment of Esfeller implicates the interests discussed by the Supreme Court in *Goss*. Accusations of harassment are, if anything, far more serious than the ten-day suspension from high school at issue in *Goss*, and are commensurately more likely to affect "a person's good name, reputation, honor, or integrity." Esfeller's disciplinary probation caused him to lose all of his leadership positions at LSU, including his seat on the Student Senate. The punishment of disciplinary probation that is now on Mr. Esfeller's record constitutes a deprivation of his liberty and property interests at LSU and will damage his chances at future higher education or employment. Thus, any violation of due process in his case should be taken very seriously.

FIRE does not suggest that LSU fail to act when allegations of harassment are made. On the contrary, we call upon LSU to treat serious accusations with the gravity to which they are entitled. The denial of Esfeller's legal rights to due process and freedom of speech, however, is not a legitimate tool for promoting safety and justice on campus. Before taking such measures, LSU has both legal and moral obligations to notify the student on what charges he or she is being investigated or tried, to allow the student to present his or her side of the story, to allow the student to confront the evidence against him or her, to treat similar cases similarly, and to follow the Code of Student Conduct as well as the U.S. Constitution. Only by following such procedure can the students, faculty members, and administrators of LSU be confident that they are not parties to great and repeated acts of injustice.

FIRE requests that you reconsider the charges against Terrence Esfeller in light of the severe lack of constitutionally required due process in his case. At the very least, the hearing panel should be given an opportunity to hear Esfeller's testimony and to change its ruling and punishments. We also ask that LSU acknowledge Esfeller's right to publicly air his side of the story, including his grievances with the university's handling of the case. We further ask that Esfeller's disciplinary probation be reversed and removed from his record pending the outcome of the reconsideration of his case. Finally, we request that LSU respect its obligations to the U.S. Constitution and provide basic procedural fairness.

Because of the serious nature of the rights being denied to Esfeller, FIRE requests a response on these matters by 5 p.m. ET on November 1, 2007.

Sincerely,



Adam Kissel  
Director, Individual Rights Defense Program

cc:

Neil F. Mathews, Vice Chancellor of Student Life and Academic Services, Louisiana State University  
Kathleen White, Dean of Students, Louisiana State University  
Eric Norman, Director of Judicial Affairs, Louisiana State University