



February 15, 2019

Dr. Jo Ann Rooney
Office of the President
Loyola University Chicago
Lewis Towers 15th Floor
820 N. Michigan Avenue
Chicago, Illinois 60611

Sent Electronic Mail (president@luc.edu)

Dear President Rooney:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

PEN America is a nonprofit organization standing at the intersection of literature and human rights to protect open expression in the United States and worldwide.

FIRE and PEN America are concerned for the state of freedom of expression at Loyola University Chicago ("LUC") in light of the university's imposition of a "Media Relations Policy" requiring that faculty and staff only speak to journalists, expressly including the *Loyola Phoenix*, through the administration's marketing officials. This policy restricts both student and faculty members' rights to expression and inquiry, and cannot be reconciled with LUC's public commitment to freedom of expression.

I. Statement of Facts

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, LUC must rescind the Media Relations Policy.

LUC maintains a “Media Relations Policy” intended to “help protect and enhance [LUC’s] brand and reputation.”¹ The policy binds all faculty and staff when they interact with “news media,” which is broadly defined (“newspapers . . . , magazines, newsletters, online publications, . . . radio, television, and podcasts”) and expressly includes LUC’s student newspaper, the *Loyola Phoenix*. The policy directs faculty and staff to “refer” media representatives “to the appropriate [University Marketing & Communications] team member for response,” and requires that if “an event attracts news media interest, press releases and statements . . . will be routed through, approved, and disseminated by” that team member. If “news media representatives,” including the *Phoenix*, are on LUC property, they “must be accompanied by” a designated LUC employee.

On February 13, 2019, the Editorial Board of the *Phoenix* published a staff editorial recounting a *Phoenix* reporter’s attempt to write about “why Loyola typically has a higher percentage of female STEM graduates.”² The underrepresentation of women in Science, Technology, Engineering, and Mathematics (“STEM”) industries and university programs has been a subject of discussion for decades, and still persists.³

After the *Phoenix* reporter emailed LUC professors within the university’s STEM programs, the reporter received a response from LUC Communication Manager Evangeline Politis. Her email reads:⁴

This is the third inquiry on this topic that has been forwarded my way, and I’ve been notified of several others. This is disrespectful and unacceptable. As I indicated in my email this morning (attached), I am the first point of contact for the Phoenix for University-related requests. I can get in touch with administration and faculty to answer your questions. I can work with Brian to answer your numbers questions (please send those along), and let me know of any other gaps in your story that I can facilitate fulfilling.

¹ Loyola University Chicago, *Media Relations Policy*, <https://www.luc.edu/news/policiesandguidelines/mediarelationspolicy> (last visited Feb. 13, 2019) (“Media Relations Policy”).

² Phoenix Editorial Board, *STAFF EDITORIAL: Loyola’s Media Policy is Straight Out of the Trump Playbook*, LOYOLA PHOENIX, Feb. 13, 2019, <http://loyolaphoenix.com/2019/02/staff-editorial-loyolas-media-policy-is-straight-out-of-the-trump-playbook>.

³ Michael Anft, *A Lab of Her Own*, CHRON. OF HIGHER ED., Jan. 22, 2017, <https://www.chronicle.com/article/A-Lab-of-Her-Own/238970>; see also, generally, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, SOLVING THE EQUATION (Christianne Corbett, ed., Mar. 2015), available at <https://www.aauw.org/research/solving-the-equation>.

⁴ Phoenix Editorial Board, *supra* note 2.

The Editorial Board of the *Phoenix* further explained that under the policy, “if we got a response at all,” the response would be an instruction to “attribute” a “robotic statement perfectly crafted by Loyola’s marketing team,” using “often-vague language,” to someone else.⁵ In an interview with NBC Chicago, *Phoenix* Editor-in-Chief Henry Redman explained that the policy had frustrated his staff’s efforts, that they have to “bang our head against the wall to get an inch of information from the school.”⁶ More specifically, Redman said, the university “will ignore our questions” and “flat out not respond to our emails, they’ll pivot away from them constantly.”⁷

The *Phoenix* also published a list of the questions “unanswered by Loyola’s administration” during the 2018–19 school year.⁸ The list of questions is too lengthy to adequately recount in this letter, but runs the gamut of matters of public concern: whether the university’s security officers are engaged in racial profiling in stop-and-frisk detentions, the university’s relationship with an alderman recently indicted on federal extortion charges, and tuition increases.⁹

In a statement to NBC Chicago, LUC said that “[w]e treat Loyola Phoenix reporters like any other journalists” and that the policy helps “efficiently and effectively” tell the “stories of the university[.]”¹⁰

II. Loyola University Chicago’s Media Relations Policy Is Inconsistent with Its Promises of Freedom of Expression and Inquiry

LUC’s Media Relations Policy effectively mandates the presence of an administrative minder. This policy is incompatible with any appreciable respect for the freedoms of inquiry and expression promised by Loyola.¹¹

⁵ *Id.*

⁶ *Loyola Student Newspaper Accuses University of ‘Trump’ Tactics, Dodging Reporters*, NBC CHI., Feb. 13, 2019, <https://www.nbcchicago.com/news/local/loyola-phoenix-newspaper-editorial-505806981.html>.

⁷ *Id.*

⁸ Henry Redman, *Running List of The Phoenix’s Unanswered Questions*, LOYOLA PHOENIX, Feb. 13, 2019, <http://loyolaphoenix.com/2019/02/running-list-of-the-phoenixs-unanswered-questions>.

⁹ *Id.*

¹⁰ NBC CHI., *supra* note 6.

¹¹ It is also likely impermissible under the National Labor Relations Act, 29 U.S.C. §§ 151–169, which bars private institutions from imposing broad restrictions on employees’ abilities to speak to the media. The National Labor Relations Board has, for example, repeatedly ruled as unlawful media policies, including those which barred any employee except for “authorized company spokespersons” to speak to the media (*Phillips 66*, 2014 NLRB LEXIS 921 (N.L.R.B. Nov. 25, 2014) and limitations on employees from “releasing statements to the media without prior permission” (*Trump Marina Assoc., LLC v. NLRB*, No. 10-1261 (D.C. Cir. May 27, 2011)). For more on the application of the NLRA to media restrictions, see BRECHNER CENTER FOR FREEDOM OF INFORMATION, EMPLOYEES’ RIGHT TO SPEAK TO THE MEDIA: CHALLENGING WORKPLACE GAG POLICIES (Jan. 2019), *available at* <http://brechner.org/wp-content/uploads/2019/01/NLRB-Brechner-gag-order-white-paper.pdf>.

A. *Loyola University Chicago Promises Freedom of Expression and Inquiry*

As a private institution, LUC is not obligated by the First Amendment to extend freedom of expression to its students. Nevertheless, Loyola admirably commits itself to protecting and advancing its students' freedom of expression. Indeed, Loyola's "Brand Position" pledges that the university "values freedom of inquiry" and "the pursuit of truth."¹²

For example, LUC's student handbook provides that the university "recognizes the importance of its role as a marketplace of ideas, where freedom of inquiry and open exchange of conflicting viewpoints is supported and encouraged."¹³ Students therefore have the individual and collective "right to freedom of speech," which is "subject only to rules necessary to preserve the equal rights of others and the other functions of the University."¹⁴ Faculty members are also extended rights of academic freedom, which LUC says "guarantees" them "the right . . . to speak" and to be "free from institutional censorship or discipline in the exercise of" this freedom.¹⁵

LUC's commitment to freedom of expression is also critical to its status as an accredited institution of higher learning. The university is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools, whose standards require that accredited institutions be "committed to freedom of expression and the pursuit of truth in teaching and learning."¹⁶

B. *The Policy Imperils Students' Rights to Inquiry and Faculty Rights to Expression*

Having made these commitments to freedom of expression, LUC is morally, if not legally, bound to uphold them. *See, e.g., McAdams v. Marquette Univ.*, 2018 WI 88, ¶84 (2018) (private Catholic university breached its contract with a professor over a blog post because, by virtue of its adoption of the 1940 AAUP Statement of Principles on Academic Freedom, the blog post was "a contractually-disqualified basis for discipline."). In imposing a system of prior restraints and institutional censorship on its faculty, LUC betrays this commitment in service of its "brand and reputation."

¹² Loyola University Chicago, *Our Brand Position*,

<https://www.luc.edu/umc/brandstandards/identityandphilosophy/ourbrandposition> (last visited Feb. 13, 2019).

¹³ LOYOLA UNIV. CHI., 2018-2019 COMMUNITY STANDARDS §603, *available at*

<https://www.luc.edu/media/lucedu/osccr/pdfs/LUC%20COMMUNITY%20STANDARDS%202018-2019.pdf>.

¹⁴ *Id.*

¹⁵ LOYOLA UNIV. CHI., FACULTY HANDBOOK 34 (rev. Feb. 27, 2015), *available at*

<https://www.luc.edu/media/lucedu/academicaffairs/pdfs/Faculty%20Handbook-%20Loyola%20University%20Chicago%20-%202015.pdf>.

¹⁶ HIGHER LEARNING COMM'N, CRITERIA FOR ACCREDITATION (rev. June 2014), *available at*

<https://www.hlcommission.org/Policies/criteria-and-core-components.html>.

i. The policy inappropriately limits faculty members' freedom of expression

While, again, the university is not bound to respect freedom of expression by virtue of the First Amendment, the interpretation of the amendment's guarantee of freedom of expression provides a useful baseline for identifying what LUC means when it voluntarily promises to respect freedom of expression.

Under the First Amendment, an employment relationship does not obliterate the First Amendment rights of employees, and government employers may not broadly restrict their employees' rights to speak on matters of public concern in their capacity as private citizens. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). The Court made clear in *Pickering* that, in order for the employer to regulate the employee's speech, the negative impact of the employee's expression must be substantial and material: If the speech of the employee—in *Pickering*, a public school teacher—“neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally,” then “the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public,” and the employee's speech is protected by a right to freedom of expression. *Id.* at 568, 573.

Expressive rights are even broader when the relevant employee is a member of the faculty. Because faculty members are employed for the very purpose of speaking, and because of the critical importance of academic freedom, faculty members enjoy broad rights to speak on matters of public concern, even when they do so as a member of the faculty. In *Garcetti v. Ceballos*, for example, the United States Supreme Court expressly reserved the question of whether limits on employee speech would extend to expression “related to academic scholarship or classroom instruction” voiced by faculty at colleges and universities, as such speech may “implicate[] additional constitutional interests . . . not fully accounted for by this Court's customary employee-speech jurisprudence.” 547 U.S. 410, 425 (2006). Lower courts have recognized *Garcetti's* reservation with respect to faculty speech.¹⁷ Instead, “academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*[.]” *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014).

¹⁷ See *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) (“We hold that *Garcetti* does not apply to ‘speech related to scholarship or teaching’”); *Adams v. Trs. of the Univ. of N. Carolina Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) (“Applying *Garcetti* to the academic work of a public university faculty member . . . could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment.”). *But cf. Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (applying *Garcetti* to a professor's complaints regarding proposed use of grant money, because grant administration fell within his teaching and service duties).

Thus, when faculty members address matters of public concern, their speech falls within a guaranteed right to freedom of expression. This is true even if the matter of public concern relates to their employment. For example, in *Pickering*, the speaker was a teacher whose “erroneous” public criticism of his employer remained protected by the First Amendment. 391 U.S. at 573–74.

In sum, LUC may not penalize or restrict faculty members for speaking as private citizens on matters of public concern or for speaking pursuant to their official duties when such speech is related to academic instruction or scholarship. Because LUC is bound by the promises it has made, the rights of its staff and faculty members to speak to the public, including student journalists, may not be ignored.

ii. The policy imposes a prior restraint on speech

LUC’s requirement that all statements to a student journalist be approved by a member of the administrative staff is a prior restraint on speech. Prior restraints are “the most serious and the least tolerable infringement on” freedom of expression. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). The risk prior restraints present to freedom of expression is so great that the “chief purpose” in adopting the First Amendment was to prevent their use. *Near v. Minnesota*, 283 U.S. 697, 713 (1931). They are valid only in the most demanding of circumstances.

The university’s interest in its brand is not such a circumstance. Its imposition of a prior restraint, in which university staff may edit or disapprove of communications altogether, cannot be squared with any semblance of a commitment to freedom of expression.

iii. The policy chills student journalists’ freedom of inquiry

Faculty and student rights to inquiry and expression are inextricably intertwined. The right to expression presupposes a corollary right to receive information. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“well established” that the First Amendment’s protection of freedom of speech “protects the right to receive information and ideas.”). In other words, even if LUC did not expressly recognize students’ rights to freedom of inquiry, those rights would naturally follow from the freedom of expression of faculty members, which LUC purports to protect.

Additionally, the policy would, if applied as it is written, yield absurd results. The policy mandates that journalists “must be accompanied by a [LUC] staff member” whenever they are on campus, and defines journalists to include members of the *Phoenix*. By its terms, the policy would require student journalists to be accompanied by university employees at all times.

Similarly, the policy would imperil faculty members who speak to students who happen to be working with the *Phoenix*. If a student asks a question of a faculty member about the underrepresentation of women in STEM fields, a faculty member could answer. But if that student is also a student journalist, the faculty member would have to receive permission from a public relations official in order to discuss the matter, even if there is no reasonable

possibility that the faculty member's answer will be seen as a statement on behalf of the institution itself.

Further complicating any even-handed application of this policy is that status as a "student journalist" is not an immutable characteristic. As with any other student activity, some students will participate for a limited period of time, stopping for any number of reasons. A journalist, after all, is merely an ordinary student who chooses to exercise their contractual rights of free expression and inquiry. Any student could make that choice at any moment.

If a student is considering writing an Op-Ed or starting a podcast, but is not certain she will do so, does the scarlet letter of "student journalist" attach from the moment the *potential* exists or from the moment she decides she's going to publish? And once a member of the media, is a student a student journalist in class, or only when sitting in a newsroom?

These questions are no more absurd than the policy that begs them. LUC has created a policy that purports to regulate a shifting audience for an overbroad period of time to achieve an illegitimate goal. The result, unsurprisingly, is absurd.

LUC may, as a matter of course, require that statements on behalf of the institution itself be made only through appropriate channels. So, too, may the university offer to field requests from journalists on behalf of willing faculty members, or to serve as a resource for journalists in search of a faculty member who might serve as a valuable source. But it cannot, consistent with a commitment to freedom of expression, subject faculty members' interactions with student journalists to prior restraint.

III. Conclusion

Institutions that promise freedom of expression and inquiry cannot exempt themselves from critical inquiry and dissenting expression. If the university's very "brand" is freedom of inquiry, it is the restriction of student journalists' rights—ostensibly in furtherance of protecting the university's "brand and reputation"—that risks damage to the university's brand.

The statement LUC provided to NBC reveals, on its face, why this policy cannot be reconciled with the promises of free expression and inquiry to which LUC has bound itself. While centralized oversight of every word said on campus may assist in telling "the stories of the university,"¹⁸ the university is not the only entity with a right to tell its story. The stories of its students and faculty can, and will, diverge, and are morally and contractually entitled to expression.

¹⁸ See *supra* n. 6.

For the foregoing reasons, we call on LUC to rescind the media policy and to affirm to the student media on its campus that they are free to inquire and publish without continued interference. We request a response by March 1, 2019.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program



Jonathan Friedman
Project Director, Campus Free Speech
PEN America

Cc:

Jeremy Langford, Vice President, Marketing and Communication