



September 25, 2019

President Kimberly R. Cline
Office of the President
Long Island University
720 Northern Boulevard
Brookville, New York 11548

Sent via U.S. Mail and Electronic Mail (PresidentCline@liu.edu)

Dear President Cline:

As you know, 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.

FIRE remains concerned about the state of freedom of expression at Long Island University Post (LIU Post) in light of a conduct letter issued to then-student Jake Gutowitz regarding his alleged possession and distribution of flyers critical of LIU Post's administration. Summoning a student on the eve of his graduation to answer allegations regarding the mere possession of flyers dramatically contravenes LIU Post's stated commitment to freedom of expression.

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. Please find enclosed an executed waiver authorizing you to share information with FIRE. However, if the facts here are substantially accurate, LIU Post's investigation of Gutowitz is flatly inconsistent with its commitment to freedom of expression.

I. LIU Post Investigates Jake Gutowitz for Alleged Involvement in "Common Sense" Flyers Criticizing University Administrators

The "Common Sense" flyers at issue here included anonymous essays, poems, and images posted on LIU Post's campus criticizing LIU Post administrators for such grievances as the presence of mold in campus buildings, bloated administrative salaries, restrictions on freedom of expression, and illness caused by campus food. The flyers contained taglines such

as “Truth,” “Ethics,” “Accountability,” and “Morals.” LIU Post’s official response to the flyers has been to call them “sexist trash” that “speaks to a disturbed individual.”¹

On May 7, 2019, three days before he was to graduate, Gutowitz received a conduct letter from Nicole Thomas, Associate Director of LIU Promise, advising Gutowitz that he was under investigation for violating the LIU Post Code of Conduct and LIU Post Ethos Statement. The investigation concerned an incident alleged to have occurred on December 10, 2018, some five months earlier. According to the letter, the LIU Department of Public Safety received an anonymous report “from a student known to Public Safety” that Gutowitz was in possession of and distributing “Common Sense” flyers on campus. The letter also indicated that these allegations, if true, were inconsistent with the LIU Ethos Statement requiring “respect for authority” and may amount to a violation of the university’s prohibition on Solicitation/Commercial Activities, which includes a prohibition on the “distribution and/or posting of unauthorized handbills or other materials.”²

Thomas advised Gutowitz that he had two business days to schedule a hearing regarding the allegation. Gutowitz attended a hearing with Thomas and Jean Anne Smith, Assistant Dean of Students, on May 8, 2019, where he denied that he ever possessed or posted the “Common Sense” flyers. At the close of the hearing, Thomas indicated she would email Gutowitz a decision letter with regard to his responsibility for the alleged violations by the end of the day, or before the semester ended that week. Gutowitz did not receive a decision letter within that time frame and still has not.

During his time at LIU Post, Gutowitz was an active student and member of the Student Government whom Smith described as “very vocal” about his views concerning the LIU Post administration during their meeting on May 8, 2019.

II. LIU Post’s Investigation of Gutowitz and the “Common Sense” Flyers Is Inconsistent with the University’s Commitment to Freedom of Expression

We recognize that LIU Post, as a private institution, is not bound by the First Amendment to uphold students’ freedom of expression. However, the university has made repeated and express commitments that its students enjoy freedom of expression. LIU Post’s investigation into Gutowitz is not consistent with those commitments.

A. LIU Post is morally and contractually bound to uphold the commitments it makes to support its students’ freedom of expression.

While LIU Post is a private university and thus not legally bound by the First Amendment, it is both morally and contractually bound to honor the promises it has made to its students. For

¹ Greg Toppo, ‘Common Sense’ or ‘Sexist Trash’?, INSIDE HIGHER ED, Nov. 19, 2018, <https://www.insidehighered.com/news/2018/11/19/anonymous-pamphlets-channel-complaints-liu>.

² *LIU Post Student Handbook*, LONG ISLAND UNIV. POST, <http://liu.edu/post/studenthandbook> (last visited Sept. 11, 2019).

example, the Planned Assembly, Demonstration and/or Picketing Policy found in LIU Post's student handbook states, in part, that "LIU supports the rights of individuals, clubs and organizations, who are members of the LIU community, to free speech and peaceful assembly."³ Similarly, the student handbook states that "intellectual inquiry and critical thought" and "artistic and creative expression" are among the university's "core values."⁴ The university's policy on political activities also pronounces that the "primary purpose of the University is to create and share knowledge," and LIU pledges that it "will support and protect the freedoms of speech, expression, petition, peaceable assembly and association" to advance that mission.⁵

Students reasonably rely on these commitments when they enroll at LIU Post, and the university has a contractual obligation to uphold these commitments. Private colleges are legally bound to uphold promises concerning freedom of expression and inquiry. For example, a New York court recently ruled against a private university that refused to recognize a chapter of Students for Justice in Palestine, which the administration feared would be "polarizing." *Awad v. Fordham Univ.*, 2019 NY Slip Op 32353(U), ¶ 16 (Sup. Ct.). The court held that the possibility that advocacy "might be controversial or unpopular with a segment of the university community" is not a valid basis to restrict student expression, as such a restriction is inconsistent with the university's mission statement guaranteeing freedom of inquiry. *Id.* Importantly, the court explained that "consideration of whether a group's message may be polarizing is contrary to the notion that universities should be centers of discussion of contested issues." *Id.* The "Common Sense" flyers are clearly unpopular with the LIU Post administration, but to punish or chill such expression is likewise inconsistent with the university's policy supporting "critical thought."⁶

LIU Post's commitment to freedom of expression is also a condition of the university's accreditation. LIU Post is accredited by the Middle States Commission on Higher Education, which requires that each institution, as a precondition for accreditation, "possess[] and demonstrate . . . a commitment to academic freedom, intellectual freedom, [and] freedom of expression."⁷ This is a laudable commitment to defend, rather than abrogate, the freedom of expression of members of the student body or faculty.

B. The "Common Sense" flyers are protected expression.

Although the "Common Sense" flyers may be offensive to LIU administrators, they are protected political expression and fall well within any reasonable understanding of freedom of

³ *Id.*

⁴ *Id.*

⁵ LONG ISLAND UNIV., POLITICAL ACTIVITIES, <https://www.liu.edu/About-LIU/University-Policies/Political-Activities> (last visited Sept. 16, 2019).

⁶ *Handbook*, *supra* note 2.

⁷ MIDDLE STATES COMM'N ON HIGHER EDUC., STANDARDS FOR ACCREDITATION AND REQUIREMENTS OF AFFILIATION 5 (13th ed. 2015), available at http://www.msche.org/wp-content/uploads/2018/06/RevisedStandards_FINAL.pdf.

expression. “One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.” *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944). While, again, LIU is not bound by the First Amendment, courts’ interpretations of the First Amendment’s guarantee of “freedom of speech” provide a useful measure of what students can reasonably expect when an institution promises freedom of expression.

i. Even if some find the “Common Sense” flyers offensive, subjectively offensive speech is protected.

The principle of freedom of speech does not exist to protect only non-controversial expression. Rather, it exists precisely to protect speech that some or even most members of a community may find controversial or offensive.

The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends others, on or off campus. *See, e.g., 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. Bd. of Curators of the Univ. of Mo.*, 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.’”) The freedom to offend some listeners is the same freedom to move or excite others. As the Supreme Court observed in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), speech “may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.” The Court reiterated this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”

In *Cohen v. California*, the Court aptly observed that although “the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance,” that people will encounter offensive expression is “in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve.” 403 U.S. 15, 24–25 (1971). “That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength,” because “governmental officials cannot make principled distinctions” about what speech is sufficiently inoffensive, and the “state has no right to cleanse public debate to the point where it is . . . palatable to the most squeamish among us.” *Id.* at 25.

ii. Expressive rights encompass the right to lampoon, satirize, and impugn the integrity of prominent leaders and officials.

In the absence of the principle that expression may not be restricted on the basis that it is offensive, authorities would have unfettered discretion to penalize speech. This is of particular importance here, where the protected expression is critical of those granted the power to determine whether such expression is permissible.

The Supreme Court of the United States has for decades held that freedom of expression protects even the most caustic, outlandishly offensive parody. For example, in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Court ruled that the First Amendment protected a mock advertisement purporting to interview Reverend Jerry Falwell, in which he described losing his virginity to his mother in an outhouse. The likening of a university president to a monarchical figure is certainly no more caustic or outlandish than the advertisement at issue in *Falwell*. A commitment to freedom of expression, which LIU Post has made repeatedly, is a recognition that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The “Common Sense” flyers express the opinions of individuals concerning how the university operates. LIU Post cannot punish or chill such expression on the basis that it is subjectively offensive to administrators. To do so eliminates an opportunity for open debate on campus issues and allows the LIU Post administration to “cleanse [the] public debate”⁸ on its own performance. Students, whether or not they choose to do so anonymously, should be free to engage in public discussion, debate and criticism of those in power.

C. LIU Post’s investigation into Gutowitz was an impermissible departure from the university’s obligations, casting a chilling effect on protected expression.

Although Gutowitz was not the author of the “Common Sense” flyers, his expressive rights are implicated and infringed where he faces an investigation for protected speech, even if it was not *his* speech.⁹ By requesting Gutowitz’s presence at a conduct meeting to discuss his alleged connection to these flyers, LIU Post chills student and faculty speech critical of the administration.

Even where an investigation finally terminates in favor of the speaker—that is, where the speaker is ultimately not punished—expressive rights may be violated by the initiation of the investigation itself. Because the “Common Sense” flyers are protected expression, LIU Post’s

⁸ *Cohen*, 403 U.S. at 25.

⁹ Official “inquiry alone trenches upon” freedom of expression. *Paton v. La Prade*, 469 F. Supp. 773, 778 (D.N.J. 1978) (student’s speech impermissibly chilled when anonymous request for information from a political organization resulted in being labeled a “subversive” and formally investigated). Courts have recognized the tradition of anonymous pamphleteering in the United States as essential to the development of our democracy. See *Talley v. California*, 362 U.S. 60, 64 (1960); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (1995).

initiation of an investigation brings the university into conflict with core principles of freedom of expression. When “an official’s act would chill or silence a person of ordinary firmness from future” expression, that act violates the right to protected speech. *Mendocino Environmental Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999). In *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957), the Supreme Court noted that government investigations “are capable of encroaching upon the constitutional liberties of individuals” and have an “inhibiting effect in the flow of democratic expression.”

Several appellate courts have held that investigations into protected expression have impermissible chilling effects on freedom of speech. *See, e.g., White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (holding that an investigation into clearly protected expression chilled speech); *Levin v. Harleston*, 966 F.2d 85, 89–90 (2d Cir. 1992) (a university president’s creation of a committee to investigate protected speech by a professor unconstitutionally chilled protected expression because it implied the possibility of disciplinary action).

LIU’s decision to investigate Gutowitz’s alleged involvement in the possession or dissemination of the “Common Sense” flyers during finals week, three days prior to graduation, sends a message to all students that if their expression offends others—administrators in particular—it could subject them to an official investigation and potential punishment. As a result, students may refrain from speaking rather than risk investigation or discipline—the very definition of the impermissible chilling effect on protected speech. While LIU Post ultimately did not finalize sanctions against Gutowitz, it is troubling that the university proceeded with the investigation after he indicated to Thomas and Smith that he was concerned about the effect this investigation would have on his ability to graduate. If there is a purpose in an investigation in this context that does not reflect an intent to retaliate against protected speech, we cannot conceive of it from our vantage point.

Moreover, the fact that an individual is merely in possession of “forbidden” flyers—which in any event Gutowitz denies—cannot serve as a basis for investigation. If it is an offense to, on a college campus, possess flyers without authorization, there is serious reason to doubt that institution’s commitment to freedom of inquiry and expression. It is all the more inappropriate to initiate such an investigation five months after the alleged incident, on the eve of a student’s graduation.

III. LIU Post Must Uphold Its Promises to Its Students and Refrain from Investigating Protected Expression Moving Forward

If it is LIU Post’s practice to question students over protected expression—which appears to be the case, as this is the second time in recent memory that a LIU Post student has reached out to FIRE with respect to such an investigation—it is a practice that the university must abandon.

We request receipt of a response to this letter no later than the close of business on October 9, 2019.

Sincerely,

Handwritten signature of Katlyn A. Patton in black ink.

Katlyn A. Patton

Program Officer, Individual Rights Defense Program and Public Records

Cc:

Nicole Thomas, Associate Director of LIU Promise

Jean Anne Smith, Assistant Dean of Students

Sandra Richard, Executive Assistant to the President

Encl.

Authorization and Waiver for Release of Personal Information

I, Jake Gutowitz, born on 02/17/1997, do hereby authorize Long Island University (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.



09/23/2019

2019 Sep 23 06:08
Signature

Date