



December 17, 2021

Dr. Robert A. Brown  
Boston University  
Office of the President  
One Silber Way, Eighth Floor  
Boston, Massachusetts 02215

*Sent via U.S. Mail and Electronic Mail (president@bu.edu)*

Dear President Brown:

FIRE<sup>1</sup> writes to you again today out of continued concern for the state of freedom of expression and freedom of conscience at Boston University (BU). Our concerns are renewed by the university's mandatory training module for faculty on preventing harassment and discrimination. Although BU may require faculty to participate in trainings that inform them of university policies and positions on harassment, discrimination, and related issues, BU's module contravenes its promises of free expression by compelling participants to express agreement with the university's views on questions of social and political concern.

FIRE calls on BU to make the module or its questions optional, or offer a revised or alternative module that respects faculty members' freedom of conscience and does not require them to personally affirm viewpoints that may conflict with their own beliefs.

**I. BU's Training Module Requires Participants to Select Specific Responses to Opinion-Based Questions**

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.

BU requires its faculty to complete the "Preventing Harassment & Discrimination" training module provided by the education vendor EVERFI.<sup>2</sup> The training's learning objectives include

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<sup>1</sup> As you may recall from our previous correspondence, 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.

<sup>2</sup> *University-wide Sexual Misconduct Prevention Training for Faculty and Staff*, BU, <https://www.bu.edu/compliance/training-sexual-misconduct-and-title-ix> (last visited Dec. 9, 2021). BU presents the training as covering the topic of sexual misconduct prevention, though a substantial part of the training is unrelated to that topic.

“[h]ow to use the appropriate actions to prevent or stop harassment with practical tips on creating a culture that promotes respect and professionalism with bystander intervention strategies and active allyship at the core.”<sup>3</sup>

The training requires participants to answer various questions that present a hypothetical situation and then ask what the participant or others “should” do or say in the situation. Participants are not permitted to continue to the next question or section until they select the answer designated by BU.

For example, one question presents the following scenario:<sup>4</sup>

Greg and Weinan are talking in the break room where many people are eating. Greg begins speaking loudly in a stereotypical Chinese accent, and Weinan is smiling. Nobody is saying anything or even seems to notice—they all just keep doing what they’re doing.

The module then asks the user what they “should” do and presents the following two options:

Take a cue from Weinan and the people around you. They must know something you don’t, and that’s why they aren’t intervening . . . maybe it’s an inside joke you haven’t heard yet.

Say something. Mocking an accent is offensive. It might be hurtful to other people within earshot, or even Weinan.

If the participant chooses the first answer, a message with the heading “Not Quite” appears and says: “If you’re uncomfortable, the chances are that others are too. Mocking an accent is offensive, and intervening is the right thing to do.” The participant can move on only after selecting the BU-designated answer that begins, “Say something.”

Another question presents the following scenario:

You overhear Adea talking to Lucy, who has recently announced she’s pregnant. Adea knows that Lucy is married to a woman, Zaine. “Wait . . .” Adea says. “So how did you get pregnant then? Was it like a friend or a donor or something? Do you do IVF?”

The participant is again asked “What should you do?” and given the following options:

Wait for Lucy to respond. You were kind of wondering, too!

Intervene. Those questions are a little invasive!

If the participant selects “Wait for Lucy to respond,” a message appears with the heading “Not Quite” and the following text: “It’s inappropriate for Adea to ask a colleague invasive medical

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<sup>3</sup> *Preventing Harassment & Discrimination For Non-Supervisors With Clery/Title IX Module*, EVERFI, <https://resources.everfi.com/courses/phd-nonsupervisors-titleix> (last visited Dec. 9, 2021).

<sup>4</sup> Screenshots of “Preventing Harassment & Discrimination” training module (on file with author).

questions. Try again.” The participant can only continue with the module after selecting the “Intervene” option.

Another question asks the participant, “How often do you think people make false accusations?” The options are “Always,” “Sometimes,” and “Rarely.” The participant can continue with the training only after selecting “Rarely.”

These questions are representative of various questions in the training about subjective beliefs or opinions that require participants to choose a specific response.

## **II. BU’s Free Speech Promises Preclude the University from Requiring Faculty to Express Specific Views**

By requiring faculty members to express certain views while taking the “Preventing Harassment & Discrimination” training, BU violates faculty members’ expressive rights. BU is free to convey information to faculty concerning these issues and to identify which responses BU believes to be the correct response. However, the current system’s requirement that faculty answers match the university’s institutional values or beliefs is a form of compelled speech inconsistent with BU’s commitments to freedom of expression.

### **A. *BU Promises Free Speech and Academic Freedom to its Faculty***

BU makes strong commitments to freedom of expression and academic freedom. In October 2020, BU’s Board of Trustees ratified the institution’s “Statement on Free Speech and Expression.” That statement opens:<sup>5</sup>

Freedom of speech and expression are central to the mission of Boston University. The University has a responsibility to allow and safeguard the airing of the full spectrum of opinions on its campuses and to create an environment where ideas can be freely expressed and challenged. Boston University is committed to the academic freedom of its faculty as articulated in the Faculty Handbook and to preparing students to engage thoughtfully, openly, and effectively in disagreement and debate.

Notably, the statement expressly provides that freedom of expression is “essential to, and compatible with, the principles articulated in Boston University’s Statement on Diversity,” correctly rejecting the notion that free speech and diversity are inherently incompatible ideals.

BU’s faculty handbook states:<sup>6</sup>

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<sup>5</sup> *Statement on Free Speech and Expression*, BU, <https://www.bu.edu/freespeechcommittees/statement> (last visited Dec. 10, 2021).

<sup>6</sup> *Faculty Handbook, Academic Freedom*, BU, <https://www.bu.edu/handbook/ethics/academic-freedom> (last visited Dec. 10, 2021).

Academic freedom is essential in institutions of higher education if they are to make their proper contribution to the common good. The common good depends upon the free search for truth and its free exposition.

These firm commitments to uphold faculty members' expressive rights are morally and legally binding on BU.<sup>7</sup>

### ***B. BU's Training Violates Faculty Members' Rights by Compelling Speech***

Freedom of speech is not limited to the right to speak—it necessarily extends to the right *not* to speak. The United States Supreme Court illuminated this principle in *West Virginia State Board of Education v. Barnette*,<sup>8</sup> ruling against compelled speech and for the protection of freedom of conscience. In *Barnette*, the West Virginia legislature enacted a statute requiring a daily flag salute in public and private schools. Several students—members of the Jehovah's Witnesses denomination—objected because they believed pledging allegiance to the flag was an act of idolatry, which their religious beliefs forbade.<sup>9</sup>

In its decision, the Court did not object to the *teaching* of patriotism and national traditions, but rather to a rule that would compel a student “to declare a belief [and] . . . to utter what is not in his mind.”<sup>10</sup> The Court held that compelled speech “would strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>11</sup> Writing for the majority, Justice Robert H. Jackson explained: “[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”<sup>12</sup>

BU's training module is not limited to providing information about official BU policies, relevant law, or other material regarding harassment or discrimination. Nor do the questions merely test participants' knowledge of BU's policies and positions. Rather, many of the questions direct participants to state what *they* “think” or believe an individual “*should*” do in a specific scenario, while limiting participants to only one permitted response. These questions require faculty members to agree with BU not only that certain examples of speech are offensive or wrong, but that they should respond to such speech in a specific way if they encounter it. The permitted answers to these questions are based not on any sort of legal obligation, but rather on BU's subjective beliefs or ethical judgments. That is, they involve matters of personal opinion and values, as opposed to objective facts. While the university

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<sup>7</sup> See *Tuttle v. Brandeis Univ.*, No. 98-4557-F, 2002 WL 202470, at \*9 (Mass. Super. Feb. 4, 2002), *aff'd as amended*, 60 Mass. App. Ct. 1119 (2004) (stating that a faculty handbook “can be binding on an employer and effectively become terms of an employment contract”).

<sup>8</sup> 319 U.S. 624 (1943). Although the First Amendment is not binding on private universities, longstanding judicial interpretations of the First Amendment's guarantee of freedom of speech provide a useful baseline for what students and faculty would reasonably expect from an institution—like BU—that makes promises of free expression.

<sup>9</sup> *Id.* at 625–29.

<sup>10</sup> *Id.* at 631, 634.

<sup>11</sup> *Id.* at 637.

<sup>12</sup> *Id.* at 642.

may encourage faculty to share the university's values, requiring that they affirm the university's values as part of their employment casts an unacceptable "pall of orthodoxy" over the campus.<sup>13</sup>

As in *Barnette*, there would be no burden on freedom of speech or freedom of conscience if BU's administration simply shared its own views on these matters. Some faculty members may not agree with some of the views or vignettes presented by the university's trainings, but freedom of expression does not shield them from views of which they disapprove. The university's commitment to freedom of expression does, however, represent an institutional abdication of any authority to require that students or faculty personally affirm the "correct" view, as reflected by the *Barnette* Court's objection to the requirement that students salute the flag and affirm their patriotism.

### ***C. The Training's Defects Are Easily Remedied***

This intrusion into faculty members' freedom of conscience is easily remedied: BU can allow faculty to opt out of the training module or opt out of these opinion-based questions. Alternatively, the training could be modified to remove those questions or allow participants to continue after selecting a response other than the university's preferred response.

As currently formulated, many of the questions, including those highlighted above, effectively compel some to agree with statements to which they object, violating the right to free expression under BU policy. That is, the training module requires faculty members "to speak when they otherwise would have refrained."<sup>14</sup>

### **III. BU Must Revise Its Training Module**

FIRE calls on BU to protect the freedom of conscience of its faculty by: (1) making the training—or the opinion-based questions it presents—optional; or (2) replacing the training with a new or revised version that allows participants to dissent from BU's preferred responses.

We request receipt of a response to this letter no later than the close of business on January 7, 2021.

Sincerely,



Aaron Terr  
Program Officer, Individual Rights Defense Program and Public Records

<sup>13</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>14</sup> *Wash. Post v. McManus*, 944 F.3d 506, 514 (4th Cir. 2019).