

FIRE

Foundation for Individual
Rights and Expression

October 10, 2023

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c/o Nancy Gessner
Office of the President
Long Island University
720 Northern Boulevard
Brookville, New York 11548

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

Dear President Cline:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by Long Island University's punishment of the American Club, one of LIU's registered student organizations, for social media posts critical of transgender women. While the posts may have offended some who viewed them, they are squarely protected by LIU's free expression policies and cannot be construed as actionable harassment. LIU must therefore rescind all sanctions against the American Club and reevaluate how the university handles similar situations involving clearly protected expression.

I. LIU Suspends the American Club for Instagram Posts Critical of Transgender Women

For the most recent International Women's Day (March 8, 2023), "LIU Freedom Fighters," a collective of students ideologically opposed to the American Club, made an Instagram post "to honor all transgender women & femmes[.]"² In response, the American Club made its own Instagram posts, one of which read "On International Women's Day, the 'LIU Freedom

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² LIU Freedom Fighters ([liufreedomfighters](https://www.instagram.com/liufreedomfighters/)), INSTAGRAM (Mar. 8, 2023), <https://www.instagram.com/p/CpjMAFfuDRV/>. The factual recitation here reflects our understanding of the pertinent information. We appreciate that you may have additional information to offer and invite you to share it with us.

Fighters’ Honors Men,” while another used a photo of a woman with a confused look on her face, captioned “when men pretending to be women celebrate International Women’s Day.”³

On March 12, the LIU Freedom Fighters posted an open letter accusing the American Club’s posts of violating LIU’s Ethos Statement, which provides that the university’s Student Code of Conduct “is founded on the principles of . . . respect for others.”⁴ The LIU Freedom Fighters also claimed the posts crossed an asserted “line that separates opinion from hate speech” and called on LIU to discipline the American Club.⁵ Within a day, LIU notified the American Club it was under investigation for its Instagram posts that allegedly violated the Student Code of Conduct and that LIU had placed the organization on interim suspension pending the investigation’s outcome.⁶

Months later, on July 6, LIU informed the American Club that the university had found the organization responsible for violating the following principles and policies:⁷

Respect for Others

Students are expected to demonstrate actions that reflect consideration and civility by complying with the principal [*sic*] of respect for others. Examples of conduct inconsistent with this principal [*sic*] and which require action are:

F. Verbal or Physical Harassment

1. Inappropriate physical, verbal or written actions against members of the university community . . . which *interfere with an individual’s personal freedom or privacy, including but not limited to actions of an offensive nature which target a particular individual or group’s national origin or gender identity (“hate crimes”)[.]*

5. Violation of the University Internet and Social Media Policy

...

Students shall not use the internet or social networks for transmission of . . . inappropriate and/or offensive material of any nature including, but not limited to

³ William Biagini, *Long Island University suspends American Club for declaring men are not women*, CAMPUS REFORM, Mar. 27, 2023, 5:07 PM, <https://campusreform.org/article?id=21587>.

⁴ LIU Freedom Fighters (liufreeomfighters), INSTAGRAM (Mar. 12, 2023), https://www.instagram.com/p/CptcdofOPpU/?img_index=1.

⁵ *Id.*

⁶ Notice of Investigation and Suspension from Samiah Bhutta, Senior Associate Director of Student Affairs, and Brendan Caputo, Director of LIU Promise, to Matthew Cairo, American Club President (Mar. 13, 2023) (on file with author).

⁷ Decision Letter from Bhutta and Caputo to Cairo (July 6, 2023) (on file with author).

depictions involving sexual, racial, religious or ethnic stereotypes.

As a result, LIU transitioned the American Club to a deferred suspension extending through May 31, 2024, required it to send all its executive officers and half of its membership to an LGBTQIA+ training session, and ordered it to submit a diversity, equity, and inclusion (DEI) action plan.⁸

II. LIU’s Explicit Promise of Expressive Freedom Prohibits it from Punishing the American Club for its Instagram Posts

The punishments and requirements LIU meted out to the American Club do not square with the university’s clear promise to “support[] the rights of students and recognized student organizations to exercise freedom of expression, free speech and peaceful assembly.”⁹ By this commitment, LIU binds itself not only morally, but contractually as well,¹⁰ in a manner that would lead students to reasonably believe LIU confers expressive rights commensurate with those the First Amendment protects. LIU is also accredited by the Middle States Commission on Higher Education, which requires its institutions to possess and demonstrate “commitment to . . . freedom of expression[.]”¹¹ These commitments preclude the sanctions LIU has imposed on the American Club.

A. LIU’s Freedom of Expression Promise Prohibits It from Imposing Viewpoint-Based Punishment

LIU may not punish the American Club merely because some members of the campus community took offense to its Instagram posts, as the First Amendment clearly protects the organization’s expression.¹² The Supreme Court has reiterated this fundamental commitment to wide open discourse, explaining 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.”¹³ These principles also

⁸ *Id.* The American Club has already submitted the DEI action plan.

⁹ *Notice of Student Assembly*, Statement of Policy, LONG ISLAND UNIV., <https://liu.edu/content/policy/sa/SA-Notice-of-Student-Assembly-Policy.pdf> [<https://perma.cc/Y2UF-D4DG>].

¹⁰ *Novio v. N.Y. Acad. of Art*, 317 F. Supp. 3d 803, 805 (S.D.N.Y. 2018) (“New York State courts have permitted a student to bring a breach of implied contract action against an institution of higher education.”).

¹¹ *Standards for Accreditation and Requirements of Affiliation*, Standard II, Ethics and Integrity, Criteria, MIDDLE STATES COMM’N ON HIGHER EDUC., <https://www.msche.org/standards/fourteenth-edition/> [<https://perma.cc/QQ2P-FNSF>].

¹² *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag is protected expression); *Cohen v. California*, 403 U.S. 15, 25 (1971) (wearing a jacket with the words “Fuck the Draft” is protected); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (holding an ad depicting a pastor losing his virginity to his mother in an outhouse is protected).

¹³ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

protect the First Amendment associational rights of student organizations the public may view as “shocking and offensive.”¹⁴

The Supreme Court has also expressly held there is no categorical exception for expression others may view as hateful¹⁵ and recently reaffirmed that the First Amendment protects speech viewed as such or as “demean[ing] on the basis of . . . gender.”¹⁶ This principle is what protects, for example, “heated exchange[s] of views” on race¹⁷ or “offensive and sophomoric” skits depicting women and minorities in derogatory stereotypes.¹⁸

“Inconsiderate” and “uncivil” expression is also protected speech. University policies that require student actions to reflect “consideration and civility”¹⁹ thus have obvious deficiencies. As one court explained:²⁰

[T]he requirement “to be civil to one another” and the directive to eschew behaviors that are not consistent with “good citizenship” reasonably can be understood as prohibiting the kind of communication that is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. Similarly, mandating civility could deprive speakers of the tools they most need to connect emotionally with their audience, to move their audience to share their passion.

Punishing uncivil, offensive, or hateful speech allows universities to discriminate against views they disfavor, as there are no agreed-upon, objective, and precise definitions for these terms. They necessarily signify different meanings and conceptual frameworks to different people, allowing for an impermissible viewpoint-based, eye-of-the-beholder standard. If authorities could punish any expression deemed uncivil, offensive, or hateful, it would imperil a broad

¹⁴ *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974). The First Circuit’s application of these First Amendment principles protected LGBTQIA+ community members in *Bonner*, much as those same principles protect American Club here.

¹⁵ *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance that prohibited placing on any property symbols that “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”).

¹⁶ *Matal v. Tam*, 582 U.S. 218, 245–46 (2017).

¹⁷ *See, e.g., Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (faculty member’s use of system-wide listserv to send “racially-charged emails” was not unlawful harassment, as the First Amendment “embraces such a heated exchange of views,” especially when they “concern sensitive topics like race, where the risk of conflict and insult is high”).

¹⁸ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993).

¹⁹ *Student Handbook 2023-2024*, Student Code of Conduct Policy, Respect for Others, LONG ISLAND UNIV., 42, (2023-2024), <https://liu.edu/about/university-policies/student-handbooks>.

²⁰ *Coll. Republicans at S.F. Univ. v. Reed*, 523 F. Supp. 2d 1005, 1018-20 (N.D. Cal. 2007).

range of political speech and academic inquiry, and such an exception would undoubtedly be used against those it would be intended to protect.²¹

Nor can LIU punish the American Club for harassment because its Instagram posts do not qualify as actionable in the educational context under federal law. For sanctions on speech to be constitutional, it must be (1) unwelcome, (2) discriminatory on the basis of gender or another protected class, and (3) “so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school.”²² Even if the American Club’s Instagram posts—which are simply general commentary on a political and cultural issue—could be considered objectively offensive²³ and directed at any particular individual(s), they cannot be said to deprive a reasonable person from receiving his or her education.²⁴

B. LIU’s Freedom of Expression Promise Prohibits It from Compelling Speech as Punishment

Requiring a student organization to submit a DEI action plan—even *if* punishment was warranted for unprotected speech—constitutes compelled speech, which is anathema to free speech principles, which protect not only the right to speak, but also to refrain from speaking. Universities have legitimate interests in promoting inclusive and enriching campus environments, but they must ensure their dissemination of ideology, no matter how acceptable it may be to the greater community, does not outweigh an individual’s—or in this case, a student organization’s—right to not be a courier of that message.²⁵ The requirement that the American Club submit a DEI action plan compels the organization to express specific,

²¹ For example, when the University of Michigan briefly enacted an unconstitutional hate speech prohibition, it was almost universally used to punish students of color who offended white students. “[M]ore than twenty cases were brought by white people accusing black people of racist speech; the only two instances in which the rule was invoked to sanction racist speech involved punishment of speech by a black student and by a white student sympathetic to the rights of black students, respectively; and the only student who was subjected to a full-fledged disciplinary hearing was a black student charged with homophobic and sexist expression.” Thomas A. Schweitzer, *Hate Speech on Campus and the First Amendment: Can They Be Reconciled?*, 27 CONN. L. REV. 493, 514 (1995) (citing Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 557–58 (1990)); see also *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 869 (E.D. Mich. 1989) (striking down the university’s speech code as unconstitutional).

²² See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). Since LIU promises free speech, the Court’s interpretation of First Amendment principles should inform LIU’s interpretation of its own policies implicating free speech.

²³ This is a dubious proposition, as there is a large segment of the U.S. population whose views on gender identity and transgender issues would likely lead them to find the American Club’s posts inoffensive. See generally Kim Parker et al., *Americans’ Complex Views on Gender Identity and Transgender Issues*, PEW RSCH. CTR., June 28, 2022, <https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/>.

²⁴ See *Davis*, 526 U.S. at 654 (“petitioner contends that the harassment had a *concrete*, negative effect on her daughter’s ability to receive an education”) (emphasis added). See also *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 368 (S.D.N.Y. 2016) (“Examples of such negative effects include a drop in grades, missing school, being forced to transfer schools, or mental health issues requiring therapy or medicine.”).

²⁵ *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

university-sanctioned views about contentious political and cultural issues and infringes on its members' liberty to follow the dictates of their own conscience.²⁶

We trust that LIU would readily recognize the problem with requiring the American Club to parrot ideals sounding in “patriotism,” “racial colorblindness,” or “individualism.” As with the DEI action plan, these criteria could require it to assent to an inherently political and moral viewpoint-dependent commitment antithetical to an organization’s beliefs to avoid negative consequences. While LIU could *encourage* an organization to uphold commitments to DEI, the university cannot compel organizations to conform with its ideological preferences, as such would be unduly coercive and violate the free speech principles the university promises to support.

C. LIU’s Freedom of Expression Promise Prohibits It from Requiring the American Club to Undergo Thought Reform

While universities may educate students about controversial issues, such as views on sex and sexuality, they must take care to not coerce or intimidate them into abandoning deeply held beliefs and adopting the school’s preferred point of view. Requiring students to attend diversity trainings may easily cross the line from education to unconstitutional indoctrination depending on two critical factors: “required attendance” and “the goal of changing the individual students’ fundamental beliefs to a preapproved set of beliefs, by methods that make clear to the students that, in certain areas of ideology and belief, dissent or deviance is not acceptable.”²⁷ Essentially, students must be able to disagree openly with, question, or debate ideas espoused in diversity training.²⁸

Requiring the American Club to attend an LGBTQIA+ training session seems to cross this line into indoctrination, in violation of LIU’s promise to freedom of expression, as the organization is singled out in having to attend this training in a way that suggests the aim is to change the organization’s views. The fact that the American Club must attend this training *because* it shared controversial beliefs suggests LIU wants it to reconsider its views, and that the organization would not be able to question or disagree with the training without further punishment.

III. The Policies Cited to Punish the American Club Are Contrary to LIU’s Freedom of Expression Promise

The principles and policies that LIU found the American Club violated are vague and overbroad, and as such chill a significant amount of protected student expression, contrary to the free speech promises LIU makes. Regulations must “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that [they] may act accordingly,” or

²⁶ See *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 634 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

²⁷ Harvey A. Silverglate & Jordan Lorence, FIRE’s Guide to First-Year Orientation and Thought Reform on Campus, 45-46 (2005).

²⁸ *Id.* at 47.

else they are unconstitutionally vague.²⁹ The language of LIU’S principles and policies that involve respect for others, harassment, and social media all fail to give students notice of what speech or conduct may be sufficiently civil and what may be considered offensive or inappropriate.

A speech restrictive regulation is also overbroad “if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate.”³⁰ Again, these same principles and policies implicating respect for others, harassment, and social media ignore that a great deal of speech that one may consider uncivil, offensive, or inappropriate includes protected speech. Without clear and objective definitions, these terms will signify different meanings to different people, opening the door for administrators to abuse their decision to punish views as odds with their own.

IV. LIU’s Punishment of the American Club Violate Due Process Rights

LIU also failed to afford the American Club due process insofar as the university imposed a burdensome interim suspension, then took nearly three months to reach a decision. This failure is inconsistent with LIU’s own policies and the most basic principles of procedural due process, including the right to an initial hearing—*before* punishment—followed by reasonably prompt resolution of misconduct charges. Universities must provide an accused organization “an opportunity to explain [its] version of the facts” before imposing any sort of punishment, including an interim suspension.³¹

LIU also failed to follow its own disciplinary policies promising the “outcome of the administrative hearing . . . will be communicated . . . within three (3) to five (5) business days after the hearing in the form of a Decision Letter.”³² While LIU held investigative interviews with some members on April 17 and 19, it did not send out a Decision Letter to the American Club until July 6—almost three months later.³³

V. Conclusion

LIU improperly investigated and punished the American Club for protected speech, including imposing an improper interim suspension, engaging in an unreasonably long investigation, and compelling the organization to express value-laden views. LIU’s actions thus impermissibly burden the American Club members’ rights to free speech, expressive association, and due process, using policies that are infirm in their vagueness and overbreadth. While the right to free speech does not shield the American Club from criticism by students, faculty, or the

²⁹ *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (9th Cir. 1984).

³⁰ *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864 (E.D. Mich. 1989).

³¹ *Goss v. Lopez*, 419 U.S. 565, 579 (1975).


³² *Student Handbook 2023-2024*, Student Affairs Policies, Student Code of Conduct Procedures, Process and Timeline for Hearing and Decision, LONG ISLAND UNIV., 45, (2023-2024), <https://liu.edu/about/university-policies/student-handbooks>.

³³ Decision Letter, *supra* note 7. While the Student Handbook says that the “judicial process timeline is approximate and may require adjustment due to continuing investigations . . . or the academic calendar[.]” *Student Handbook*, *supra* note 19, nothing indicates that this was required in this case.

broader community—which would represent a “more speech” remedy preferred to censorship³⁴—free speech commitments like those LIU maintains preclude censoring speech, even if some, many or even most people are offended.³⁵

We accordingly request a substantive response to this letter no later than close of business October 24, 2023, confirming, first, that LIU will lift the American Club’s suspension, drop the mandate that its officers and members attend a LGBTQIA+ training session, and allow it to withdraw its DEI statement, and second, that LIU will revise the policies used to sanction the American Club, insofar as they are at odds with LIU’s free speech promises. We also urge LIU to better handle future investigations by not meting out interim punishments absent extenuating circumstances and providing decision letters in accord with the university’s stated policy.

Sincerely,



Haley Gluhanich

Program Officer, Campus Rights Advocacy

Cc: Brendan Caputo, Director of LIU Promise
Samiah Bhutta, Senior Associate Director of Student Affairs

³⁴ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

³⁵ This does not, of course, bar LIU from offering resources to students who may have been offended or upset by the American Club’s social media posts.