



April 18, 2014

President Barry Glassner
Lewis & Clark College
Office of the President
615 Southwest Palantine Hill Road, MSC 33
Portland, Oregon 97219

Sent via U.S. Mail and Facsimile (503-768-7688)

Dear President Glassner:

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, thefire.org, will give you a greater sense of our identity and activities.

FIRE is deeply concerned by the threats to due process and freedom of expression presented by Lewis & Clark College's (LCC's) punishment of two students for their expression at a campus party. To bolster its claim that this expression created a "hostile and discriminatory environment," LCC expanded its investigation to include instances of similar expression wholly unconnected to the incident in question. Through its actions in this matter, LCC has betrayed its institutional promises of free expression and abandoned fundamental fairness in its disciplinary proceedings. We call on LCC to promptly rectify its errors in its handling of these students' cases.

The following is our understanding of the facts. Please inform us if you believe we are in error.

On November 23, 2013, LCC students [REDACTED] and [REDACTED], both members of LCC's football team, attended a private party in a fellow player's suite in LCC's Holmes Hall. In one room, a number of students were playing beer pong, including [REDACTED] who is African-American. [REDACTED] jokingly named his beer pong team "Team Nigga" and would exclaim that team name each time his team scored a point.

According to [REDACTED] and [REDACTED] who are friends, the two share a running joke in which [REDACTED] professes to believe in “white power,” highlighting the comical absurdity of an African-American holding such a view. At one point during the party, [REDACTED] greeted [REDACTED] and said, “how about a ‘white power?’” to which [REDACTED] exclaimed, “white power!”

A student in the residence hall later reported the party to LCC’s Campus Living office. Area Director Natasha Begin then reported the issue to LCC’s Campus Safety division, which undertook an investigation into the alleged “racial and biased comments” made at the party. According to the report’s account of the interview with the student who first reported the party (identified in the report as RP, for “reporting party”):

The RP stated that the specific comments they had heard occurred “probably around 11 or 11:30[pm]”.

The RP clarified that “what sounded like one voice” had said “nigger, over and over again”. A second voice – specifically different from the first – had said, “Can I get a white power?” This was said one distinct time, with no discernible response.

The RP did not make mention of any “chanting”, or any conspicuous or clear repeating response to either comment.

When interviewed by Campus Safety, [REDACTED] denied that “any statements of a racial or biased nature” were made at the party, but mentioned that he had made the “white power” joke with [REDACTED]. [REDACTED] explained the genesis of the inside joke by telling the officer that roughly 6 weeks earlier, [REDACTED] had yelled “white power” while passing other students on the way from practice to class in a jocular manner. [REDACTED] denied that anyone had chanted “nigger” at the party. The campus safety officer lectured [REDACTED] regarding the “inappropriateness” of the joke, stating that “actions, attitudes, and language – even those meant in privacy – can have a negative impact on others.”

When Campus Safety officials interviewed [REDACTED] he informed the officer that he had heard his teammates and friends say “white power” around football practice as a joke, and he would at times use it in a joking manner as well. He expressed that he had never taken offense to it, and denied that anyone had “chanted” the phrase at the party. [REDACTED] also states that another teammate, who is white, had greeted him with “what’s up nigga,” which they often used as a friendly greeting. The reporting officer also wrote, “I asked [REDACTED] which players in attendance – naming them individually – commonly used the n-word.” The officer also “expressed [REDACTED] hope that ... [REDACTED] would shoulder the responsibility to speak up and shed some awareness to his teammates and friends about how those particularly racist comments, and other even less inflammatory biased comments, negatively affect community members of color – and the community as a whole.”

According to the Campus Safety report, both [REDACTED] and [REDACTED] strenuously denied any “chanting” of racially inflammatory terms.

Campus Safety officials interviewed ██████ and ██████ on November 25. On November 27, ██████ and ██████ were each charged with the following “activities that may violate the Student Code of Conduct”:

Physical or Mental Harm - intentionally or recklessly causing physical or mental harm to any person, or intentionally or recklessly causing reasonable apprehension of such harm.

Discrimination or Harassment - Conduct creating an intimidating, hostile, or offensive working, campus living, or academic experience.

Disorderly Conduct - Engaging in disorderly or disruptive conduct on College premises or at College sponsored activities, which interferes with the activities of others, including studying, teaching, research, and College Administration.

While the charges were spurred by the events reported from the November 23 party, a report accompanying the charges, taken from Area Director Begin, indicated a much wider scope of inquiry:

Others interviewed [sic] that similar language may have occurred at other times involving those named in the report, in the Bon, in the Football team locker room, and around campus generally. The pervasiveness of this language is also a subject of the investigation. Other acts of potential hate-speech and bias that have occurred recently on campus are also under investigation at this time.

The students’ College Review Board hearings were held on December 3. Though the students were not provided in advance of the hearing with any materials or documents regarding any incidents besides the November 23 party, they were both questioned at the hearing about other incidents in which they had allegedly exchanged similar remarks. Yet according to ██████ LCC rejected one of his potential character witnesses because he was not present at the November 23 party, even though this witness could have provided testimony about the other, earlier events discussed at the hearing.

Based on the events of November 23, as well as the previous incidents discussed in their hearings, ██████ and ██████ were found responsible on all charges. ██████ decision letter, dated December 5, stated:

Your repeated use of racially charged language is disruptive and caused the reasonable apprehension of harm in our community. Additionally, your initiation of and complicity in using this language in this situation and around campus is unacceptable. Whether intentionally or not, your language has contributed to the creation of a hostile and discriminatory environment.

LCC placed [REDACTED] on conditional probation until May 31, 2014, and placed [REDACTED] on unconditional probation until January 31, 2015. LCC further ordered both students to complete a “Student Goal Portfolio” to “emphasize how your conscious choices to engage in certain behaviors help you attain your goals,” and required them to “identify and complete a Bias Reduction and Bystander Intervention Training.”

[REDACTED] and [REDACTED] both appealed the findings and sanctions. Among the matters factoring into [REDACTED] appeal, as [REDACTED] wrote, was that he was led to believe that the hearing would focus only on the events of November 23 and that he had no way of preparing a defense against the other allegations that surfaced at the hearing. LCC upheld its findings of responsibility on all three disciplinary charges and sustained all sanctions against the students, with the exception of changing [REDACTED] “unconditional probation” sanction to “conditional probation.” The findings against the students and the resulting sanctions were otherwise upheld in full. The December 19 response [REDACTED] received from Director of Campus Living Kelly Hoover and Associate Dean for Student Engagement Latricia Brand additionally stated:

Your use of racially charged language, intentional or not, was reckless and created an environment where others in the space felt it was necessary to correct your behavior. More broadly your actions caused reasonable apprehension of harm to the community.

LCC must promptly reverse these students’ punishments. The content of their expression was protected by their right to free expression, and they were punished under an unfair disciplinary process that violated their right to due process.

While LCC is a private college not bound by the First Amendment, it makes institutional promises that bind it morally and legally to protect free expression. As LCC’s policy on Freedom of Expression & Academic Inquiry states, “Members of the College community are free to examine and discuss all questions of interest to them and to express opinions publicly and privately.” Such promises may indeed be legally binding on LCC, as Oregon law recognizes that the terms contained in publications provided to a student by a private university can constitute a binding contract. *See Dauven v. George Fox Univ.*, No. CV. 09-3050PK, 2010 U.S. Dist. LEXIS 142066, at *49–50 (D. Or. Dec. 2, 2010) (citing cases requiring universities to adhere to stated policies, consistent with “the general holding of courts that the relationship between a university and a student is contractual in nature.”); *Tate v. North Pacific College*, 140 P. 743 (Or. 1914) (“The defendant issued its catalogue, stating its requirements for graduation and for the conferring upon candidates of the degree of Doctor of Dental Medicine, and the plaintiff, with knowledge of those requirements, entered the college, matriculated and attended its sessions, with the intention of obtaining said degree. These acts on the part of the college and of the plaintiff constituted a contract.”). *See also Dizick v. Umpqua Cmty. Coll.*, 599 P.2d 444 (Or. 1979) (upholding verdict for a student who claimed that he was fraudulently induced to enroll by the college’s promises of specific training and equipment availability).

By these standards, the speech taking place at the November 23 party is protected, and LCC cannot punish its speakers on the basis of the speech's content. If such promises of free expression are to carry any weight, LCC must recognize that they apply to expression some may find offensive, insensitive, or even hateful. As the Supreme Court of the United States declared in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), “[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” If LCC intends to mete out discipline based on speech that is merely offensive, it cannot simultaneously claim that it grants campus community members the broad speech rights necessary to serve the purpose and ideals of an institution of higher education.

It strains credulity to claim that the students' expression at the party constituted objective “Physical or Mental Harm” or any kind of actionable “Discrimination or Harassment.” With regard to student-on-student hostile environment harassment in the university setting, the Supreme Court has observed that such harassment must be conduct that is (1) unwelcome; (2) discriminatory; (3) on the basis of gender or another protected status, like race; (4) directed at an individual; and (5) “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.” *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999). [REDACTED] and [REDACTED] November 23 exchanges do not come close to reaching this threshold. There is no legitimate basis on which to conclude that a joke made between teammates and friends at a private party at a private residence, which was overheard by an outsider, could reach the level of severity and pervasiveness required to create a hostile environment as defined by the Supreme Court. Even after stringing together disparate incidents of alleged racial expression in addition to those from the November 23 party to support the claim that the students created a hostile environment, LCC's case is not credible.

Further, that LCC expanded its investigation of the students to include other alleged incidents having nothing to do with the events of November 23 fundamentally violates their due process rights. In effect, LCC tried the students for additional disciplinary infractions without charging them or enabling them to prepare a meaningful defense against them, and in at least one instance excluded witnesses from speaking on their behalf. These actions are fundamentally unfair to the students and incompatible with LCC's due process promises and obligations.

That LCC has recently dealt with several controversies involving racist expression and faced criticism from the student body over its handling of these incidents is well-documented.¹ In this charged environment, LCC's desire to act decisively is understandable. As an educational institution, LCC has ample resources at its disposal to

¹ Caleb Diehl, *Rising From the Fall*, The Pioneer Log, available at <https://piolog.creatavist.com/story/7646>.

educate the student body on such matters and to engage in productive dialogue. This case, however, exemplifies the dangers of attaching disciplinary sanctions for students to such an approach. When the campus disciplinary system is employed in this quest, the desire to educate and enlighten often transmogrifies into a campaign to ban the use of certain words—no matter the context or the speaker. This cannot be squared with LCC's obligation to protect its students' right to free expression.

LCC's conclusions that [REDACTED] and [REDACTED] created a discriminatory and harassing environment are unfounded and were reached in violation of their free speech and due process rights. FIRE thus requests that LCC clear all disciplinary charges and sanctions related to the students' expression and clear their records of all mention of LCC's misguided disciplinary action. We hope LCC will make clear to its students that it will not sacrifice free speech and due process in its efforts to promote tolerance, diversity, and civility on campus.

We have enclosed signed FERPA waivers from [REDACTED] and [REDACTED], permitting you to freely discuss their cases with FIRE.

We request a response to this letter by May 2, 2014.

Sincerely,



Ari Z. Cohn
Program Officer, Legal and Public Advocacy

Encl.

cc:

Anna Gonzalez, Dean of Students
Kelly Hoover, Director of Campus Living
Laticia Brand, Associate Dean for Student Engagement
Charlie Ahlquist, Assistant Director for Residential Education