



November 8, 2017

Richie C. Hunter
Vice President, Strategic Communications and External Relations
Rensselaer Polytechnic Institute
1000 Troy Building
110 8th Street
Troy, New York 12180-3590

Sent via U.S. Mail and Electronic Mail (hunter3@rpi.edu)

Dear Vice President Hunter:

Thank you for your letter of October 10, 2017. We remain concerned that Rensselaer Polytechnic Institute's policies and practices contradict RPI's stated commitment to freedom of expression, and we are disappointed that RPI declined to substantively address our concerns. We are also troubled by reports that, following our letter of October 9, RPI removed flyers critical of the administration in advance of a homecoming fundraising campaign.

We again ask RPI for a substantive response to our concerns. Additionally, we write to remind RPI that its accreditation by the Middle States Commission on Higher Education requires RPI to protect students' freedom of expression and to adhere to the promises it makes to its students.

I. Facts

The following is our understanding of the facts. For the sake of brevity, we incorporate the facts recited in our letter of October 9, 2017, and summarize those facts only briefly. Please inform us if you believe we are in error.

Students at RPI are engaged in a long-running dispute with the university's administration, and are concerned that the autonomous, student-operated Rensselaer Union is being undermined by actions of the administration.¹

¹ See generally the materials available on the "Save the Union" website. The timeline demarcates 2008 as the beginning of the dispute, due to the removal of student representatives from an RPI Board of Trustees' committee. SAVE THE UNION, THE SITUATION, <https://savetheunion.xyz/situation> (last visited Oct. 9, 2017).

Students again demonstrated on October 13, 2017. This demonstration followed a denial of permission to peacefully demonstrate by RPI Assistant Vice President for Student Life and Dean of Students Travis T. Apgar, who wrote that RPI had “made a decision some time ago that we would not approve demonstration applications for the dates” encompassing homecoming weekend. In subsequent statements, RPI claimed that it had denied “that specific request” only “after careful review,”² an assertion that cannot be squared with RPI’s decision in advance to reject all applications.

In a statement to RPI’s student newspaper, Apgar pledged that RPI “support[s] freedom of speech and the students’ right to demonstrate,” but said that RPI had “determined that a demonstration would pose potential disruption of already-planned events and raises concerns for the safety of attendees.”³ In the same statement, Apgar complained that “those claiming to be concerned with the state of the student-run Union” had engaged in “personal attacks” and the distribution of “misinformation.”⁴ Apgar complained of a “lack of dialogue between student event planners and” his staff.⁵ At that time, Apgar had already denied the request.

RPI erected a fence limiting access to the demonstration site, apparently as an alternative to “a more extensive separation of our student protesters from the event,” as interim Vice President for Student Life LeNorman Strong told *The Polytechnic*.⁶ RPI viewed further separation as “not desirable.”⁷ Students moved the fence and held their demonstration as planned.⁸ We are unaware of any arrests, violence, or damage that occurred in the course of the students’ peaceful demonstration.

On October 8, the “Save the Union” organizers posted a video to YouTube that shows an employee of RPI removing “Save the Union” posters from the exterior of the Jonsson Engineering Center.⁹ A second video, taken shortly before dawn on the day of the October 13 demonstration, shows at least one Institute employee removing “Save the Union” posters from the exterior of the Low Center for Industrial Innovation, while leaving other posters up.¹⁰

² *RPI students to protest to protect student control of student union*, WRGB (Oct. 13, 2017), <http://cbs6albany.com/news/local/rpi-students-to-protest-to-protect-student-control-of-student-union>.

³ Sidney Kochman, *Protest denied*, POLYTECHNIC (Oct. 11, 2017), https://poly.rpi.edu/2017/10/11/protest_denied.

⁴ *Id.*

⁵ Brookelyn Parslow, *Fence installed, motivation questioned*, POLYTECHNIC (Oct. 18, 2017), https://poly.rpi.edu/2017/10/18/fence_installed_motivation_questioned.

⁶ Parslow, *supra* note 5.

⁷ *Id.*

⁸ Mark Robarge, *Hundreds urge RPI to ‘Save the Union’*, TROY RECORD (Oct. 13, 2017), <http://www.troyrecord.com/general-news/20171013/hundreds-urge-rpi-to-save-the-union>.

⁹ Save the Union, *RPI administration again targets Save the Union signs in full compliance with sign policy*, YOUTUBE (Oct. 8, 2017), https://www.youtube.com/watch?v=1R3Fp5rTb_w.

¹⁰ Wolfizen, *Save the Union Poster Takedown 2017-10-13 06:00:00-07:00:00*, YOUTUBE (Oct. 13, 2017), <https://www.youtube.com/watch?v=wF2bf5VX6T8>.

These acts recall RPI's conduct in April 2016, when security officers intercepted students while they were posting "Save the Union" signs. When students informed the officers that the Student Handbook permitted them to post the signs, the officers responded that "today's a different story" because prospective students would be in attendance for Accepted Student Day, and that the change was "coming from the top."¹¹ These events were also recorded.¹²

II. RPI Promises Freedom of Expression to Its Students, and RPI's Status as an Accredited Institution Is Dependent Upon Keeping These Promises

RPI is a private university and thus not legally bound by the First Amendment. However, it is both morally and contractually bound to honor the promises of freedom of expression it has made to its students. Additionally, RPI's accreditation as an institution of higher learning is contingent in part upon its respect for the freedom of expression of students and faculty, and upon its integrity in adhering to the promises that it makes.

A. RPI Promises Its Students Freedom of Expression

RPI's Student Bill of Rights, included in the institution's Handbook of Student Rights and Responsibilities, provides that students are "citizen[s] of the nation at large, and [RPI] shall not impede or obstruct students in the exercise of their fundamental rights as citizens."¹³ RPI asserts that "[a]cademic freedom is essential to a university community," that both "[f]reedom of speech and freedom of assembly are essential to academic freedom," and that "[a]ll members of the university community should be able to express their views by words and actions[.]"¹⁴ Accordingly, students "shall be free to organize and join" together to "promote their common interests," and groups "shall be free to examine and discuss all questions of interest to them and to express opinions publicly and privately."¹⁵ Students are promised that they are "free to support causes by orderly means, including peaceful assembly, which do not disrupt the normal operation of" RPI.¹⁶

B. RPI Is Legally Bound to Adhere to Its Promises of Free Expression

Even leaving aside the moral obligation to adhere to the promises it makes, RPI is legally obligated to keep these promises. "Under New York law, an implied contract is formed when a university accepts a student for enrollment[.]" *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 93 (2d Cir. 2011) (citations omitted). "The terms of the implied contract are

¹¹ Mark Robarge, *RPI students: Jackson trampling on our rights*, TROY RECORD (Apr. 9, 2016), <http://www.troyrecord.com/general-news/20160409/rpi-students-jackson-trampling-on-our-rights>.

¹² Save the Union, *RPI Public Safety Student Rights Oppression I*, SOUNDCLOUD (Apr. 9, 2016), https://soundcloud.com/save_the_union/rpi-public-safety-student-rights-oppression-1.

¹³ 2014 – 2016 Rensselaer Handbook of Student Rights & Responsibilities, Rev. Oct. 2015, at 4 ("Student Bill of Rights"), available at <http://www.rpi.edu/dept/doso/resources/main/2014-2016StudentHandbookrevOctober2015.pdf> ("Handbook").

¹⁴ Handbook at 28.

¹⁵ Handbook at 5–6.

¹⁶ Handbook at 6.

‘contained in the university’s bulletins, circulars and regulations made available to the student.’” *Id.* (quoting *Vought v. Teachers Coll., Columbia Univ.*, 127 A.D.2d 654, 654 (2d Dep’t 1987)). Handbooks distributed to students and faculty are routinely found to provide the terms binding upon the institution. *See, e.g., Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 242–44 (D. Vt. 1994) (holding private institution to terms of student handbook and inquiring whether it deviated from its own procedures); *Matter of Monaco v. New York Univ. & N.Y. Univ. School of Med.*, 145 A.D.3d 567, 568 (1st Dep’t 2016) (policies in faculty handbook have force of contract). Where there is a contract, there is a duty to adhere to it in good faith. *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002) (“In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance” and encompass “any promises which a reasonable person in the position of the promisee would be justified in understanding were included”).

Additionally, “private colleges and universities are accountable in a [Civil Practice Laws and Rules] article 78 proceeding . . . for the proper discharge of their self-imposed as well as statutory obligations.” *Gertler v. Goodgold*, 107 A.D.2d 481, 486 (1st Dep’t 1985), *aff’d*, 66 N.Y.2d 946 (1985). The actions of a private institution are “subject to judicial scrutiny” and an “inquiry may be made to determine whether [the institution] abided by [its] own rules” and whether it has “acted in good faith.” *Id.* When a private university has “not substantially complied with its own guidelines or its determination is not rationally based upon the evidence,” a court may annul its decisions. *Hyman v. Cornell Univ.*, 82 A.D.3d 1309, 1310 (3d Dept. 2011).

RPI’s Student Handbook provides ample grounds for concluding that the Institute has entered into an implied (if not express) contract with its students. The Handbook is laden with the language of obligation, purporting to set forth “rights” and “responsibilities,”¹⁷ deploying the words “shall” and “must” 177 times,¹⁸ and setting forth the rules and procedures by which students may be punished or expelled.¹⁹ Individual students have drastically reduced bargaining power vis-à-vis the terms in the Handbook, which is promulgated by RPI’s administration and not open to negotiation. As the party that drafted the contract, any ambiguity in the terms of the Handbook is held against RPI. *Lai Ling Cheng v. Modansky Leasing Co.*, 73 N.Y.2d 454, 460 (1989) (ambiguities are “strictly construed against the drafter). As discussed *infra*, RPI’s conduct has not met, in letter or in spirit, the commitments it has made.

C. RPI’s Accreditation Is Predicated on Its Demonstrated Commitment to Freedom of Expression

RPI’s promises of freedom of expression are also important to maintaining RPI’s status as an institution accredited by the Middle States Commission on Higher Education (MSCHE). MSCHE’s Standards for Accreditation and Requirements of Affiliation include an evaluation

¹⁷ Handbook at 3.

¹⁸ Handbook, *passim*.

¹⁹ Handbook at 8–14.

of an institution’s “ethics and integrity,” which are “central, indispensable, and defining hallmarks of effective higher education institutions,” and require that an institution “be faithful to its mission, honor its contracts and commitments, adhere to its policies, and represent itself truthfully.”²⁰ Among the criteria for this evaluation is an inquiry into whether an institution “demonstrates . . . a commitment to academic freedom, intellectual freedom, [and] freedom of expression.”²¹ Additionally, an institution must demonstrate “honesty and truthfulness in public relations announcements, advertisements, recruiting and admissions materials and practices.”²² Finally, these criteria require an institution to avoid any “conflict of interest or the appearance of such conflict in all activities and among all constituents.”²³

RPI’s conduct fails to meet MSCHE’s standards. Although MSCHE is not set to conduct another evaluation of RPI until 2024–2025,²⁴ the Commission solicits complaints concerning non-compliance with either MSCHE standards or an institution’s own policies or procedures, and may initiate proceedings resulting in an adverse accreditation action.²⁵ If RPI does not honor its promises, the students it has deceived may choose to inform MSCHE about their experiences.

III. RPI’s Policies and Conduct Breach Its Promises of Freedom of Expression

Both RPI’s policies and its conduct—in repeatedly denying students’ requests to engage in peaceful demonstrations critical of RPI’s administration, and in selective removal of posters critical of RPI—are incongruous with its legal and moral obligations to its students. Unless and until RPI satisfactorily addresses the issues raised herein by revising its speech codes and pledging to protect freedom of expression for all RPI students, RPI fails to honor its commitments to freedom of expression.

A. Restrictions on Peaceful Demonstrations

RPI’s policy on peaceful demonstrations is inconsistent with a commitment to freedom of expression because it requires students to seek administrators’ permission to engage in a peaceful demonstration and gives administrators unfettered discretion to deny those requests. The policy provides that any “group or individual planning a demonstration must submit an Application For Approval of Peaceful Demonstration to the Dean of Students Office

²⁰ MIDDLE STATES COMM’N ON HIGHER EDUC., STANDARDS FOR ACCREDITATION AND REQUIREMENTS OF AFFILIATION 5 (13th ed., rev. Nov. 2015), available at <http://msche.org/publications/RevisedStandardsFINAL.pdf> (“MSCHE Standards”).

²¹ MSCHE Standards, *supra* note 20, at 5.

²² *Id.*

²³ *Id.*

²⁴ Middle States Comm’n on Higher Educ., *Statement of Accreditation Status: Rensselaer Polytechnic Institute*, <http://www.msche.org/Documents/SAS/375/Statement%20of%20Accreditation%20Status.htm> (last visited Nov. 6, 2017).

²⁵ MIDDLE STATES COMM’N ON HIGHER EDUC., COMPLAINTS INVOLVING MEMBER AND CANDIDATE INSTITUTIONS, (effective Aug. 14, 2017), available at <http://www.msche.org/documents/Complaints.pdf>.

at least seven (7) days prior to the proposed demonstration date.”²⁶ The Application must identify both the location of the demonstration and “the object of the intended protest, or other purpose.”²⁷

Administrative procedures requiring a speaker to obtain a license or permit or to register before engaging in expression are disfavored under the law and exceedingly difficult to justify. *New York Times v. United States*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”) (internal quotation marks omitted). As the Supreme Court has observed, “It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” *Watchtower Bible and Tract Society of NY, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002).

Because the use of permits to control expressive activity “has the potential for becoming a means of suppressing a particular point of view,” licensing schemes are permissible only where they do “not delegate overly broad licensing discretion” to the issuing authority. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Yet RPI’s policy provides *no* objective criteria whatsoever. This unfettered discretion allows RPI administrators the ability to refuse to permit speech critical of RPI while monopolizing the Institution’s resources to convey its own message.

Even in the absence of discriminatory enforcement, the policy as written creates a conflict of interest in allowing administrators broad discretion in deciding whether, or when, students might engage in demonstrations critical of decisions made by those same administrators. Because of this broad discretion, RPI is unable to adhere to the “avoidance of conflict of interest or the appearance of such conflict in all activities and among all constituents” as required for accreditation.²⁸ More alarmingly, RPI appears to have improperly exercised its discretion twice in the past year, denying students permission to hold demonstrations in support of the “Save the Union” campaign both outside President Shirley Ann Jackson’s biannual town hall meeting on March 30, 2016, and outside a fundraiser on homecoming weekend.

In addition to the pernicious threat of censorship presented by a system of prior restraint, RPI’s blanket refusal to grant permission for any demonstration by students during the Homecoming weekend cannot be justified as a time, place, or manner regulation. As we explained in our letter of October 9, fundamental principles of freedom of expression allow only “*reasonable* restrictions on the time, place, or manner” of speech. Such restrictions must be untethered to the content of the expression and narrowly tailored in service of a significant institutional interest, and must “leave open ample alternative channels for communication.”

²⁶ Handbook at 29.

²⁷ *Id.*

²⁸ MSCHE Standards, *supra* note 20, at 5.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added). RPI’s prohibition on *all* student demonstrations during homecoming weekend was not a reasonable time, place, or manner restriction because it broadly deprived students of access to a meaningful audience, namely alumni and donors, whose presence on RPI’s campus was temporary.²⁹

B. Restrictions on Distribution of Flyers

RPI has also implemented policies that permit the institution to censor material critical of the administration. The Institute has repeatedly utilized these policies to censor “Save the Union” written materials, often shortly before the anticipated arrival of outside visitors, including alumni, donors, and prospective students. These acts have been repeatedly captured on video. In maintaining and utilizing these policies to censor written materials critical of the administration, RPI has exhibited a continuing hostility to students’ freedom of expression.

RPI’s “Sign Policy,” which extends limitless discretion to administrators to censor written material displayed on campus, is antithetical to freedom of expression. Again, while “reasonable” regulations concerning the “time, place, or manner” of speech are permissible, such regulations must be content-neutral (*i.e.*, “justified without reference to the content of the regulated speech”) and narrowly tailored. *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). RPI’s Sign Policy does not qualify as a “time, place, or manner” policy both because it regulates the content of expression and because it is not narrowly tailored.

RPI’s Sign Policy expressly regulates the “style, content, and posting of signs and posters” on campus, extending to signs affixed to particular locations or carried on campus.³⁰ Posters may be affixed to interior spaces only with the authorization of “those having jurisdiction over that building,” but permission is not required to affix posters to the exterior of three buildings: the Low Center for Industrial Innovation (CII), the Darrin Communications Center (DCC), and the Jonsson Engineering Center (JEC). Posters must display the name and email address of the “group or person posting the sign” and must display a date, no later than 15 days after the date of posting, that the posters may be removed. These restrictions, standing alone, might be defensible regulations of the time, place, or manner of student expression.

Yet the policy also regulates the style and content of posters, expressly reserving “the right” of RPI to remove posters “deemed” to be “graphically inappropriate, profane, libelous, in unsightly condition, or [communicating] outdated information.” Because the Sign Policy expressly regulates content, it is not a content-neutral regulation of time, place, or manner. In

²⁹ Indeed, the Supreme Court has expressed skepticism that a regulation leaves open “ample alternative channels for communication” when the speaker’s ability to reach his or her intended audience is affected. *See Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977). Several courts have similarly held that an alternative channel “is not ample if the speaker is not permitted to reach the intended audience.” *Saieg v. City of Dearborn*, 641 F.3d 727, 740 (6th Cir. 2011); *Berger v. City of Seattle*, 569 F.3d 1029, 1049 (9th Cir. 2009); *see also Wisconsin Action Coal. v. Kenosha*, 767 F.2d 1248, 1258 (7th Cir. 1985) (holding that because the city did not present evidence showing another time period where a comparable number of adults are home, the plaintiffs could not be barred from soliciting during the hours in question).

³⁰ Sign Policy, Handbook at 34–36.

applying principles of freedom of expression embodied in the First Amendment, the Supreme Court views content-based regulations as “presumptively unconstitutional” and justified only upon proof that they the policies are “narrowly tailored to serve compelling” interests. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015).

RPI’s policies are not narrowly tailored, granting administrators unlimited leeway to determine what messages may or may not be shared. Even if the policy were content-neutral, such regulations must “contain adequate standards to guide the official’s decision and render it subject to effective judicial review.” *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). In other words, standards must be objective and give people notice about what expression is or is not permissible. Allowing authorities unfettered discretion to limit speech is particularly dangerous because “such discretion has the potential for becoming a means of suppressing a particular point of view.” *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). Without objective criteria, “unfettered discretion may permit the administering officials to roam endlessly at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions[.]” *Menotti v. City of Seattle*, 409 F. 3d 1113, 1143 (9th Cir. 2005) (quoting in part *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969)) (quotation marks omitted).

RPI’s Sign Policy lacks objective criteria. It permits administrators to remove “graphically inappropriate” or “profane” materials. Administrators are likewise authorized to determine that a particular sign may be removed because it is posted “in excess.” What is “inappropriate” or “profane” depends on whether it subjectively offends an administrator, and what amounts to posting “in excess” is unbounded by any objective criteria, such as a limit on the specific number of signs that may be posted in a given area. *See, e.g., Reed*, 135 S. Ct. 2233 (Alito, J., concurring) (observing that a regulation “restricting the total number of signs allowed per mile of roadway” would be premised on content-neutral criteria).

Moreover, the Sign Policy provides that in “extraordinary cases,” the policy’s “rules may be waived” by RPI administrators, without providing examples or objective criteria as to what constitutes an “extraordinary” case. This boundless discretion is ripe for abuse, and it appears that RPI *has* suspended its own rules when, in advance of the April 2016 Accepted Student Day, security personnel told students that the provisions of the Sign Policy were inapplicable because “today’s a different story.”

IV. Conclusion

Rensselaer’s policies are inconsistent with a commitment to freedom of expression, granting administrators almost limitless discretion to bar speech critical of the Institute. On repeated occasions, RPI has broken with its stated commitment to freedom of expression in order to suppress expression by “Save the Union” proponents, particularly when that expression might be seen by alumni, donors, or prospective enrollees. In maintaining policies that fail to protect students’ freedom of expression, and in taking actions indicative of viewpoint discrimination, RPI falls short of the demonstrated commitment to students’ freedom of expression required

by the Middle States Commission on Higher Education, and it risks the possibility that students, faculty, or the public will invoke the Commission's complaint procedure.

RPI must rescind and revise the policies that have been abused to suppress speech critical of the Institute and publicly commit to respecting student expression, including that of the "Save the Union" campaign. FIRE would welcome the opportunity to work with RPI to revise its policies and develop new standards that would protect both RPI's institutional needs and students' freedom of expression.

We request a response to this letter by November 21, 2017.

Sincerely,



Adam Steinbaugh
Senior Program Officer, Individual Rights Defense Program
Foundation for Individual Rights in Education