



October 12, 2020

Dean Kevin Washburn
University of Iowa College of Law
130 Byington Road
Iowa City, Iowa 52242

Sent via Electronic Mail (kevin-washburn@uiowa.edu)

Dear Dean Washburn:

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 is concerned about a proposal that, if adopted, would seriously threaten the expressive rights and academic freedom of the University of Iowa College of Law's faculty. The proposal, which was created by the Iowa Law Anti-Racism Action Committee ("Action Committee"), includes a number of recommendations for how to advance diversity and inclusion at Iowa Law.¹ We appreciate that these are only recommendations, but your statement that "[w]e will be implementing [as] many of these ideas as we can soon"² suggests that the university may adopt this proposal.³

Of particular concern to FIRE is the report's proposal to "[i]nclude a question on the annual faculty/staff evaluation form that asks what the employee has done to advance the university's mission to create an inclusive community."⁴ The proposed recommendations suggest that Iowa Law:

Add a question to the annual faculty evaluation form that asks what the employee has done to advance the university's mission to create "an inclusive community in which people of different

¹ Iowa Law Anti-Racism Action Committee, *Recommendations*, UNIV. OF IOWA COLL. OF LAW, available at <https://law.uiowa.edu/sites/law.uiowa.edu/files/2020-09/ILARAC%20RecommendationsFINAL.pdf>.

² *Iowa Law Antiracism Committee Works Toward a Bold Plan for Action*, UNIV. OF IOWA COLLEGE OF LAW, Sept. 3, 2020, <https://law.uiowa.edu/iowa-law-antiracism-committee-works-toward-bold-plan-action>.

³ FIRE takes no position on the balance of the proposals.

⁴ Iowa Law Anti-Racism Action Committee, *supra* note 1.

cultural, national, individual, and academic backgrounds encounter one another in a spirit of cooperation, openness, and shared appreciation.”

FIRE has little doubt that this proposal represents a well-intentioned effort to better serve the Iowa Law community. However, such a mandate risks establishing an ideological litmus test for evaluating professors, which could impact promotion and tenure consideration, and presents a number of issues.

First, the key terms defined in these recommendations, and laid out in the University of Iowa’s *Excellence through Diversity, Equity, and Inclusion Action Plan*, lack precision. These terms—“diversity,” “equity,” and “inclusion”—are not defined in a sufficiently objective manner to be applied in a viewpoint neutral way, leaving room for the terms to be used as a proxy for particular viewpoints or beliefs.

Even if unintentional, impermissible viewpoint-based outcomes are unfortunately easy to imagine. For example, conservative professors—believing that their views are not widely represented at Iowa Law—might argue that attending the Conservative Political Action Conference (CPAC) would contribute to diversity of thought, as recommended by the Action Committee. Other professors, however, possibly including those in the position of administering or reviewing the evaluations, may be displeased to learn that a conservative professor claimed that attending CPAC contributed to diversity at Iowa Law, and thus refuse to credit it. The many possible variations on this problem illustrate the threat of the vague definition.

According to the report, equity “means acknowledging and addressing structural inequalities—historic and current—which advantage some and disadvantage others.” This definition, however, does not clarify how professors are meant to acknowledge and address these disadvantages. This invites subjective determinations by administrators tasked with reviewing faculty evaluations, violating First Amendment and academic freedom protections guaranteed to faculty. The same can be said of the definition of inclusion. How is a faculty member to “creat[e] inclusive environments”? And how is a faculty member to know or assume community members’ subjective opinions—if they “feel respected” and “have a sense of belonging”—which the Action Committee laid out as a metric in determining whether a faculty member has created an inclusive environment?

FIRE is concerned that faculty members with dissenting or simply unpopular views will be at a marked disadvantage when being evaluated for tenure or other promotions. Without more, vague and amorphous terms like “inclusion” will necessarily signify different meanings and conceptual frameworks to different people—effectively leaving decisions regarding the satisfaction of these criteria to the discretion of the evaluator and thus inviting subjective and arbitrary decision-making. This discretion will all but inevitably be abused to punish views at odds with popular sentiment or the views of those tasked with evaluating a faculty member’s commitment to “diversity,” “inclusion,” and “equity.”

To illustrate our concern by analogy, we trust that your office would readily recognize the problem with rewarding faculty members who demonstrate “contributions to patriotism.” Just as with “diversity” and “inclusion,” evaluating broad, subjective terms like “patriotism” requires an inherently political, viewpoint-dependent calculation. Without a careful, viewpoint-neutral specification of what these evaluative criteria will mean in practice, faculty members with personal or professional beliefs and commitments that differ from those of their peers or evaluators will be penalized.

FIRE’s second concern centers on the recommendation that a question about diversity and inclusion be included in faculty evaluations. We understand that this question would be added to faculty members’ annual self-evaluation—which currently asks about teaching, scholarship, and service—that is submitted to the Dean as “part of each faculty member’s annual review.”⁵

We again recognize the good intentions behind this element of the proposal. We also recognize the tension between an individual faculty member’s right to make pedagogical decisions and the shared responsibility of an institution and its faculty to determine “who may teach, what may be taught, [and] how it shall be taught[.]” *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). But we caution that the proposal’s uncertain, subjective terms might redound to the detriment of faculty members’ academic freedom.

We understand that the committee has not proposed to require faculty to demonstrate certain actions in support of “diversity and inclusion” as an express condition of employment or promotion. But explicitly including this question in an annual evaluation—leaving room to reward such participation or penalize its absence—is a worrying step toward a similar result.

We write you today to ask that the University of Iowa College of Law consider the consequences of this proposal on those faculty whose views, pedagogical choices, or associations are unpopular or simply out-of-step with the majority on- or off-campus. To protect academic freedom, meet the university’s legal obligations, and to honor the individuality of the Iowa Law faculty, we urge you not to implement this recommended policy.

We appreciate your time and attention to our concerns.

Sincerely,



Sabrina Conza
Program Analyst, Individual Rights Defense Program

Cc: Adrien Wing, Associate Dean and Anti-Racism Action Committee Chair
Neda Barrett, Senior HR Director & Director of DEI and Global Engagement

⁵ *Id.*