



November 16, 2020

Belinda Higgs Hyppolite
Office of Diversity, Equity, and Inclusion
The University of Oklahoma
660 Parrington Oval
Norman, Oklahoma 73019

Sent via Electronic Mail (Belinda.Hyppolite@ou.edu)

Dear Dr. Hyppolite:

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 the state of freedom of expression and freedom of conscience at University of Oklahoma (OU) based on the university's required diversity trainings for students and faculty. Although a university may require members of its community to participate in trainings that communicate the university's policies and views on diversity and inclusion, OU's diversity training requires its participants to affirm to the university which responses to questions of social and political concern are correct according to the university's administration.

By requiring students and faculty to affirm that their personal views align with those of the university, without providing avenues for expressing dissenting viewpoints, OU violates the freedom of conscience of its community members and, by compelling certain speech, violates the university's obligations under the First Amendment. OU must make answering the diversity training's questions voluntary or make clear that the OU-designated answer is only the best response from OU's perspective.

I. OU's Diversity Training Requires Students, Faculty, and Staff to Agree with Concepts That May Violate Their Freedom of Conscience

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.

OU has implemented mandatory diversity trainings for all members of the OU community.¹

FIRE has been contacted by Elizabeth Owen, a graduate student and staff member at OU, who disagrees with a number of the answers she is required to select during three mandatory diversity trainings. As a graduate student and a staff member, Owen is required to take three separate trainings: Diversity Training for Faculty and Staff; Diversity, Equity and Inclusion for Students; and Managing Bias.² In this letter, we will primarily address concerns with the language in the “Diversity Training for Faculty and Staff” program.

The training for faculty and staff begins with a set of questions titled “Insights” that are said to “encourage reflection and introspection.” The description for this section says that there “are no right answers to these questions and your selections will be completely anonymous.” Owen is not required to select one specific answer to these questions and is provided options of “yes” and “no.”

Later in the Diversity Training for Faculty and Staff program, however, Owen is asked questions pertaining to given examples of situations, and she is required to answer the questions in the manner OU deems correct. If Owen selects the answer that she believes to be correct, but OU deems to be incorrect, she is required to repeat the question until she selects the university’s preferred answer.

For example, one of the questions in the training asked Owen to “try to help your frustrated coworker, Michael, realize that understanding difference is not a prerequisite for respecting it.”³ It then showed a video of the coworker—Michael—saying “I’m so tired of all this transgender stuff.” Next, it asked Owen to select a response, with the options being “Wow, that’s incredibly intolerant of you[.]” “You seem upset. What’s the matter?[,]” and “I agree. Political correctness can be so tiring.” When Owen selected the response that most closely fit her feelings about the situation, that political correctness can be tiring, the fictional Michael responded, “Right. Like who appointed the language police around here?” The training then told Owen that her opinion was not the “best choice” and automatically rewound the video, requiring Owen to select the answer that OU preferred—“You seem upset. What’s the matter?”—in order to move on.

Another example was a question about accommodations for an employee with fibromyalgia. The question states:⁴

Anya has fibromyalgia and feels drained and in immense pain by the end of a workday. She sneaks in a few breaks when she can, but

¹ OU Launches Mandatory Diversity Training for All Students, Faculty and Staff, UNIV. OF OKLA., Aug. 27, 2020, https://www.ou.edu/web/news_events/articles/news_2020/ou-launches-mandatory-diversity-training-for-all-students-faculty-and-staff.

² Based on our concern, FIRE issued a request under the Oklahoma Open Records Act seeking access to all diversity training materials on November 6, 2020. For your reference, a copy of that request is enclosed.

³ Diversity Training for Faculty and Staff, UNIV. OF OKLA. (on file with author).

⁴ *Id.*

her work responsibilities can keep her from getting the rest she needs, and sometimes her efficiency suffers.

What should Anya do?

Although Owen originally selected the response that most closely reflects what she would do were she Anya (“Nothing. She takes multiple breaks when she can to help with her disability, which is already more than her peers”), the training program required her to repeat the process, giving her an explanation about why OU did not select this as the proper answer. When Owen selected a second response that she believes would also be appropriate (“Talk to her supervisor about switching to part-time, or a less demanding position”), she was again required to repeat the process. Finally, when Owen selected the response that OU has marked as the correct choice (“Talk to her supervisor about what reasonable accommodations can be made for her”), she was permitted to move on.

On these and other questions, Owen disagreed with the mandatory OU-selected answer but was forced to affirm OU’s preferred response rather than the response that reflects her own conscience. Failing to do so would render her unable to complete the mandatory training and thereby subject her to adverse action by the university.

Although, according to Owen’s account, OU’s Diversity, Equity and Inclusion for Students training included subjective questions that concern matters of opinion that students must nevertheless answer “correctly” in order to complete the mandatory session, it also included a quiz at the end in which students could choose any answer that reflected their own conscience without repercussions. OU would benefit from remedying the remaining trainings, as it has displayed that it is able to take the correct—and legally required—approach of allowing students to speak on their own conscience without compelling certain speech.

II. The First Amendment Bars Educational Institutions from Compelling Speech

It has long been settled law that the First Amendment is binding on public colleges like OU. *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

The First Amendment’s protections are not limited to the right to speak but also extend to the right not to speak. The Supreme Court ruled against compelled speech and for the protection of freedom of conscience in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, the West Virginia legislature enacted a statute requiring a daily flag salute in public and private schools, to which several students—adherents of the Jehovah’s

Witnesses denomination—objected because they believed pledging to the flag was an act of idolatry.

In its decision, the *Barnette* Court did not object to the *teaching* of patriotism and national traditions, but rather that a student would be compelled “to declare a belief [and] . . . to utter what is not in his mind.” 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.” *Id.* Writing for the majority, Justice 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.

Id.

OU’s diversity trainings—however well-intended—require students, faculty, and staff to express the “correct” response and profess their agreement with the ideas that the university disseminates. While, as in *Barnette*, there would be no constitutional issue or burden on the freedom of conscience if the university’s administration simply shared its own views on the correct response to hypothetical situations, the requirement that students and faculty affirm the “correct” view is similar to the requirement in *Barnette* that students salute the flag.

This invasion of student, faculty, and staff freedom of conscience is easily remedied. In *Barnette*, this problem was solved when students were allowed to opt out of saluting the flag. OU can similarly allow students and faculty to opt out of the currently-required diversity trainings. Alternatively, OU could modify the training such that the training identifies the university’s preferred response to subjective situations but does not require students or faculty to express their agreement.⁵

Because OU’s questions are couched as “should” questions, as highlighted above, requiring members of the OU community to express their agreement with those answers amounts to compelling students and faculty to speak. That is, it requires university constituents “to speak when they otherwise would have refrained.”⁶ Absent an explanatory slide or clear statement that these answers reflect the *administration’s* beliefs about what should be done in these particular situations and that faculty and staff are free to disagree, OU effectively compels members of its community—like Owen—to agree with statements to which they object, violating their freedom of conscience.

⁵ FIRE’s Guide to First-Year Orientation and Thought Reform expands on our recommendations for diversity trainings and preventing compelled speech. See <https://www.thefire.org/research/publications/fire-guides/fires-guide-to-first-year-orientation-and-thought-reform-on-campus>.

⁶ *Washington Post v. McManus*, 19-1132 (4th Cir. 2019).

III. OU Cannot Retaliate Against Students, Faculty, and Staff for Their Diversity Training Responses

FIRE is also concerned about the possibility of the answers selected by faculty, students, and staff being recorded and saved for future retaliatory use. Although the questions in the “Insights” section of the Diversity Training for Faculty and Staff are labeled as having no right answers and being completely anonymous, the other trainings do not include a similar disclaimer.

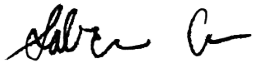
If OU maintains records of student or faculty members’ specific responses to the questions in their diversity trainings, that practice may invite abuse, even if they are not presently used for any improper purpose. For example, these answers could later be used to identify those with dissenting opinions or could become the subject of public records requests. In that event, a chilling effect could result, causing members of the OU community to feel less comfortable speaking honestly about their viewpoints. Accordingly, OU should clarify whether these questions are recorded and maintained.

IV. OU Must Amend its Trainings

FIRE calls on OU to commit to protecting the freedom of conscience of its students and faculty members by addressing our foregoing concerns.

We request receipt of a response to this letter no later than the close of business on Monday, November 30, 2020.

Sincerely,



Sabrina Conza
Program Analyst, Individual Rights Defense Program

Cc: Jill Irvine, Interim Senior Vice President and Provost
Jane N. Irungu, Associate Provost for Inclusive Faculty Excellence
Anil Gollahalli, University Vice President and General Counsel

Encl.

November 6, 2020

Open Records Office
The University of Oklahoma
339 W. Boyd St., RM 416
Norman, Oklahoma 73069

Sent via Electronic Mail (openrecords@ou.edu)

To whom it may concern,

This is a request for the following records pursuant to the Oklahoma Open Records Act (51 OK Stat § 51-24A.1 *et seq.*)

Records Requested:

Any document, video, or material used to train or inform students, faculty, or staff about diversity, equity, and inclusion. This request is limited to materials being used as of October 25, 2020.

Fee waiver request: This request is made on behalf of the Foundation for Individual Rights in Education, a nonprofit and nonpartisan organization that works to preserve civil liberties on college campuses. We request a waiver of any fees or costs associated with this request.

This request concerns a matter of public interest. Any materials that compel members of the University of Oklahoma community to express agreement with a particular position or viewpoint violate freedom of conscience and the First Amendment's freedom of speech guarantee. The public has an interest in ensuring that a public university—such as the University of Oklahoma—is not violating the Constitution or the rights of its faculty, staff, and students. The records are not sought for a commercial or personal interest, but rather for the purpose of providing the public with information concerning civil liberties in higher education.

Request for expedited processing: The records pertain to a matter of public importance, given the importance of the First Amendment rights implicated. Providing expedited production of the records will facilitate the public understanding of these matters. Any undue delay in production will undermine the purpose of the public records laws, which serve to allow public input and oversight of government affairs.

Request for Privilege Log: If any otherwise responsive documents are withheld on the basis that they are privileged or fall within a statutory exemption, please provide a privilege log setting forth (1) the subject matter of the document; (2) the person(s) who sent and received the document; (3) the date the document was created or sent; and (4) the basis on which it is the document is withheld.

Please note that this request does not seek a search of faculty or student email accounts or records.

These requests should in no way be construed to include a review or search of email accounts, websites, or other forms of data or document retention which are controlled by students, alumni, or faculty members, nor by governmental or advisory bodies controlled by the same. Any search should be limited to documents held by the administration and/or its staff members, including records created or maintained by persons acting in the capacity of administrators or staff members.

Finally, be advised that, except as expressly provided in the statute, any officer violating any of the provisions of the Oklahoma Open Records Act is guilty of a misdemeanor. 51 OK Stat § 51-22.

If I can be of assistance in interpreting or narrowing this request, please don't hesitate to ask.

Best,

Sabrina Conza

Program Analyst, Individual Rights Defense Program

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