



July 27, 2021

Jonathan Wickert  
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*Sent via U.S. Mail and Electronic Mail (provost@iastate.edu)*

Dear Provost Wickert:

FIRE<sup>1</sup> is concerned by Iowa State University's implementation of Iowa Code § 261H.7, enacted as part of House File 802. ISU issued guidance instructing faculty that changes to classes are necessary if "the class could reasonably be classified as 'mandatory.'"<sup>2</sup> This includes courses "required for a specific degree program" or classes which are not mandatory but for which there are "very limited alternative courses that do not incorporate" the prohibited concepts.<sup>3</sup> ISU warns, as an example, that a violation of the law is "likely" in an English course if the class is required, "even though discussion of the concepts may be considered germane."<sup>4</sup>

We appreciate that ISU is interested in its "absolute responsibility to comply with both the letter and spirit of the law."<sup>5</sup> However, the statute's plain language makes it abundantly clear that its restrictions do not reach academic discussion. Even if they did, the statute is subordinate to the First Amendment, to which ISU has an "absolute responsibility," and any interpretation applying it to classroom discussion is unconstitutional.

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<sup>1</sup> 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.

<sup>2</sup> IOWA STATE UNIV., *Iowa House File 802 – Requirements Related to Racism and Sexism Trainings*, <https://bit.ly/2Vd9uy4> (last visited July 13, 2021).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Daniel C. Vock, *GOP furor over 'critical race theory' hits college campuses*, IOWA CAPITAL DISPATCH, July 3, 2021, <https://iowacapitaldispatch.com/2021/07/03/gop-furor-over-critical-race-theory-hits-college-campuses>.

First, ISU’s interpretation is irreconcilable with the statute’s plain language. The law’s restriction on “training” was intended to limit administrative trainings required as a condition of enrolling in classes, not as a restriction on courses taken for academic credit. This is abundantly clear not only from the plain meaning of “training,” but the statute’s five clauses emphasizing its limited scope. These include exemptions for “the use of curriculum” and for the “discuss[ion of] specific defined concepts as part of a larger course of academic instruction.”<sup>6</sup> Moreover, the statute expressly provides that it is not intended to “[i]nhibit or violate the [F]irst [A]mendment rights of students or faculty, or undermine a public institution of higher education’s duty to protect to the fullest degree intellectual freedom and free expression,” and that the “intellectual vitality of students and faculty shall not be infringed under this section.”<sup>7</sup>

The statute’s plain meaning is why the University of Iowa correctly determined that the legislation “would have zero impact within the classroom as academic instruction is specifically exempted. . . .”<sup>8</sup> It is also why one member of the legislature explained that the law “just affects diversity training” in higher education, and only reaches “what they’re even allowed to teach and curriculum” in K-12 classes.<sup>9</sup>

Second, even if a strained reading of the statute could reach academic discussion, its application to academic discussion in higher education is unconstitutional. The First Amendment broadly protects the academic freedom of faculty members to discuss matters “germane to the classroom subject matter,” even if it causes “discomfort” or offends activists outside of the classroom.<sup>10</sup> Apart from faculty members’ expressive rights, the First Amendment also protects the rights of students to receive information unfettered by a “pall of orthodoxy.”<sup>11</sup> This is because “the classroom is peculiarly the ‘marketplace of ideas,’” through which students and faculty engage in the “robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.”<sup>12</sup>

Application to classroom discussion would unconstitutionally chill pedagogically relevant speech. Among the statute’s prohibited “concepts” are arguments that “the United States of America and the state of Iowa are fundamentally or systemically racist or sexist.”<sup>13</sup> This chills—for example—the ability of history classes to debate the legacy of the Constitution’s framework.<sup>14</sup> The statute’s limit on arguments that “meritocracy . . . [is] racist or sexist”<sup>15</sup> likewise bars faculty in a sociology course from discussing whether social constructions of

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<sup>6</sup> Iowa Code § 261H.7(2), (4)(c).

<sup>7</sup> *Id.*

<sup>8</sup> UNIV. OF IOWA, *House File (HF) 802 Information*, <https://bit.ly/3r9Mpbu>.

<sup>9</sup> IOWA LEGIS., HOUSE VIDEO (2021-03-16) at 2:51:30 PM (Rep. Wolfe comments), <https://bit.ly/2V6YkLo>.

<sup>10</sup> *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 675–683 (6th Cir. 2001).

<sup>11</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Bd. of Educ. v. Pico*, 457 U.S. 853, 861 (1982) (First Amendment limits the “power of the State to control even the curriculum and classroom”), 457 U.S. 853, 907 (Rehnquist, J., dissenting) (“cheerfully conced[ing] that the First Amendment limits the ability of primary and secondary schools to limit materials if “exercised in a narrowly partisan or political manner”).

<sup>12</sup> *Keyishian*, 385 U.S. at 603 (cleaned up).

<sup>13</sup> Iowa Code § 261H.7(1)(c)(2).

<sup>14</sup> *See, e.g.*, Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 410 (2013) (discussing “how Constitutional arrangements protected slavery”).

<sup>15</sup> Iowa Code § 261H.7(1)(c)(9).

“merit” favor credentials disproportionately obtained by white men or the wealthy, reinforcing a gatekeeping effect.<sup>16</sup> So, too, does its limit on assigning “privileges” to a race<sup>17</sup> chill the discussion of the concept of “white privilege.”

While some may find these and other ideas proscribed by HF802 to be erroneous, offensive, or part of a “dangerous ideology,”<sup>18</sup> they are protected by the First Amendment, under which “there is no such thing as a false idea.”<sup>19</sup> Accordingly, ISU must apply “every reasonable construction” of the statute to avoid unconstitutional application.<sup>20</sup> This would avoid not only collision with the Constitution, but with other conflicts in Iowa law and university policy. As both Iowa’s legislature and Board of Regents have recognized, it “is not the proper role” of Iowa’s public universities “to shield individuals from” protected speech, “which may include ideas and opinions the individual finds unwelcome, disagreeable, or even offensive,” and universities must “ensure the fullest degree of intellectual freedom and free expression[.]”<sup>21</sup>

The chilling effect of ISU’s unconstitutional implementation cannot be understated. By declaring that the statute reaches the classroom, and advising that certain ways faculty might teach and discuss issues of race might violate the law, even tenured faculty will have reason to self-censor: violations of “laws specifically applicable to state employees” or of other ISU “principles or policies,” are grounds for disciplinary action against faculty, tenured or not.<sup>22</sup>

We call on ISU to rescind its implementation of Iowa Code § 261H.7 and clarify that students and faculty can speak freely about race and gender both in and out of the classroom. If ISU believes the law to be vague, we call on the Board of Regents to take steps to ascertain or limit its scope, including by obtaining a formal Attorney General Opinion.<sup>23</sup>

We request receipt of a response to this letter by August 10, 2021. Be advised that FIRE is committed to using all of the resources at its disposal to see this matter to a just conclusion.

Sincerely,



Adam Steinbaugh  
Director, Individual Rights Defense Program

Cc: Wendy Wintersteen, President, Iowa State University  
Michael Richards, President, Board of Regents, State of Iowa

<sup>16</sup> See generally KHIARA BRIDGES, *CRITICAL RACE THEORY: A PRIMER (CONCEPTS AND INSIGHTS)* 77–80 (2018) (describing critical scholars’ debates about merit and credentials within law schools).

<sup>17</sup> Iowa Code § 261H.7(1)(b).

<sup>18</sup> See, e.g., Christopher F. Rufo, *Battle Over Critical Race Theory*, WALL ST. J., June 27, 2021, <https://www.wsj.com/articles/battle-over-critical-race-theory-11624810791>.

<sup>19</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 339, 349 (1974).

<sup>20</sup> *Hooper v. People*, 155 U.S. 648, 657 (1895).

<sup>21</sup> Iowa Code § 261H.2(1), (2)(a); BD. OF REGENTS, STATE OF IOWA, BOARD POLICY MANUAL § 4.2 Freedom of Expression, available at <https://bit.ly/3iK5zRH>.

<sup>22</sup> IOWA STATE UNIV., FACULTY HANDBOOK §§ 7.2.2.5, 7.2.2.6 (Jan. 2021), available at <https://bit.ly/3xG2icn>.

<sup>23</sup> State officers and members of the General Assembly may request such opinions. 61 Iowa Admin. Code § 1.5.