

August 6, 2021

Adam B. Steinbaugh
Foundation for Individual Rights in Education
510 Walnut Street
Suite 1250
Philadelphia, PA 19106

Re: FIRE July 27, 2021 Letter

Dear Mr. Steinbaugh:

Iowa State University is in receipt of FIRE's July 27, 2021 correspondence regarding the newly enacted State of Iowa legislation, House File 802 and the "Frequently Asked Questions" ("FAQ") document that was provided to campus regarding this new law. It appears by your letter and subsequent media activity that you misconstrue and misunderstand both the purpose and content of the FAQ. As referenced in the original FAQ, as we have received questions and feedback from our campus community about the law and the FAQ, we have made, and will continue to make, revisions to the FAQ. Attached is the most recent version.

Protecting the First Amendment and Academic Freedom rights of its faculty, staff, and students is a core value of Iowa State University. First Amendment and Academic Freedom rights and responsibilities are clearly codified in existing university policy. The university's efforts to provide information to the campus community about the compliance risks associated with HF-802 does nothing to diminish the university's commitment to protecting the constitutional rights of its students, faculty, and/or staff. At the same time, as a public institution, Iowa State is also obligated to comply with the laws of the State of Iowa. As such, the university has a responsibility to exert a good faith effort to comply with the validly enacted laws of the State of Iowa.

As an initial matter, FIRE's July 27 letter identifies the university's FAQ document as "issued guidance" that "necessitates" ISU faculty to make changes to their academic courses. This is incorrect. Rather, the FAQ is a resource to be used by the campus community in evaluating the compliance risks associated with various programs that take place on campus. The FAQ explains the key provisions of the new law and provides a framework for faculty and staff to use to evaluate how the law may impact their individual responsibilities on campus. As is noted in

the FAQ, it is anticipated that the vast majority of academic courses will be unaffected by the new law. In addition to providing the FAQ, administrative professionals from the Office of the Senior Vice President and Provost and the Office of University Counsel have had meetings with Deans, faculty senate leadership, department chairs, and individual faculty members to discuss the issues raised by HF-802 and to answer specific questions to help facilitate the analysis contemplated by the FAQ. To date, no faculty member has been advised to make any alterations to their planned academic programming. Identifying and discussing unanswered questions and practical implications regarding HF-802, and encouraging faculty members to evaluate the compliance risk associated with their courses is not unconstitutional or a violation of Academic Freedom.

Moreover, your letter surprisingly fails to acknowledge the complexity of the relationship between the provisions of the new law, principles of Academic Freedom, and other related implications of mandatory courses containing the specifically defined topics. FIRE has written extensively about the critical legal questions being raised by the Supreme Court's decision in *Garcetti* and the current split in the courts of appeal regarding *Garcetti*'s impact on Academic Freedom.¹ Your letter seems to disregard how these issues may impact the relationship between principles of Academic Freedom and the compliance risk of HF-802.

As noted in the FAQ, HF-802 expressly states that the university cannot “*teach*, advocate, act upon, or promote” specific defined concepts in “any mandatory staff or student training.” But the important term “mandatory staff or student training” is open to interpretation. Similarly, HF-802 allows for the “discussion of the specific defined concepts as part of a larger course of academic instruction” and allows for the use of “curriculum that teaches the topics of sexism, slavery, racial oppression, racial segregation, or racial discrimination.” But again, the important terms “course”, “class”, and “academic instruction” are not specifically defined. Accordingly, the FAQ discusses the possibility that a class could be interpreted as a mandatory student training if the specifically defined concepts were “taught, advocated, acted upon, or promoted” in a class where those concepts were not germane to the general subject matter and where the class was required of all students regardless of their chosen field of study. Under these circumstances, there exists some risk that a program described as an academic course could nonetheless be reasonably classified as a mandatory student training, and therefore draw scrutiny under HF-802.

While your letter recognizes that faculty Academic Freedom in the classroom is bound by what is germane to the curriculum of the academic program, it ignores the impact of that limitation as it relates to the analysis of HF-802. If a faculty member were to present the HF-802 specifically identified concepts in a course where those concepts were not germane to the overall subject matter of the academic program, there is a significant risk that Academic Freedom would not apply, and the material could be construed more as a training than as being taught as part of a “larger course of academic instruction.” If this occurs in a course that is arguably mandatory,

¹ See e.g., <https://www.thefire.org/in-meriwether-v-hartop-the-sixth-circuit-recognizes-an-academic-exception-to-restrictions-on-the-first-amendment-rights-of-public-employees/>

there is a greater risk that the presentation would draw scrutiny under HF-802. On the other hand, as specifically noted in the FAQ, academic instruction of the defined concepts where those concepts are germane to subject matter of the course, pose little or no risk of drawing scrutiny under HF-802.²

The risk associated with the relationship between HF-802 and Academic Freedom is similar to the complexities noted in FIRE's *Guide to First-Year Orientation and Thought Reform on Campus* regarding mandatory diversity training.³ In this context, FIRE recognizes that "State colleges and universities cannot justify any and all curricular decisions by invoking their educational expertise. . . ." Similarly, as your organization notes, "when a state university forces people to hear its message by imposing it on a captive audience . . . the requirement to sit and listen to a political and social orthodoxy itself raises constitutional concerns." Even in the absence of HF-802, simply recasting mandatory diversity training as an "academic course" may raise compliance concerns that are a proper university consideration. Again, your July 27 correspondence seems to ignore and disregard FIRE's previous statements on these related subjects.

As recognized in the FAQ, the issues created by the complexities noted above likely apply to a very narrow set of circumstances. There is nothing improper or unconstitutional, however, with arming faculty members with the information needed to evaluate whether those complexities apply in their situation and providing them a framework to assess the risk that their activity might draw scrutiny under HF-802.

Iowa State University remains committed to its robust diversity, equity and inclusion efforts while simultaneously protecting the First Amendment and Academic Freedom rights of our community members. As always, the university values FIRE's timely opinions and constructive discussions on these topics.

Very truly yours,



Michael E. Norton
University Counsel

² The examples that you cite in your letter such as "the ability of history classes to debate the legacy of the Constitution's framework" or discussing meritocracy in a sociology class, fall squarely in this category as is clearly stated in the FAQ.

³ See <https://www.thefire.org/research/publications/fire-guides/fires-guide-to-first-year-orientation-and-thought-reform-on-campus/fires-guide-to-first-year-orientation-and-thought-reform-on-campus-full-text/#Contents4>.

Frequently Asked Questions

Iowa House File 802 – Requirements Related to Racism and Sexism Trainings at Public Postsecondary Institutions

August 5, 2021

This FAQ document is based on the university's current understanding of Iowa House File 802 as informed by the Act itself as well as its legislative history. As additional information becomes available, and as feedback and questions are received, this document may be updated periodically, and the most current version supersedes previous guidance.

Q. What is Iowa House File 802?

A. On June 8, 2021, Governor Reynolds signed into law House File 802, an Act establishing specific requirements related to racism and sexism trainings conducted at, and diversity and inclusion efforts by, state governmental entities, including Iowa's public postsecondary educational institutions.

Generally, the Act prohibits the state's public universities, including Iowa State, from conducting **mandatory** staff or student trainings that teach, advocate, act upon, or promote specific prohibited defined concepts. The prohibited specific defined concepts are defined in the Act and are explained within this FAQ.

The Act also "prohibits" the regent universities and the universities' employees from discriminating against students and employees based upon political ideology or any other characteristic protected under applicable law (see [ISU Non-Discrimination Policy](#)), and calls for the universities' diversity and inclusion efforts to "discourage" students from doing so.

The following sections provide guidance regarding the impact of House File 802 on staff and student trainings, and on academic courses.

Applicability to Training Programs

Q. What Types of Trainings and Programs Does the Act Prohibit?

A. The Act applies to all "**mandatory staff or student trainings**" at the university, including mandatory trainings conducted by university staff and contractors hired by the university. The Act does not apply to voluntary programs and activities that staff and students may elect to attend or not to attend.

If a staff or student training is mandatory, then the university is prohibited from "teaching, advocating, acting upon, or promoting specific defined concepts." The Act defines the prohibited "**specific defined concepts**" to include the notions that:

- 1) One race or sex is inherently superior to another race or sex;
- 2) the United States of America and the State of Iowa are fundamentally or systemically racist or sexist;

- 3) an individual, solely because of the individual's race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- 4) an individual should be discriminated against or receive adverse treatment solely or partly because of the individual's race or sex;
- 5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- 6) an individual's moral character is necessarily determined by the individual's race or sex;
- 7) an individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- 8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of that individual's race or sex;
- 9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race;
- 10) any other form of "race or sex scapegoating" or any other form of "race or sex stereotyping."

The Act explains that prohibited "race or sex scapegoating" includes "assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex, or claiming that, consciously or unconsciously, and by virtue of persons' race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others."

The act explains that prohibited "race or sex stereotyping" includes "ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of the individual's race or sex."

Q. Does the Act Require the University to Change its Commitment to Diversity, Equity and Inclusion?

A. Iowa State University will continue its commitment to diversity, equity, and inclusion, including efforts to provide trainings and courses of study that increase understanding of these critical ideas. The Act requires the university to review its mandatory trainings on these topics and make any necessary required adjustments to ensure compliance. The university can remain in compliance with the Act, while maintaining the essential principles and values of its ongoing diversity, equity and inclusion work.

Q. Does the Act Prohibit All Diversity and Inclusion Trainings and Educational Programs?

A. The Act does not affect, or minimally affects, the majority of diversity, equity, and inclusion related programs and activities, and educational courses, offered by the university. The Act itself makes clear that public institutions of higher education *may continue*:

- "training that fosters a workplace and learning environment that is respectful of all employees and students";
- "promoting racial, cultural, ethnic, intellectual, or academic diversity or inclusiveness";

- “the use of curriculum that teaches the topics of sexism, slavery, racial oppression, racial segregation, or racial discrimination, including topics relating to the enactment and enforcement of laws resulting in sexism, racial oppression, segregation, and discrimination”.
- “discussing specific defined concepts as part of a larger course of academic instruction”;

In addition, the Act does not prohibit a university employee or contractor who provides mandatory training from responding to questions regarding specific defined concepts raised by participants in the training.

Finally, nothing in the Act may be construed so as to violate the First Amendment rights of members of the university community.

Q. Is the University Asking All Scheduled Diversity, Equity and Inclusion Trainings to Stop?

A. Scheduled diversity training programs should continue. The compliance plan being implemented by the university will allow for any necessary adjustments to mandatory trainings, while continuing our efforts to promote a diverse, inclusive and welcoming campus climate.

Q. How Does the Act Define “Mandatory Staff or Student Training” and How Do I Know If The Act Applies To My Program or Event?

A. The Act does not define or provide definitive examples of what is or is not a “mandatory staff or student training.”

However, based on the full context of the Act and legislative history, the Office of University Counsel is currently advising that departments/units clearly differentiate between: (1) official mandatory trainings for staff and/or students, and (2) all other events, programs, sessions, lectures, speakers, discussions, etc., that are open to employees or students, but which are not required. At official mandatory trainings, the specific defined concepts are prohibited.

The following actions can be taken to differentiate between “mandatory staff or student training” and other programming:

- In any announcement or marketing of a program or event, reserve the words “training”, “workplace training”, “student training” or “required” and “mandatory” for official university or department/unit trainings. All other offerings should be described as “educational” or “learning” and as “discussions”, “symposiums”, “opportunities”, etc.
- Clearly indicate and promote whether a program is optional and voluntary. This may be helpful in distinguishing the program from a mandatory staff or student training.
- Pay attention to wording. In the workplace setting, “urging” or even “encouraging” attendance could be construed by some as more indicative of a mandatory training, where their employment terms and conditions would be impacted by their attendance. Instead of “all staff are encouraged to attend”, consider a more general statement such as “this program is open to all.”

Questions or concerns about whether a training or program could reasonably be considered “mandatory” can be directed to the Office of University Counsel.

Q. What Steps Can I Take Right Now to Assess My Trainings and Programs?

A. Iowa State University remains firmly committed to the principles of diversity and inclusion, its Principles of Community, freedom of expression, and academic freedom. The university will continue to uphold these essential principles and values, while undertaking a good faith effort to comply with the Act. With this commitment in mind, the following action items can be undertaken now by departments and units:

- Evaluate the language used to describe your programs and events. As detailed above, if your program/event is not an official mandatory training, do not describe it as such.
- Develop a plan to review any current mandatory staff or student trainings to identify potentially prohibited topics (see the “[specific defined concepts](#)” identified above).

If you have more specific questions about the application of the Act, contact the Office of University Counsel at universitycounsel@iastate.edu.

Applicability to Academic Courses

Because House File 802 references a relatively narrow set of specific defined concepts and the specific defined concepts are potentially germane to many courses of study, the university expects that the vast majority of academic programs and courses will and should continue as they have in the past. Iowa State University remains firmly committed to the principles of diversity, equity, and inclusion, our Principles of Community, freedom of expression, and academic freedom.

Yet, because the Act is new and still being interpreted, it is still prudent to be mindful of the Act. Faculty who do touch upon the specific defined concepts in their courses are encouraged to consider the two key factors of student choice, germaneness, and open discussion, as described below, when assessing their courses or programs.

Q. What Factors Should I Consider to Mitigate My Risk Under the Act?

A. Instructors should consider the factors identified above to assess courses as follows:

- Is the course or course session required/mandatory? Elective courses are least likely to draw scrutiny under the Act because students voluntarily selected to participate in them with knowledge and notice of the subject matter. A mandatory course or course session that teaches the specific defined concepts may draw scrutiny.
- If specific defined concepts are taught, is the discussion of these concepts germane to the overall subject matter and learning objectives of the course? If the concepts are not germane to the course, the risk of drawing scrutiny under the Act increases and the university’s academic freedom and scholarly discourse and germaneness policy is implicated.
- If discussion of specific defined concepts is germane, are these concepts presented, examined and studied in a way that promotes open discussion, including the opportunity for students to advance and freely express alternative viewpoints? If the specific defined concepts are germane to the subject matter of the course and are examined in an open way that allows for student academic freedom, the Act and the university’s policy should not apply.

Q. I Teach a Course that Examines and Discusses One or More of the “Specific Defined Concepts.” Do I Need to Change My Course?

A. The Act should not have any impact on courses already in compliance with university policy relating to academic freedom (See FH 7.2.1.2 and 7.1.1) because our policy already requires that material and concepts presented in a course must be relevant to the scholarly subject matter (i.e., germane), and presented by appropriate means.

The possibility of a course drawing scrutiny under the Act can be eliminated by providing students with choice, ensuring that the teaching of specific defined concepts is germane to the subject matter, and ensuring that students are able to freely express their viewpoints. Key factors to consider:

Choice. The primary focus of the Act is prohibiting the specific defined concepts in mandatory staff or student “trainings.” While the Act on its face distinguishes trainings from academic instruction, there is a risk that an academic course or course session could be seen as a prohibited training, if the course or session functions like a mandatory training.

Germaneness. The Act specifically permits discussion of the specific defined concepts in academic courses, when they are germane to the subject matter of the course as required under University policy. Specifically, the Act does not prohibit:

- Discussing specific defined concepts as part of a larger course of academic instruction.
- The use of curriculum that teaches the topics of sexism, slavery, racial oppression, racial segregation, or racial discrimination, including topics relating to the enactment and enforcement of laws resulting in sexism, racial oppression, segregation, and discrimination.

Free expression. Instructors should take care to promote open discussion, including the opportunity for students to disagree and to advance alternative viewpoints, consistent with the university’s commitment to student free expression, and its required Free Expression Syllabus Statement:

Iowa State University supports and upholds the First Amendment protection of freedom of speech and the principle of academic freedom in order to foster a learning environment where open inquiry and the vigorous debate of a diversity of ideas are encouraged. Students will not be penalized for the content or viewpoints of their speech as long as student expression in a class context is germane to the subject matter of the class and conveyed in an appropriate manner.

As an example, a requirement that every student, regardless of major or area of concentration, participate in a class session that teaches the specific defined concepts could draw scrutiny under the Act if the specific defined concepts are not germane to the scholarly subject matter. In a situation such as this, the class session may be viewed as functioning like a mandatory training, because the session is required and the specific defined concepts are not germane.

If you have specific questions about the application of the Act, contact the Office of the Senior Vice President and Provost at provost@iastate.edu, or the Office of University Counsel at universitycounsel@iastate.edu.