



FIRE

Foundation for Individual
Rights and Expression

September 15, 2022

Donde Plowman
Office of the Chancellor
The University of Tennessee, Knoxville
800 Andy Holt Tower
Knoxville, Tennessee 37996-0184

Sent via U.S. Mail and Electronic Mail (chancellor@utk.edu)

Dear Chancellor Plowman:

FIRE¹ appreciates that the University of Tennessee, Knoxville, is one of the few institutions in the country whose student speech policies earn a “green light” rating from our organization.² However, we are concerned by various components of the Diversity Action Plans recently developed by UTK colleges and campus units that threaten students’ and faculty members’ expressive freedoms.

We understand universities have a legitimate interest in promoting an inclusive and enriching campus environment, including for students or faculty from backgrounds traditionally underrepresented in academia. But in doing so, UTK must not exceed the boundaries established by the First Amendment and principles of academic freedom. Many components of the Diversity Action Plans risk doing exactly that by compelling faculty to affirm prescribed ideological views and promote them in their courses, and by establishing mechanisms to investigate and punish students for protected speech.

FIRE calls on UTK to ensure the constitutionally suspect components of the Diversity Action Plans are eliminated, or implemented in a manner respecting students’ and faculty members’ expressive rights.

¹ As you may recall from past correspondence, the Foundation for Individual Rights and Expression (FIRE), is a nonpartisan nonprofit dedicated to defending freedom of speech, expression, and conscience, and other individual rights on campus.

² *School Spotlight: University of Tennessee – Knoxville*, FIRE, <https://www.thefire.org/schools/university-of-tennessee-knoxville> (last visited Sept. 15, 2022).

I. UTK Colleges and Campus Units Create Diversity Action Plans

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.

On July 7, 2020, you issued a statement to the university community describing UTK's efforts as part of "a sustained push to advance diversity, equity, and inclusion."³ The statement said campus units were developing Diversity Action Plans in line with this objective. The three-year plans were to address several goals and priorities, including to "[c]reate and sustain a welcoming, supportive and inclusive campus climate," and "[e]nsure that curricular requirements include significant intercultural perspectives."⁴ They were also to "include objectives, actions to meet each objective, metrics to measure progress, a timeline for completing actions, and a list of responsible parties."⁵

In November 2021, the National Association for Scholars (NAS) submitted a public records request to UTK for a copy of each Diversity Action Plan that was submitted and approved. NAS subsequently posted the documents it received.⁶

While most of the proposed objectives and actions are unobjectionable from a free speech and academic freedom perspective, there are still many that do raise concerns on that front, including (verbatim):

- College of Arts & Sciences
 - Develop a mechanism for reporting bias incidents or other climate and civility issues locally.
- College of Law
 - Consider including in the bylaws competence in Diversity & Inclusion as part of the expectations for faculty rank and requirements for tenure and promotion of faculty.
 - Consider requesting applicants/candidates to complete a diversity statement during the application process to explain how the candidate contributes to the COL Diverstiy [sic] & Inclusion Mission.
 - Require faculty to report on individual efforts to address diversity, equity, and inclusion in teaching, scholarship and/or service as part of faculty performance evaluations.

³ *Equity and Inclusion: What We're Doing*, UNIV. OF TENN., KNOXVILLE OFF. OF THE CHANCELLOR, <https://chancellor.utk.edu/2020/07/07/equity-and-inclusion-what-were-doing>. [<https://perma.cc/4UUX-2SMA>].

⁴ *Diversity Action Plans*, UNIV. OF TENN., KNOXVILLE DIVERSITY AND ENGAGEMENT, <https://diversity.utk.edu/diversity-action-plan> [<https://perma.cc/BSS8-YX3X>].

⁵ *Id.*

⁶ The documents are available here: <https://www.nas.org/reports/the-anatomy-of-a-diversity-equity-and-inclusion-takeover>. They also formed the basis for an NAS report. *See The Anatomy of a Diversity Equity and Inclusion Takeover*, NAT'L ASS'N OF SCHOLARS, <https://www.nas.org/reports/the-anatomy-of-a-diversity-equity-and-inclusion-takeover> [<https://perma.cc/TWE3-9PHQ>].

- Assess curriculum (including individual courses) for the inclusion of intercultural perspectives and issues related to social justice, equity, and the elimination of bias in teaching legal doctrine, policy, practice, and theory.
- Support faculty to better integrate intercultural perspectives in the classroom and in pedagogical methods to foster equity and inclusion [in part by] [p]rovid[ing] students the opportunity to evaluate courses and faculty members on the effectiveness of their efforts.
- College of Communication and Information
 - Require DEI Statement from all applicants.
 - Require inclusion of CCI's Diversity Statement on course syllabi.
 - Mandate participation in providing DEI and cultural competency content in courses.
- College of Social Work
 - Develop process for systematic review of course syllabi to ensure continuity of intercultural perspectives in all CSW programs.
 - Review and revise course syllabi to ensure inclusive teaching content.
 - Review Retention, Promotion and, Tenure procedures for equity and inclusion.
- College of Architecture + Design
 - In job announcement, require applicants to submit a value statement on diversity, equity and inclusion.
 - Assessment of DEI included in faculty teaching reviews and staff evaluations.
 - Establish a method of accountability through the inclusion of a Diversity Sector in the Course Evaluations for foundations and designated upper level courses.
 - Equip CoAD faculty to have appropriate conversations about inclusive teaching by engaging the Teaching & Learning Innovation; all faculty to review and incorporate content and recommended behaviors, where appropriate, from the Inclusive Teaching teaching resources.
- College of Education, Health, and Human Sciences
 - Require education/professional development in departmental working groups; individual faculty work through the Inclusive Teaching Toolbox; individual syllabus review. All department instructors develop and demonstrate DEI skill sets and dispositions in C&I [curriculum and instruction].
 - Require education/professional development in departmental working groups; use Inclusive Teaching Toolbox and feedback from syllabus review to revise one course.
 - Departmental instructors will incorporate content related to diversity, equity, and inclusion to prepare students for work in a global community.
 - Include a domain on DEI perspectives and dispositions in teaching evaluations/student evaluations, and annual review (professional development goal).
- Tickle College of Engineering
 - Require job search candidates to include diversity and inclusion statement with application.
 - Explicit consideration of DEI work in annual performance reviews and promotion and tenure recommendations.
- College of Veterinary Medicine
 - Include a DEI statement on every syllabus and Canvas website.

- College of Nursing
 - Create a system for internal (CON) reporting of DEI complaints and processes to follow to investigate and settle to [*sic*] issue.

The objectives fall into roughly five categories: (1) bias reporting systems; (2) DEI statement requirements for faculty seeking appointment, tenure, or promotion, or who otherwise are undergoing evaluation; (3) mandatory syllabus statements; (4) DEI-based revision of course content; and (5) DEI-based student evaluations. The extent to which these various objectives have been implemented is unclear.

II. The First Amendment Prohibits UTK from Requiring Faculty to Promote or Demonstrate Commitment to Prescribed Ideological Views

Several of the planned objectives may violate the First Amendment rights and academic freedom of prospective and current faculty by requiring them to embrace specific beliefs on disputed political and ideological issues and to embed those perspectives in their academic activities. It has long been settled that the First Amendment binds public universities like UTK.⁷ Accordingly, decisions and actions of a public university—including the maintenance of policies implicating student and faculty expression⁸—must comply with the First Amendment.

When government entities wish to “disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”⁹ The Supreme Court has repeatedly “invalidat[ed] or recogniz[ed] as invalid government action that inhibits belief and association through the conditioning of public employment on political faith,”¹⁰ including a government employer’s decision not to hire a job candidate based on the candidate’s political associations or beliefs.¹¹ These principles apply with particular force at public institutions of higher education, as free speech is the “lifeblood of academic freedom.”¹² Universities “occupy a special niche in our

⁷ *Healy v. James*, 408 U.S. 169, 180 (1972).

⁸ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

⁹ *Wooley v. Maryland*, 430 U.S. 705, 717 (1977); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (government “may not compel affirmance of a belief with which the speaker disagrees”).

¹⁰ *Elrod v. Burns*, 427 U.S. 347, 357 (1976).

¹¹ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76–77 (1990); *see also Wagner v. Jones*, 664 F.3d 259, 269 (8th Cir. 2011) (reversing trial court’s dismissal of plaintiff’s lawsuit alleging she was denied a position as a legal research and writing instructor at the University of Iowa College of Law because of her political views, as “[t]he state can neither directly nor indirectly interfere with an employee’s or potential employee’s rights to association and belief”).

¹² *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008); *see also Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 836 (1995) (“For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”).

constitutional tradition,”¹³ and academic freedom is an area “in which government should be extremely reticent to tread.”¹⁴

Tennessee’s Campus Free Speech Protection Act further enshrines these principles in state law, expressing the general assembly’s intent that “public institutions of higher education, including their faculty, shall not require students or other faculty to adopt or to indicate their adherence to beliefs or orthodoxies on any particular political, philosophical, religious, social, or other such subject.”¹⁵ The act affirms “faculty are free in the classroom to discuss subjects within areas of their competence” and “no faculty will face adverse employment action for classroom speech, unless it is not reasonably germane to the subject matter of the class as broadly construed, and comprises a substantial portion of classroom instruction.”¹⁶

Requiring prospective or current faculty to submit DEI statements—or to otherwise demonstrate commitment to DEI—as part of hiring, evaluation, promotion, or tenure review threatens faculty members’ scholarly autonomy and right to dissent from the prevailing consensus on issues of public or academic concern without suffering diminished career prospects. FIRE would not object to UTK colleges simply recognizing applicants’ and faculty members’ voluntarily chosen and relevant teaching, research, and service activities that may be characterized as DEI contributions. But UTK must not impose any mandate that coerces faculty to enthusiastically embrace UTK’s perspectives on DEI-related issues or to substantially reorient their teaching or scholarly pursuits to conform with UTK’s ideological aims.

FIRE has seen how vague or ideologically motivated DEI statement policies too easily function as litmus tests, penalizing dissenting faculty or selectively rewarding faculty who promote favored views in their teaching or research.¹⁷ We are concerned UTK’s policies will similarly establish a means to discriminate against faculty who disagree with—or whose track record reflects insufficient dedication to—UTK’s positions on matters of public and academic concern.¹⁸

¹³ *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

¹⁴ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.”) (cleaned up).

¹⁵ Tenn. Code § 49-7-2403(c).

¹⁶ *Id.* § 49-7-2405(a)(10).

¹⁷ *See FIRE Statement on the Use of Diversity, Equity, and Inclusion Criteria in Faculty Hiring and Evaluation*, FIRE (June 2, 2022), <https://www.thefire.org/issues/fire-statement-on-the-use-of-diversity-equity-and-inclusion-criteria-in-faculty-hiring-and-evaluation>.

¹⁸ The concept of “equity,” for example, currently drives significant debate and controversy. *See, e.g.*, Dan Morenoff, *We Must Choose ‘Equality,’ Not ‘Equity’*, NEWSWEEK (Apr. 25, 2022), <https://www.newsweek.com/we-must-choose-equality-not-equity-opinion-1699847> (arguing that equity wrongly requires “active discrimination against those who’d do too well under equal treatment” and defines fairness as “whatever it takes to produce matching results for disparate groups”); Steven Mintz, *How to Stand Up for Equity in Higher Education*, INSIDE HIGHER ED (Apr. 20, 2021), <https://www.insidehighered.com/blogs/higher-ed-gamma/how-stand-equity-higher-education> (arguing for

It is also troubling that some UTK colleges seem poised to require faculty to revise course content to reflect certain DEI perspectives. FIRE recognizes colleges' broad discretion to make high-level curricular decisions, but we caution against undue interference with individual faculty members' academic freedom to use their pedagogical judgment and expertise to decide how best to approach their subjects and to communicate ideas to students. UTK must not require faculty to endorse or promote specific viewpoints in the classroom for the purpose of advancing certain social or ideological ends.

Our concern here extends to potential indirect means of penalizing faculty who do not affirm certain viewpoints in class, including student evaluations that rate faculty on categories such as "DEI perspectives and dispositions." As with DEI statement requirements, this vague reference to an ideologically fraught issue opens the door to discrimination against faculty whose course content does not reflect students' or the college's DEI-related views. To the contrary, academic freedom gives faculty discretion to determine the content of their teaching so long as it is germane to the subject matter of the course.

UTK likewise may not compel faculty to express specific, university-sanctioned views about DEI in their syllabi. Some faculty members may not wholly agree with their college's perspectives on this issue. Other faculty members may broadly embrace those values but prefer not to include a syllabus statement for any number of reasons, whether because they believe the statements are performative or counterproductive, they prefer to focus on other issues or information in their syllabi, they believe the statement's compelled nature saps it of authenticity, or they otherwise wish to be free from compulsion to demonstrate allegiance to a designated set of values or academic priorities.

To further illustrate our concern by analogy, we trust UTK would readily recognize the problem with evaluating faculty or requiring syllabus statements based on affirmation of the importance of "patriotism," "individualism," or "racial color-blindness," or on involvement in activities or organizations promoting these kinds of contested ideas. As with DEI, these criteria entail inherently political or moral viewpoint-dependent assessments that impose negative consequences on faculty with personal or professional beliefs and commitments that differ from those of their colleagues, their students, or the university. This infringes on faculty members' academic freedom and liberty to follow the dictates of their own consciences.

III. Bias Reporting Systems Threaten Free Speech

FIRE is also concerned by the College of Arts & Sciences' and College of Nursing's plans to develop mechanisms to report and investigate "bias incidents" or "DEI complaints." We understand UTK may wish to provide additional support to students affected by bias or bigotry beyond its existing policies banning harassment and discrimination. Too often, however, bias reporting systems define their terms vaguely or expansively, exposing a wide array of protected

equity in higher education, which "implies much more than equal opportunity; it entails equality of resources, ideas, respect and outcomes" and extends to pedagogical reforms such as "decolonizing the curriculum").

student and faculty speech to monitoring, investigation, and punishment by administrators and/or law enforcement.¹⁹

The Supreme Court has repeatedly, consistently, and clearly held government entities may not restrict expression on the basis that others find it to be offensive or hateful. This core First Amendment principle is why the authorities cannot outlaw burning the American flag,²⁰ punish the wearing of a jacket emblazoned with the words “Fuck the Draft,”²¹ penalize a parody advertisement depicting a pastor losing his virginity to his mother in an outhouse,²² or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might resort to violence.²³ In ruling that the First Amendment protects protesters holding insulting signs outside of soldiers’ funerals, the Court reiterated this fundamental principle, remarking that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”²⁴

This principle applies with particular strength to universities dedicated to open debate and discussion. Take, for example, a student newspaper’s uses of a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.”²⁵ These words and images—published at the height of the Vietnam War—were no doubt deeply offensive to many at a time of deep polarization and unrest. So, too, were “offensive and sophomoric” skits depicting women and minorities in derogatory stereotypes,²⁶ “racially-charged emails” to a college listserv,²⁷ and student organizations that the public viewed as “shocking and offensive.”²⁸

Consequently, “mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”²⁹ The Campus Free Speech Protection Act reaffirms that “[i]t is not the proper role of an institution to attempt to shield individuals from free speech, including ideas and opinions they find

¹⁹ *2017 Report on Bias Reporting Systems*, FIRE, <https://www.thefire.org/research/publications/bias-response-team-report-2017/report-on-bias-reporting-systems-2017> (last visited Sept. 15, 2022).

²⁰ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the “bedrock principle underlying” the holding being that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

²¹ *Cohen v. California*, 403 U.S. 15, 25 (1971).

²² *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

²³ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

²⁴ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

²⁵ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

²⁶ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993)

²⁷ *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (the First Amendment “embraces such a heated exchange of views,” especially when they “concern sensitive topics like race, where the risk of conflict and insult is high.”).

²⁸ *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

²⁹ *Papish*, 410 U.S. at 670.

offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrong-headed.”³⁰

Even bias reporting systems without an independent enforcement mechanism can have a serious chilling effect on the campus speech environment, as the mere prospect of administrative intervention is likely to cause students to self-censor views that may upset others. Encouraging students to report each other for expressing unpopular or controversial opinions undermines the university’s fundamental role as host to an open and vigorous discussion of ideas.

Certainly, UTK has a duty to respond to unlawful behaviors, such as harassment, discrimination, and true threats, and mechanisms to do so already exist. Any bias reporting system that UTK nevertheless implements should define bias or DEI incidents narrowly to cover only such unlawful behaviors and avoid impermissibly overbroad and vague definitions. Alternatively, UTK colleges implementing a bias reporting system must make clear its sole purpose is to provide affected parties with support and that incidents encompassing First Amendment-protected expression will not face investigation or punishment.

IV. Conclusion

FIRE calls on UTK to clarify the status of the Diversity Action Plan objectives identified in this letter, provide any relevant policies implemented pursuant to those objectives, and ensure that the Diversity Action Plans operate within the limits placed on public institutions of higher education by the First Amendment, state law, and principles of academic freedom. We respectfully request a substantive response to this letter no later than September 29, 2022.

Sincerely,



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³⁰ Tenn. Code § 49-7-2405(a)(5).