



# FIRE

Foundation for Individual  
Rights and Expression

December 21, 2022

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*Sent via U.S. Mail and Electronic Mail (iusm@iu.edu)*

Dear Dean Hess:

FIRE<sup>1</sup> is concerned by Indiana University School of Medicine's training on "Mitigating Unconscious Bias in Decision-Making" that requires faculty to sign an "honor code" pledging that "their views, beliefs, actions, and inactions do not, intentionally or unintentionally, perpetuate the problem of health care inequity."<sup>2</sup> This practice is unconstitutional for two reasons: First, language in the pledge is unconstitutionally overbroad and vague. Second, while IUSM may encourage faculty to adopt or express certain views, requiring them to recite and assent to university-sanctioned views violates faculty's First Amendment right against compelled speech. This requirement is flatly inconsistent with the role of the university as a bastion of free inquiry and unenforceable at a public institution bound by the First Amendment.<sup>3</sup> IUSM must immediately rescind the unconstitutional pledge requirement and provide notice to faculty that they will not face adverse employment action if they have failed to abide by it.

The honor code reads:<sup>4</sup>

IU School of Medicine expects that its community members treat one another with respect and facilitate an atmosphere of

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<sup>1</sup> As you will recall from previous correspondence, the Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit dedicated to defending freedom of speech. You can learn more about our recently expanded mission and activities at [thefire.org](http://thefire.org).

<sup>2</sup> Our Commitment to Diversity, Equity, Inclusion, & Justice, *Honor Code*, INDIANA UNIV. SCH. OF MED. (on file with author, released through a Freedom of Information Act request). The recitation of facts here reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

<sup>3</sup> It has long been settled law that the First Amendment binds public universities like Indiana University. *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>4</sup> Our Commitment, *supra* note 2 (emphasis added).

cooperation and collegiality. The School demands excellence and expects that community members act with integrity at all times. Recognizing the damaging effects that bias, discrimination, and exclusion have on the work environment, patient care, medical research, medical education, and health care outcomes, IU School of Medicine strives to be a place that is diverse, welcoming, and inclusive for all and commits to identifying and dismantling hate, oppression, systemic racism, and discrimination in academic medicine. **IU School of Medicine expects all in its community to reflect on these values and ensure that their views, beliefs, actions, and inactions do not, intentionally or unintentionally, perpetuate the problem of health care [sic] inequity.**

Being intentional with your learning while completing this module is part of the commitment to our Honor Code.

That honor code is followed by an Honor Code Pledge reading:<sup>5</sup>

If you have not yet done so, take the pledge to uphold the Honor Code as a member of the IUSM community by clicking tab below[.] Once you complete the pledge, come return to Canvas to finish the module.

The policy that faculty’s “views, beliefs, actions, and inactions [must] not, intentionally or unintentionally, perpetuate the problem of health care [sic] inequity” is impermissibly overbroad and vague as written.

The lack of definition of key terms likely renders the policy overbroad on its face. A statute or law regulating speech is unconstitutionally overbroad “if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate.”<sup>6</sup> IUSM’s policy ignores that a great deal of speech one may characterize as, for example, “inaction unintentionally perpetuating the problem of health care [sic] inequity,” is nonetheless entitled to First Amendment protection.

Relatedly, the regulation is unconstitutionally vague because it “fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes” or “invites arbitrary and discriminatory enforcement.”<sup>7</sup> The policy’s failure to properly define key terms to reach only an objective, narrow range of unprotected speech gives university administrators unfettered discretion to punish a wide range of faculty speech on the basis that it fails to sufficiently promote the university’s vision of “health care [sic] equity.”<sup>8</sup>

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<sup>5</sup> *Id.* at Honor Code Pledge.

<sup>6</sup> *Doe v. University of Michigan*, 721 F. Supp. 852, 864 (E.D. Mich. 1989).

<sup>7</sup> *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (9th Cir. 1984).

<sup>8</sup> The concept of “inequity,” or its counterpart “equity” is the subject of considerable debate in higher education, for example. *See, e.g., Dan Morenoff, We Must Choose ‘Equality,’ Not ‘Equity,’ NEWSWEEK* (Apr. 25,

Additionally, by requiring faculty promise to ensure their “views, beliefs, actions, and inactions” do not perpetuate the problem of healthcare “inequity,” IUSM effectively requires faculty to express university-sanctioned views about contested political issues.<sup>9</sup> The policies of a public university—including maintenance of policies implicating faculty and student expression<sup>10</sup>—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.”<sup>11</sup>

This principle applies with particular force at public institutions of higher education, as free speech is the “lifeblood of academic freedom.”<sup>12</sup> Universities “occupy a special niche in our constitutional tradition,”<sup>13</sup> and academic freedom is an area “in which government should be extremely reticent to tread.”<sup>14</sup> As the Supreme Court explained in overturning legal barriers to faculty members with assertedly “seditious” views:<sup>15</sup>

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.

Conditioning faculty progress on a pledge to assent to university-approved views on contested issues constitutes compelled speech, a significant violation of faculty expressive rights.

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2022), <https://www.newsweek.com/we-must-choose-equality-not-equity-opinion-1699847> (arguing 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, 2022), <https://www.insidehighered.com/blogs/higher-ed-gamma/how-stand-equity-higher-education> (arguing that equity “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”).

<sup>9</sup> *Id.*

<sup>10</sup> *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

<sup>11</sup> *Wooley v. Maynard*, 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”).

<sup>12</sup> *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.”).

<sup>13</sup> *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

<sup>14</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>15</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (cleaned up).

Compelled speech is anathema to the First Amendment, which protects not only the right to speak, but the right to *refrain* from speaking.<sup>16</sup>

To further illustrate our concern by analogy, we trust that IUSM would readily recognize the problem with requiring faculty ensure their views and beliefs appreciate the importance of “racial colorblindness,” or “individualism.” Just as with equity or inequity, determining whether one acceptably commits to or promotes these ideologies necessitates inherently political or moral, viewpoint-dependent assessments that implicitly impose negative consequences on faculty with beliefs and commitments that differ from those of their colleagues or IUSM. Such criteria would similarly infringe on faculty members’ liberty to follow the dictates of their own consciences.<sup>17</sup>

IUSM can require faculty to adhere to established medical standards, but this authority cannot be abused to demand faculty articulate particular views—even ones that some faculty members do indeed hold. We request a substantive response to this letter no later than the close of business on Wednesday, January 11, 2023, confirming that IUSM will clarify that this pledge is not mandatory for faculty to proceed through the training, or to proceed with professional development or pedagogical instruction at IUSM.

Sincerely,

A handwritten signature in black ink, appearing to read "Graham Piro". The signature is fluid and cursive, with the first name "Graham" and last name "Piro" clearly distinguishable.

Graham Piro  
Program Officer, Campus Rights Advocacy

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<sup>16</sup> See *Wooley*, 430 U.S. at 714 (“[T]he right to freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).

<sup>17</sup> “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 634, 642 (1943).