

Diversity, Equity, and Inclusion Issues in Higher Education

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Mandatory Diversity, Equity, and Inclusion (“DEI”) have become a fierce subject of debate across higher education.¹ While DEI statements vary among institutions, they usually promote the idea of advancing diversity, equity, and inclusion through experiences, accomplishments, goals, and pedagogical practice.² For instance, the UNC School of Medicine's faculty affairs office features samples of diversity statements with one faculty excerpt expressing, “. . . Through these experiences, I have become aware of how gender, race, and socioeconomic status influence training opportunities and outcomes, and how this hinders the diversification of the faculty body.”³ These statements demonstrate inclusion, openness, and understanding.

Nevertheless, some university faculty have voiced concerns that these mandatory statements constitute compelled speech.⁴ This situation potentially avails institutions to challenges when they move beyond requiring faculty to adhere to DEI statements but adopt them as the faculty’s mandated voices. A real-life example of this possible concern may be illustrated at the University of California System, which not only expects its faculty to fulfill the institution's DEI expectation, but to go beyond that and champion the policy.⁵ Some critics view this employment expectation a form of compelled speech. Hypothetically, if a professorial candidate is being

¹ Isha Trivedi, *More Colleges Are Adding Diversity to Tenure Standards. But the Debate’s Not Settled*, THE CHRON. OF HIGHER EDUC. (Aug. 12, 2022), https://www.chronicle.com/article/more-colleges-are-adding-diversity-to-tenure-standards-but-the-debates-not-settled?cid2=gen_login_refresh&cid=gen_sign_in.

² Colleen Flaherty, *Breaking Down Diversity Statements*, INSIDE HIGHER ED (Nov. 19, 2018), <https://www.insidehighered.com/news/2018/11/19/new-paper-explores-what-faculty-candidates-include-their-diversity-equity-and>.

³ *Sample DEI Statements*, UNC SCHOOL OF MEDICINE, <https://www.med.unc.edu/facultyaffairs/wp-content/uploads/sites/427/2021/03/Sample-DEI-Statements.pdf> (last visited Jan. 24, 2023).

⁴ Trivedi, *supra* note 1.

⁵ Daniel Ortner, *In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia*, 70 CATH. U.L. REV. 515, 562 (2021).



considered for a college faculty position and writes a DEI statement but chooses, through implied language, not to “champion” the policy and instead dedicates time to other priorities such as the academic field of study, that lack of DEI support may be seen as a negative aspect of the candidate.⁶ Simply stated, mandatory DEI statements may unduly lead to compelled speech when it moves beyond acknowledging the value of DEI and the efforts surrounding such an important priority but also mandates a certain perspective or approach alienating other forms of diversity, equity, and inclusion.⁷

The concern over compelled speech is certainly plausible. The Supreme Court has held that the government violates the First Amendment when it pushes public employees to affirm beliefs with which they disagree.⁸ The core principle behind this doctrine is that just as there is a right to speak, there is also a right to be silent and to refrain from speaking.⁹ Directly on point is *West Virginia Board of Education v. Barnette*, in which the state required school children to recite the Pledge of Allegiance while saluting the American flag or the child would face expulsion.¹⁰ The Court held that the First Amendment does not allow public authorities to compel a person to utter a message with which they do not agree.¹¹ Moreover, in *Barnette*, the Court held that “The compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.”¹² Before this, Justice Jackson vividly portrayed the Court’s reasoning:

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,

⁶ *Id.*

⁷ *Id.* at 552.

⁸ See *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463-64 (2018).

⁹ EDWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1270 (6th ed. 2019).

¹⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 625 (1943).

¹¹ *Id.* at 634.

¹² *Id.* at 646.

or other matters of opinion or force citizens to confess by word or act their faith therein.¹³

Applying *Barnette* to the DEI context, public universities could face potential legal challenges if they compel a candidate for hiring, promotion, or other opportunities to express a prescribed message with which they may disagree. Requiring faculty to affirm DEI policies, while seemingly benign as an expectation, may be crafted by critics as akin to making students recite the Pledge of Allegiance because, as Justice Jackson eloquently demonstrated, this mandate could require affirmation and conflict with one’s beliefs, which presents a potential challenge via the First Amendment.

Alternatives offer a feasible side-step to the constitutionality of these required DEI statements. That is, the legal concerns of DEI statements could be mitigated by utilizing a more holistic approach. For instance, in 2022, Indiana University-Purdue University Indianapolis (“IUPUI”) adopted a new option, referred to as the “balanced-integrative case,” to analyze tenure and promotion by allowing faculty to use DEI initiatives as part of their teaching and research.¹⁴ This IUPUI option for tenure and promotion first requires a demonstration of excellence across an array of integrated scholarly activities aligned with diversity, equity, and inclusion.¹⁵ Faculty must also demonstrate independence, innovation, initiative, and scholarly impact.¹⁶ This completely separate option differs from the rejected proposal at the University of Washington, which would have used DEI statements to complement the current process.¹⁷

¹³ *Id.* at 642.

¹⁴ Collen Flaherty, *The DEI Pathway to Promotion*, INSIDE HIGHER ED (May 14, 2021), <https://www.insidehighered.com/news/2021/05/14/iupui-creates-path-promotion-and-tenure-based-dei-work>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Trivedi, *supra* note 1.



Balancing the broad issue of Diversity, Equity, and Inclusion is a difficult task because there is no one-size-fits-all approach.¹⁸ By giving faculty a choice regarding which merits are considered when engaging in the promotion, hiring, or tenure process, the university can avoid some of the abovementioned concerns. Proponents of mandatory DEI statements say that this practice is necessary to signal care and attention to the diversity of students' ideas and backgrounds while supporting their sense of belonging.¹⁹ However, the suggested process incentivizes alternatives by recognizing the several ways that academic knowledge, research, and scholarship can contribute to a professor's worth.²⁰ In sum, this process does not have to be mutually exclusive; a holistic approach can highlight DEI initiatives along with other academic contributions.²¹

¹⁸ Mariah Stewart, *Colleges Revise Tenure Requirements to Include Diversity and Inclusion Accomplishments*, INSIGHT INTO DIVERSITY (Dec. 21, 2021), <https://www.insightintodiversity.com/colleges-revise-tenure-requirements-to-include-diversity-and-inclusion-accomplishments/>.

¹⁹ Poorvu Center for Teaching and Learning, *Diversity Statements*, YALE UNIV. <https://poorvucenter.yale.edu/DiversityStatements>.

²⁰ Stewart, *supra* note 17.

²¹ See generally Stewart, *supra* note 16 (arguing against the notion that DEI can mask other contributions).

