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Balancing Free Speech and Institutional Commitment to Diversity, Equity, and/or Inclusion

A Conversation Guide for Engaging with Legal Counsels

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Introduction

The second Trump presidency has presented several unique challenges to higher education in the United States (e.g., Casey, 2025; Ng et al., 2025). Before the current moment, both public audiences and sociopolitical actors (e.g., legislators, media pundits) had been calling attention about their perceived limitations of institutions of higher education (IHEs; Mutua et al., 2024), speaking to the rising costs of attendance (Ehrmann, 2021) or the liberalizing effect of these educational environments (Eger et al., 2024)—regardless of how well-founded said claims were. Yet, scrutiny of IHEs has seemingly only amplified in the past couple of years at the time of composing this guide. Legal inquiries by government agencies, such as the U.S. Department of Justice, have targeted practices adopted at IHEs because of their perceived incongruence with objectives delivered by the executive branch, including notable examples involving prestigious institutions like Harvard and Columbia University (Casey, 2025).

At the heart of many of these investigations have been actions at IHEs connected to the freedom of speech—a protection ensured by the U.S. Constitution—that governmental actors have perceived as in conflict with American values. That is, the federal government has staunchly regulated which forms of speech and expression are allowed within institutions, mirroring its broader attacks on particular movements (e.g., those advancing diversity, equity, and inclusion; see Exec. Order No. 14398, 2026). Whether it be protests arguing for Palestinian rights (Ashar, 2025) or broader calls for serving minoritized communities by enacting DEI values (Chin, 2025), there has been a clear tension between advocating for ideas deemed divisive by state actors and the fundamental freedoms inculcated in the U.S. Constitution to use one's voice. Of note, although freedom of speech is a principle that applies most directly to public IHEs, many private colleges and universities often adopt policies that mirror this idea (Whittington, 2019), making the connection between free speech and DEI relevant across the U.S. higher education landscape. Central to these conversations are how students, staff, and faculty are responding to these tensions (e.g., Briscoe, 2026; Haber-Curran, 2025; Phan, 2025). Yet, what is missing is how senior leaders are providing guidance to campus constituents.

Notably, in a recent article published in *Educational Researcher*, Lewis and Muñiz (2024) explicitly called for more scholarship on how IHE legal counsel members are navigating this moment in U.S. history, marked by staunch aggression against DEI practices. The fact that said literature is lacking is unsurprising, as little empirical scholarship has involved learning from IHE legal counsels themselves—a fact that is perhaps itself predictable given the high-stakes, risk-averse nature of the role (Hutcherson, 2025). And yet, in an era where IHEs are criticized for their conservative interpretations of laws and policies (termed 'repressive legalism' by Garces et al. [2021]), it is perhaps even more integral to comprehend how IHE legal counsel members are themselves viewing the challenges presented in the contemporary sociopolitical moment. As an education researcher who has committed my career to studying how IHEs perpetuate inequities and who has recently begun pursuing a legal degree, I believed it to be a useful personal and

professional exercise to learn the decision-making that these legal counsel members engage in their roles.

Informed by a qualitative study featuring members of legal counsel across public and private IHEs, this conversation guide is designed for audiences who have critical questions about the (in)actions that those at many colleges and universities are taking in response to anti-DEI pressures and the legal counsel members who represent them. That is, I pose several questions that I have heard anecdotally wondering why IHEs have decided to acquiesce to anti-DEI pressures that are seemingly contrary to free-speech values. In exploring these inquiries, I highlight relevant scholarship expressing the need for said perspectives, while also integrating responses from the legal counsel members I interviewed for this study. My ultimate goal for this guide was to create a series of critical questions that constituents can pose to legal counsels to help them understand what undergirds their approaches when addressing DEI and free speech values, and vice-versa.

Defining Relevant Terms

Before moving to discuss existing relevant literature, I think it useful to first define language around the roles and principles at play. The legal counsel role differs across institutions, but its primary purpose is to advise a college or university primarily on the legal questions an organization faces—yet who also has to consider other consequences (e.g., risk management, public perception). Depending on the size/needs of the institution, there may be one person in this role, an office of legal counsel members who specialize on particular issues (e.g., contracts, athletics, employment), member(s) that oversee a system of higher education, or someone external to the organization altogether. When used for legal counsel members, “in-house employees” are those hired by the institution or system to represent the organization as a client on a consistent basis and position them within their organizational chart. Said roles stand in contrast to attorneys hired on a case-by-case basis (e.g., outside counsel, consulting attorneys). Regardless of their in-house or outside status, these individuals would likely be on the front line of addressing the requisite legal standards involved in free-speech cases.

Despite being related concepts, freedom of speech and expression are distinct. Freedom of expression principle that includes, but is not limited to freedom of speech, and is afforded by the U.S. constitution; it more broadly includes being able to engage in acts outside of speech (e.g., protest) without government censure. Conversely, freedom of speech is a principle ensured by the First Amendment of the U.S. Constitution that allows individuals to share a range of ideas without the fear of experiencing censorship from government or state actors. Of note people are quick to place freedom of speech in conjunction with academic freedom, but it is important to highlight that academic freedom uniquely applies to the higher education context and to researchers/instructors. The American Association of University Professors (2026) defined academic freedom as:

the freedom . . . to investigate and discuss the issues in their academic field, and to teach and publish findings without interference from administrators, boards of trustees, political figures, donors, or other entities. Academic freedom also protects the right of a faculty member to speak freely when participating in institutional governance, as well as to speak freely as a citizen. (para. 1)

I discussed these principles and more with the legal counsels in the study.

Scholarly Background

IHEs have consistently been sites where people question the exercise of free-speech rights (Ben-Porath, 2023; Chemerinsky & Gillman, 2026; Soucek, 2026; Sun & McClellan, 2020). That is because colleges and universities, at their very heart, were founded for the development of ideas and knowledge—and for this to occur, dissent is necessary. However, this being a core value of IHEs does not preclude attempts to restrict free speech, as evidenced by various moments in higher education’s history (e.g., the suspicion of communist faculty during the 1940s and 1950s; Thelin, 2026).

As IHEs have become increasingly diverse in recent decades (Renn & Reason, 2021), they have been caught in the crosshairs for attempting to create affirming and equitable environments for minoritized students while also determining how to accommodate the diversity of thought, including conservative and oppressive beliefs. On one hand, proponents of DEI believe that educators should take active steps to regulate speech that marginalizes to create welcoming spaces for underserved populations (see Khalid & Snyder, 2024). And yet, on the other hand, people have also argued that free-speech ideals necessitate that all thoughts—even those perceived to be negative or harmful—must exist in spaces (Dryden, 2018), as long as they do not meet the narrow categories of restricted speech (e.g., that which will incite violence in the immediate; obscenity; see Foundation for Individual Rights and Expression [FIRE], 2026).

Given the complicated nature of these questions, legal counsel members are well-positioned to help IHEs navigate these terrains. However, though these roles have been around for decades and an entire professional association dedicated to these members since 1960–1961 (National Association of College and University Attorneys [NACUA], 2026), little research exists that features the perspectives of these attorneys and how they approach their practice. A notable exception is the work of Hutcherson (2025), who explored how these individuals negotiated their work in hostile legislative environments, anticipating pushback from legislative officials and other constituents. Nevertheless, ample opportunities exist to understand better how legal counsel are maneuvering these sociopolitically tense realities, leading to the project highlighted in this guide.

Context on the Study

Before discussing the findings, I first explain a bit more about the study. Still, it is critical to note that I developed this project as exploratory. Adopting a general qualitative approach (Kahlke, 2014), which affords greater flexibility in study design decisions, I wanted to lay the groundwork for future inquiries.

Who Participated?

When developing the project, I developed a recruitment strategy that necessitated participants meeting two main criteria: a) serving as a current general counsel member at a U.S. IHE or having been in this role within the last 5 years; and b) having experience in navigating situations that involve freedom of speech and DEI. The first was so that individuals had the experience of or were within arms' reach of knowing how the current sociopolitical context was shaping the work of the legal counsel; the second criterion recognized that, depending on the size of the IHE and their allocated responsibilities, some lawyers may not have a portfolio that exposed them to the matters at the core of this study. I chose to include those who worked at both public and private institutions, believing that each type of institution would still face questions about free speech—even though their deference to constitutional interpretation may differ—and that this could also open the door to future comparative analysis.

Recruitment proved to be more difficult than expected. Specifically, I found myself having to rethink strategies that I had relied on in the past to get participants who were faculty, student affairs/academic affairs staff, and students (e.g., disseminating via listservs and social media). Cold emailing was slow but did yield some results; the most effective was having someone connect me with someone they knew who was a legal counsel member. Here was my first lesson: the lack of empirical scholarship regarding legal counsel members may not have been because of a shortage of interest in speaking with these individuals, but rather, because of the difficulty in recruiting them to participate in research. And by the latter, I do not mean to suggest that they are disinterested parties who do not wish to contribute to broader scholarly understanding. Instead, as people trained in the law and who are trained to plan for every possible contingency, they may anticipate risks in engaging with social science research—regardless of the protections that researchers often provide (e.g., the use of pseudonyms [including Phil Jennings, the only participant to give both a first and last name], deleting identifiable data). For this reason, I am grateful for the eight legal counsel members who ended up participating in this project.

What Guided My Thinking?

I used an organizational theoretical framework, sensemaking (Weick, 1995), to inform my understanding of participants' experiences. Undergirding sensemaking is the belief that the complexities of organizations and the decision-making that occurs with them are themselves

multifaceted process. That is, people naturally look back and reevaluate unclear events or situations using cues from other actors, their own position in the organization, and from particular facets. In the full study, I drew upon the following tenets (see Weick, 1995 for explanation of the terms): rooted in *identity construction*; driven by *plausibility* rather than accuracy; as *social*; as *ongoing*; *retrospective*; focused on and by *extracted cues*; and *enactive* of sensible environments. Hence, sensemaking felt apt for this study, as legal questions are often ambiguous and require higher-order reasoning. The literature on sensemaking subsequently influenced the types of questions that I asked, as well as how I analyzed the resulting data.

What was Involved in the Study?

Once I selected the participants, I scheduled two 60-minute elite, individual interviews with them via Zoom. Elite interviewing is a qualitative data collection method that recognizes the time constraints placed on senior-level administrators, as well as the unique power dynamics that they must navigate given their responsibilities (McClure & McNaughten, 2021). To help ensure anonymity, I told the participants that they did not have to disclose specific fact patterns that might lead to the identification of the institution, and by proxy, them as attorneys. They either responded to hypothetical situations or spoke about cases in the abstract. The questions had to do with their own views on the relationship between first speech and DEI values, as well as how they worked with campus constituents regarding these issues. After completing the interviews, I then engaged a multi-step coding process using the Dedoose software. This process yielded findings that helped lead to the creation of this guide.

Common Questions that Campus Constituents Have About Free Speech and DEI

In developing this section, I reflected upon anecdotal experiences I have had working across different higher education institutions, as well as my own research into DEI scholarship. I have frequently heard different versions of “Why does ‘the institution’ not do this? Why have they gone back on their values? Why is ‘the institution’ so afraid to do XYZ?” And in all fairness, I have posed these kinds of inquiries—and will likely continue to do so in the future. That is because even a greater understanding of the law does not always present technical solutions to what are inherently adaptive challenges (Heifetz & Laurie, 1997). One can examine precedent, doctrines, and principles, but the beauty of law is that it’s ever evolving. So, I bring this guide to fruition not as a means to quell dissent or to say have unquestioned trust, but rather, to provide a starting point for engagement with a legal counsel member.

Question 1: Why Are Some IHEs Not Engaging Institutional Commitments to DEI Values?

Contextualizing the Question

Many proponents of DEI values argue that the work requires more than simply acknowledging the diversity of thought and making all perspectives feel included; the “equity” component of DEI necessitates a critical evaluation and reconstruction of systemic inequities that disenfranchise minoritized populations. For this reason, when campus community members or those they invite engage in speech that further oppresses those who are already minoritized in society, advocates question what IHEs can do to address these issues, which reflect embedded inequities. People regularly invoke “discrimination” to suggest the wielding of power against those who do not have as much access to it.

Offering the Perspective from Legal Counsel Members

What is important to underscore is that those who are in legal counsel roles may have different understandings of what DEI work entails. For example, one of the participants (Atticus) in the study shared the following statement:

I think probably before I went to the university, I viewed equity issues as nondiscrimination issues. Once at the university, I think I felt like equity issues involved more than simply affirmative acts and discrimination. I felt like they included much more inclusive activity, inclusive thought and activity than probably that I had been exposed to before.

This philosophy that equity involved ideas of nondiscrimination was present across the legal counsel members that I interviewed. And importantly, to not engage in discrimination meant to not discriminate against anyone, including those who held privileged or dominant standing in society. This type of rationale was magnified, especially in the given moment, for as Atticus went on to state:

I would say the answer is probably different pre-Trump to post Trump. You know, it used to be pre-Trump. It used to be that it was a good thing to advance issues of equity. And so as in house counsel, you would be advising not only on what the law was, but what good, good policy might be. And that might be, as you know, advancing equity, inclusion and diversity, and all those lightning rod words that are, these are lightning rods now, I think now. And of course, I haven't been, I guess I have been technical.

Grounding an IHE's practices less in what it might look like to do good work and align with

institutional values/policy and more in what the sociolegal landscape might be perpetuating thus began to take hold.

Gustavo was another participant who named this viewpoint, as he reflected upon conversations about DEI on college campuses necessarily not benefiting one group over the other. He shared,

I can't say unequivocally, you know, with a straight face, that that interpretation is... legally wrong, like... If the law says, you know, you cannot discriminate based on sex, you cannot discriminate based on race, like. if you are saying, you know, this program is only for women, or this program is only for Hispanics, like. You are discriminating based on race and based on sex. You're doing it for a good reason, you know, you're doing it because these groups have been excluded from these opportunities forever.

In sharing this perspective, Gustavo aligned with others who viewed discrimination as an act that inherently excludes a group or an individual, regardless of whether it was fundamentally altruistic. Thus, from this viewpoint, it is problematic to state that one is against discrimination while excluding white students, for example, or those from wealthy backgrounds.

Points to Discuss

I have long believed it to be the responsibility of IHEs to reckon with their oppressive histories and contemporary legacies of marginalization, echoing the concerns that many other DEI proponents have put forward. So, what does this mean for holding institutions accountable while, at the same time, working with legal counsel members who may have differing interpretations of what it means to enact these practices within a legal framework? Questions that a person may engage with their legal counsel about would be:

- How are the institutional values of DEI in concert or in conflict with federal, state, and local laws?
- What are some alternative legal pathways and justifications for advocating for DEI?
- How are institutional leaders advocating for DEI on a state and local level? How can we do so, given our professional and personal capacities?

Question 2: What Considerations are IHEs Dealing with When it Comes to Upholding Free Speech Across Different Perspectives?

Contextualizing the Question

A fundamental disagreement that people frequently have when it comes to DEI and free speech is what is at stake when institutional leaders make a decision for a given scenario. For those across the spectrum, they regularly acknowledge that the consequences are felt beyond the individuals involved. Protesting for the rights of minoritized backgrounds could prevent current or future community members from feeling that they belong. Those advocating for more

conservative ideologies may see the institution as acting against the interests of broader audiences.

Offering the Perspective from Legal Counsel Members

Legal counsel members recognized that the institution was always their client, meaning that they had to put forward the interests of the organization as opposed to the individuals who make them up. The financial, reputational, and other forms of health of IHEs was frequently at the foreground of their minds. Stephanie captured this when she named,

You know, there's a lot of times where I could make a decision, and maybe if I was a decision maker, I would make a different decision, but at the end of the day, I try to focus on what my role is. And that's to advise the institution to... tell people what the risks are, you know, sometimes we'll wear more of our counselor hat than our attorney hat, but, in general, I just try to really embrace, like, what my role is, and, you know, I might have my personal beliefs, but when I'm doing my day job, it's how do I advise the institution?

Beyond thinking about the IHE broadly, legal counsel members also had to consider other senior-level administrators were going to also chime in to the situation.

As Phil Jennings shared, “To be a good lawyer, I have to understand my VP for Comms and Marketing is gonna say we can't have the bad news story, because if you have [that], we're gonna have the bad legislative session.” He later went on to state:

The threats of funding, kind of the... the power of the government being wielded over us, our politics being wielded over us at a federal level, at a state level. I think it's... Did we get through without... donors getting mad, legislators getting mad?

Atticus also emphasized the different audiences that they are working with and how they must weigh their decision-making in light of these individuals' commitments:

Most of the people giving advice to the decision makers, most of them come from a particular viewpoint. you know, the Vice President for Student Affairs is going to be very student-oriented. The Provost is going to be very faculty-oriented. The great Communications Expert is going to be you know, what sells out in the public. The Government Relations person is going to be concerned about what the legislators think. The Advancement person is going to be concerned about the what the donors think.

This type of thinking was omnipresent across the legal counsel members interviewed.

Points to Discuss

Coming to gain an understanding of what scope legal counsel members have to keep in mind to execute their responsibilities can itself be a fruitful exercise for individuals. Nevertheless, simply an acknowledgement of the audiences they consider does not preclude pushing back against the privileging of particular groups over others. In an attempt to build a bridge with a legal counsel member who is weighing these considerations, the following inquiries may be useful:

- Who or what is the IHE worried about in this specific situation?
- How do you see a pathway forward that recognizes the potential ramification to the IHE, while also holding the harm that may result to students, staff, and/or faculty?
- What is gained or loss from prioritizing this constituent?

Question 3: What about the Students Being Harmed by Allowing Hateful Speech on Campus? What Can Be Done?

Contextualizing the Question

Fierce supporters of freedom of speech argue that the principle only works if very little value judgment is assigned when choosing what does not fit under the umbrella of unregulated speech. To start choosing arbitrarily what speech can move forward and what cannot hold the risk of having the pendulum swing the other way in the future. For this reason, the Supreme Court has created very few categories of unprotected speech (see FIRE, 2026). Hence, speech that belittles or invalidates minoritized groups' existence is itself frequently protected even if it leads to tangible harm.

Offering the Perspective from Legal Counsel Members

Several legal counsel members in the study did find that even if the legal question was one that must result in the allowing of hate speech, they could still find other ways to work with minoritized communities on campus to ensure that they felt heard and secure. For example, Darlene was one legal counsel member who viewed her own journey with free speech understanding differently over time. She spoke about her journey in the following way:

Before 2017, 2018, it was straightforward, not easy, but straightforward to be able to tell people, free speech, you could almost be a purist . . . Free speech at all costs, right? But then I started . . . I started to have conversations about how, well, there's some . . . some of us that have to carry more water. Free speech costs more to certain groups than it does to other groups in this country at this time. And so, you have to acknowledge that and have conversations about it. So, what does that mean? So, trying to get people to kind of change the frame of the discussion a bit. I'm not saying free speech is bad, but we can't just beat our chest and act like it doesn't come at a cost that is inequitable, not equitably applied or felt.

Because of this shift in paradigm, Darlene started to view her role in a new light, one in which she saw the importance of upholding free speech while also holding space to recognize how marginalized groups are more negatively affected at times by its enforcement. For this reason, she adopted a view that being in her position not only necessitated interpretation of the law, but also mitigating harm:

And you know what? It is an insufficient response if you're not doing something meaningfully to mitigate the harm. But that's not... that wasn't a priority 10 years ago. Generally speaking, I'm not talking about any particular university, but just in the culture. So that's something that's gotten people, like, trying to figure out how can we, if we're gonna up the ante and have a higher expectation of institutions about how we respond to feelings of lack of safety. Then, let's make sure we're going to continue to do this far beyond this moment. For everybody who is a marginalized group.

Other general counsels echoed said points.

For example, Skye was another participant who shared her similar approach. In highlighting the various cases she has handled in the past, she noted,

If somebody said my free speech was violated, for example. There were hecklers that didn't allow me to I mean, it's just a free speech thing, then you would look at the facts. Is that true? What did we do? How did we handle that? How can we remedy that? If somebody was hurt, you know, what are the factors there? If somebody felt like. This protest went on, and I'm feeling not safe on campus, which is a common theme. What are our processes in place, and what support measures are we giving? Was there a violation of somebody's rights? You can have both and, right? You can have... somebody that needs support measures, and not a free-speech violation. So, those are the kinds of things to look for.

The idea that you can have someone who needs support because they were affected by hateful speech—even when that speech does not rise to the level of a student conduct or legal violation—emerged as a vital alternative for those in legal counsel roles. As Phil Jennings named in his interviews, it was the manifestation of “empathy” that could make a legal counsel member stand out, while still serving the IHE as his primary client.

Points to Discuss

Perspectives of equity acknowledge the disenfranchisement that is experienced by oppressive groups at the hand of structural inequities, but also through discursive violence. Thus, even though events or instances where linguistic oppression occurs may not themselves be curtailed, an IHE's responsibility does not end. In fact, even the legal counsel members above saw it as

within their scope of responsibility to work with other campus partners to see how to support the affected students or student groups. Thus, to consider bridge building when speech is itself cannot be abated may involve the following questions:

- What types of education can the IHE provide concerning the incident or event that counters the hate speech?
- What other remedies are available for people who felt negatively affected by those forms of speech?
- How can we ensure that students still feel safe on campus and feel like they have a rightful presence on campus despite hateful speech?

Concluding Thoughts

Debates about free speech and DEI are not going anywhere, especially within the landscape of IHEs. And although dissent is useful—nay critical—for free speech to survive, some tensions may potentially be alleviated from gaining a deeper comprehension of the various roles that people are playing within IHEs. I intended this guide to be a starting point for readers to learn more about what legal counsel members are considering when thinking about offering guidance for the IHEs they are employed at. It was my desire that this document could help individuals continue to advance DEI values, while at the same time, working within the free-speech framework. Throughout this study, I learned that potential disagreements among campus constituents could potentially be avoided if they had a deeper understanding of what the other was thinking. The legal counsel members in this project showed a disposition to learning and listening that higher education professionals can capitalize on when working together with these roles, all for the betterment of campus communities.

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