

March 20, 2023

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
Via <https://www.federalregister.gov>

Docket ID ED—2023—OPE—0029

Dear Secretary Cardona:

This letter presents comments on the “Request for Information Regarding First Amendment and Free Inquiry Related Grant Conditions” published by your department in the *Federal Register* on February 22, 2023.

Your request for information pertains to the “Free Inquiry Rule,” which refers to Direct Grant Programs and State-Administered Formula Grant Programs. The provisions in § 75.500(b) and (c) for Direct Grant Programs, and § 76.500(b) and (c) for State-Administered Formula Grant Programs added in 2020 state that it is “a material condition of these Department grants that public institutions of higher education (IHEs) that receive these grants comply with the First Amendment and private institutions that receive grants from the Department follow their stated institutional policies on freedom of speech, including academic freedom.”

Such language appropriately reinforced the federal government’s commitment to free speech on college campuses. Free expression faces a crisis on IHE campuses today. Shortly after your department issued this request for comment, the dean of Stanford’s diversity, equity, and inclusion joined students and other rioters in disrupting a planned lecture from Judge Kyle Duncan, just the latest in a sad list of shout downs that have occurred at colleges and universities over the last decade.¹

Earlier this school year, rioters at the University of New Mexico shouted down Fox News contributor Tomi Lahren, pounding on the walls with such force that the room was shaking.²

¹ Jeremiah Poff, “Stanford Law Dean Faces Student Revolt after Apologizing to Trump-Appointed Judge,” *The Washington Examiner*, March 14, 2023, <https://www.washingtonexaminer.com/restoring-america/equality-not-elitism/stanford-law-dean-student-revolt-after-apologizing-judge>.

² Brian Flood, “U of New Mexico Investigating ‘Who Violated the Law’ after Violent Protestors Interrupted Tomi Lahren Speech,” *FoxNews.com*, September 16, 2022, <https://www.foxnews.com/media/u-of-new-mexico-investigating-violated-law-violent-protestors-tomi-lahren-speech>.

Lahren could not continue her remarks and had to be escorted out of the building for fear of her safety.

Episodes such as these have plagued college campuses since at least 2015.³ For example:

- In 2018, students tried to occupy the Columbia University library, ignoring calls from school officials who said the rioters were “disrupting those trying to study”⁴;
- In 2017, Texas Southern University students shouted down Texas State Representative Briscoe Cain, calling him racist⁵;
- In 2018, Duke University students demanded that the school president, Vincent Price, “get off the stage” during his speech to a group of alumni.⁶

There were still more disruptive events involving shouting down invited speakers or violent riots that resulted in the destruction of school property and even injury of university personnel at the University of California-Berkeley, Auburn University, Georgetown University, Evergreen State College, the University of Wisconsin, Texas A&M, the University of Oregon, and Middleburg College, to name just a few IHEs, all since 2015.⁷

³ See Jonathan Butcher, *Splintered: Critical Race Theory and the Progressive War on Truth* (Nashville: Bombardier Books, April 2022).

⁴ Emma Buzbee, “Protestors Storm Butler Demanding ‘Decolonization’ of Curriculum, Campus Monuments,” *Columbia Spectator*, April 25, 2018, <https://www.columbiaspectator.com/news/2018/04/25/protesters-storm-butler-demanding-decolonization-of-curriculum-campus-monument>.

⁵ Stanley Kurtz, “Texas State Legislator Shouted Down at Texas Southern University,” *National Review Online*, October 10, 2017, <https://www.nationalreview.com/corner/texas-legislator-shouted-down-tsu-briscoe-cain-campus-free-speech/>, and Texas Scorecard, “Protestors Storm Briscoe Cain Speech at TSU,” *YouTube.com*, October 10, 2017, <https://www.youtube.com/watch?v=pWZSekfr24U>.

⁶ Adam Beyer and Sarah Kerman, “Group of Students Protests President Price’s Alumni Address, Issues Demands,” *The Chronicle*, April 14, 2018, <https://www.dukechronicle.com/article/2018/04/041418-beyer-protest>.

⁷ Nick Miroff, “Protestors Shout Homeland Security Chief Off Georgetown University Stage,” *The Washington Post*, October 7, 2019, https://www.washingtonpost.com/immigration/protesters-shout-homeland-security-chief-off-georgetown-universitystage/2019/10/07/1f2892d2-e915-11e9-9c6d-436a0df4f31d_story.html, Aaron Hanlon, “The New Threat to Free Speech Isn’t Coming from the Left,” *The Washington Post*, October 15, 2019, <https://www.washingtonpost.com/outlook/2019/10/15/real-threat-freespeech-campus-isnt-coming-left/>, Susan Svrluga, “UC-Berkeley Says ‘Free Speech Week’ Is Cancelled. Milo Yiannopoulos Is Coming Anyway,” *The Washington Post*, September 23, 2017, <https://www.washingtonpost.com/news/grade-point/wp/2017/09/23/uc-berkeley-says-free-speech-week-is-canceled-milo-yiannopoulos-says-hes-still-coming-to-campus/>, and Thomas Fuller, “Berkeley Cancels Ann Coulter Speech over Safety Fears,” *The New York Times*, April 19, 2017, <https://www.nytimes.com/2017/04/19/us/berkeley-ann-coulter-speech-canceled.html>, Katharine Q. Seelye, “Protestors Disrupt Speech by ‘Bell Curve’ Author at Vermont College,” *The New York Times*, March 3, 2017, <https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curveprotest.html>; Jeremy W. Peters, “In the Name of Free Speech,” *The New York Times*, June 14, 2018, <https://www.nytimes.com/2018/06/14/us/politics/campus-speech-protests.html>, and Christine Hauser, “Campuses Grapple with Balancing Free Speech and Security After Protests,” *The New York Times*, March 29, 2017, <https://www.nytimes.com/2017/03/29/us/texas-aandm-speaking-policy-richard-spencer.html>; Ryan Haas, “UO Students Shout Down President During \$50M Gift Announcement,” *OPB*, October 6, 2017, <https://www.opb.org/news/article/university-oregon-president-speech-protest-50-million-gift/>.

When IHE's fail to permit speakers to be heard—worse, when they facilitate the disruption, as at Stanford University—they are in violation of free speech guarantees.

In response, some state lawmakers have adopted proposals that protect the rights of everyone on public college campuses to listen and be heard in public areas of those schools. Policymakers in Alabama, Arizona, Georgia, North Carolina, and Wisconsin adopted proposals that protected everyone's expressive rights in public areas of public universities.⁸ Some of these proposals included provisions stating that students who had been found guilty of violating someone else's First Amendment rights on at least two occasions should face sanctions including the possibility of suspension and/or expulsion, the first such attempts to provide consequences to individuals who commit violent behavior that blocks someone else's expressive rights.

State lawmakers should continue to lead their states by considering proposals that

- Require universities to adopt a mission statement in favor of free speech, similar to the University of Chicago statement on free speech;
- State that anyone lawfully present on a public college campus should be allowed to protest or demonstrate in a publicly-accessible area of that campus;
- Clarify that no teacher or student will be punished for expressing a view that does not agree with an institutional position on any contemporary public policy issue;
- Explain that all publicly accessible areas of a public college campus are free speech zones;
- Consider consequences for students who violate the free speech rights of others, up to and including suspension and expulsion; and
- Require public university boards to produce annual reports that analyze the culture of free expression on their campus and report on the incidents involving shout downs and other incidents involving free speech.

Restrictive campus speech codes and policies such as free speech zones and bias response teams, which the U.S. Department of Justice said “chill” speech in a 2018 statement of interest, threaten free expression, and state policymakers should replace such policies with the ideas described above.⁹

These reforms are too specific for the Education Department to adopt and apply to every public college campus in the U.S. These provisions should be considered by state policymakers,

⁸ See Jonathan Butcher, “Executive Order to Protect Free Speech on Campus Recognizes Ongoing Challenge,” Heritage Foundation Issue Brief No. 4942, March 27, 2019, <https://www.heritage.org/sites/default/files/2019-03/IB4942.pdf>.

⁹ U.S. Department of Justice, “Justice Department Files Statement of Interest in Michigan Free Speech Case,” Press Release, June 11, 2018, <https://www.justice.gov/opa/pr/justice-department-files-statement-interest-michigan-free-speech-case>.

including legislators, governors, and public university board members, while any federal activity in the area of free speech in higher education should not inhibit state officials' attempt to adopt such provisions.

However, since the Education Department already asks grantees to comply with federal civil rights laws and regulations, such requirements could be expanded to require grantees to certify or demonstrate that they are abiding by the First Amendment and the school's own policies protecting free speech on campus as part of their grant applications and renewal documents. Such a requirement should help incentivize IHEs to proactively adopt and maintain school policies that protect free expression without also expanding the federal role in higher education beyond appropriate bounds.

Meanwhile, Washington should continue its support of the First Amendment through the U.S. Department of Justice's intervention in lawsuits to protect free speech on campus. And there are precise changes the agency can make regarding the requirements for federal grantees that will allow the Education Department to continue to emphasize the importance of free expression, recognizing that expressive rights are threatened and being violated at colleges and universities today. Any regulatory changes the agency adopts should encourage state lawmakers and state university board members to improve and expand their legislative and regulatory attempts to protect the ability of anyone lawfully present on a public college campus to listen and be heard, while also maintaining that protecting the First Amendment is a priority for the agency.

Sincerely,

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