

March 25, 2024

Dr. Miguel A. Cardona
Secretary, U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

RE: Docket ID ED–2024–OPE–0017

Dear Secretary Cardona:

This is a comment on the Department of Education’s proposed rule with regard to the National Resource Centers Program and Foreign Language and Area Studies Fellowships Program, Docket ID ED–2024–OPE–0017.

In general, we agree that the revised or rewritten sections bring 34 CFR Parts 655–657 closer to statute, easier to understand, and more in line with the two programs’ core mission of serving “the security, stability, and economic vitality of the United States” (20 U.S.C. 1121). We suggest the following additional improvements:

(1) **Mission.** The programs’ mission of serving “the security, stability, and economic vitality of the United States” is well-described in the context of the proposed definition of “Areas of national need” (§ 655.4). This mission is supported by the proposed definition of “Diverse perspectives” in the same section, which properly emphasizes relevant viewpoints “derived from scholarly research or sustained professional activities and community engagement abroad.”

Yet, this mission of serving “the security, stability, and economic vitality of the United States” is missing from § 656.1 on the “purpose” of the National Resource Centers Program, and it should be added there. Omitting it there would diminish the likelihood of an accurate assessment of the “purpose” evaluation criterion at § 656.21(3)(2). Likewise, the mission language is missing from § 657.1 describing what the Foreign Language and Area Studies Fellowships Program is, and that language should be added there. Putting this purpose in these sections would help applicants and evaluators understand the fundamental purpose of the programs, leading to better applications and evaluations.

This mission is undermined, furthermore, when adversaries of the United States support the same centers and/or fellowship students that these programs support. This mission also is undermined when students take advantage of federal funding to pursue foreign countries’ interests over those of the United States.¹ Therefore, we recommend that applicant institutions, center personnel, and

¹ Neetu Arnold, “Hijacked: The Capture of America’s Middle East Studies Centers,” National Association of Scholars, September 28, 2022, <https://www.nas.org/reports/hijacked/full-report>; Adam Kissel, “Transforming Federal Foreign Language Programs to Serve U.S. Interests,” The Heritage Foundation, March 17, 2023, <https://www.heritage.org/education/report/transforming-federal-foreign-language-programs-serve-us-interests>; Louis D. Brandeis Center for Human Rights Under Law, “The Morass of Middle East Studies: Title VI of the Higher Education Act and Federally Funded Area Studies,” November 2014, https://brandeiscenter.com/wp-content/uploads/2017/10/antisemitism_whitepaper.pdf; Mike Gonzalez, “America Is Ill-Served by Its Government-

fellowship students be required to certify in assurances that they intend to uphold the programs' mission through the duration of funding. These assurances should be required in applications and referenced at §§ 656.11 and 657.11 and, for student applicants to institutions, referenced at § 657.12.

(2) **Diverse perspectives.** Higher Education Act, Title VI programs have been criticized over many years for a lack of diverse perspectives. As early as 2003, Stanley Kurtz noted, “For some time now, I have criticized scholars who study the Middle East (and other areas of the world) for abusing Title VI of the Higher Education Act. Title VI-funded programs in Middle Eastern studies (and other area studies) tend to purvey extreme and one-sided criticisms of American foreign policy.”² When Title VI programs were reauthorized in 2008, “diverse perspectives” requirements were added in multiple locations in the law. Indeed, a presentation of diverse perspectives is critical for stakeholders to develop an accurate understanding of a studied topic or region.

As stated above, the proposed definition of “diverse perspectives” is appropriate for the mission of Title VI programs. Additionally, this requirement would appropriately be among the selection criteria for applications, as described at §§ 656.21(d)(4), 656.22(d)(4), 657.11(a)(1), and 657.21(d)(4).

What is missing, however, is clarity for applicants on how this statutory requirement will be measured when grantees report on their activities. Applicants should understand their responsibilities on the front end, rather than being surprised on the back end by annual-report reviews that may find grantees out of compliance due to a lack of diverse perspectives. Clarity in this area should be added in a new section under Subpart D of Part 656 and under the reporting requirements section at § 657.33.

(3) **Consultation.** The proposed regulations at §§ 656.20(e), 656.24(a)(4), 657.20(e), and 657.22(a)(9) do not sufficiently apply the statutory requirements of 20 U.S.C. 1121(c) regarding consultation on the national need. The statute requires that the Secretary:

- “shall, prior to requesting applications for funding under this subchapter during each grant cycle, consult with and receive recommendations regarding national need for expertise in foreign languages and world regions from the head officials of a wide range of Federal agencies.”
- “may take into account the recommendations.”
- shall “provide information collected [from the consultation] when requesting applications.”
- shall “make available to applicants a list of areas identified as areas of national need.”

Funded Area Studies and Foreign Policy Programs,” Heritage Foundation Backgrounder No. 2946, August 25, 2014, <https://www.heritage.org/asia/report/america-ill-served-its-government-funded-area-studies-and-foreign-policy-programs>.

² Stanley Kurtz, “Studying Title VI,” June 16, 2003, *National Review*, <https://www.nationalreview.com/2003/06/studying-title-vi-stanley-kurtz>.

Yet, the proposed regulations merely refer to the second bullet point. They do not identify how the Secretary will engage in the required consultation, how the Secretary will determine areas of national need, how the Secretary will include consultation results in the request for applications, or how the Secretary will make available to applicants a list of areas identified as areas of national need.

We note that the Graduate Assistance in Areas of National Need (GAANN) Program is an analogous program of the Department of Education. A similar consultation is required before the Secretary designates “areas of national need” (20 U.S.C. 1135a(b)). The GAANN Program regulations similarly fail to explain how the consultation is conducted or used, with results that thwart the statute. As a result, instead of prioritizing areas of national need, grant competitions have sometimes included all possible disciplines listed in the Appendix to 34 CFR Part 648, regardless of whether such disciplines have any relationship to the national need. As a result, funding has been wasted on areas that are not national needs.

The same issue presents a risk to these Title VI programs. To reduce the waste of government funds, the regulations should elaborate on the consultation process and how the results are communicated in order to prevail upon Department staff to follow the statute fully, and the regulations should prioritize the results more strongly in grant competitions in order to persuade more applicants to attempt to serve the identified national need.

(4) Employment practices. Proposed § 656.21(a)(5) creates an evaluation criterion for employment practices that is not authorized by the statute. While encouraging applications from a wide variety of potential job applicants may be a good employment practice, the “extent to which” such practices exist in a proposed Center is not a criterion authorized by the statute. Creating unauthorized criteria opens the Department of Education to possible litigation. Section (a)(5) should be removed.

To further illustrate that this language is arbitrary and capricious, note that the current language at § 656.21(b)(3) identifies a different, also arbitrary and capricious, list of groups: “members of racial or ethnic minority groups, women, persons with disabilities, and the elderly.” Changing the list, as proposed, to “race, color, national origin, gender, age or disability” is equally arbitrary and capricious.

The same arguments apply to § 656.22(a)(5), which uses the same proposed new list of groups.

(5) Discrimination against certain institutions. Proposed §§ 656.21(b)(4), 657.21(c)(1), and 656.22(b)(4) use as a criterion having “enough qualified tenured and tenure-track faculty.” These provisions unreasonably discriminate against institutions of higher education that do not use a tenure system but have many highly qualified faculty members. These provisions should refer only to “qualified faculty” rather than “qualified tenured and tenure-track faculty.”

(6) “Barriers.” Proposed § 657.21(e)(2) establishes an evaluation criterion that is not in the statute, “the extent to which [an applicant] identifies barriers, if any, to equitable access to and participation in the FLAS Fellowships Program and how the institution proposes to address these barriers.” This provision is unauthorized and is arbitrary and capricious. Such a criterion

appears neither in the statute nor in existing regulations; it would be a new invention here, and it does not even track the inclusion language of § 656.21(a)(5). This criterion should be removed from the final regulations.

(7) Minority-Serving Institutions. In the past, the Department of Education has prioritized Minority-Serving Institutions (MSIs) for grants despite providing no evidence that MSIs are better equipped to serve the mission of Title VI programs. Such a priority was arbitrary and capricious, opening the Department to potential litigation. To reduce litigation risk, we recommend that the final regulations bind the Secretary from using a competitive or absolute priority in favor of MSIs. Such new provisions should appear in §§ 656.24 and 657.22.

Thank you for the opportunity to comment. We would be delighted to answer any questions about our comment.

/s/

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