ED-2023-OPE-0029-0001

March 8, 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

Dear Secretary Cardona:

This is a response to the Request for Information Regarding First Amendment and Free Inquiry Related Grant Conditions.

The Department of Education has requested responses regarding how 34 CFR §§ 75.500 and 76.500, sections (b) and (c), "have affected or are reasonably expected to affect decisions surrounding First Amendment and free speech-related litigation in Federal and State court and institutional policies on freedom of speech" as well as other relevant information.

From 2007–2012, I directed the defense program at the Foundation for Individual Rights in Education (now identified as the Foundation for Individual Rights and Expression, or FIRE). FIRE's core mission was to promote and defend individual rights, particularly freedom of speech, for students and faculty members at U.S. colleges and universities. I have seen in detail how hundreds of free-speech controversies and violations have played out on college campuses.

I continue to monitor the free-speech environment on college and university campuses. For the past three years, I have supported FIRE's annual Free Speech Rankings.[1] In June of 2022, I published a report on the approximately 100 policies, just at West Virginia four-year public colleges and universities, that FIRE had identified as violating the First Amendment (known as "speech codes").[2]

West Virginia is far from unique. FIRE produces an annual report on speech restrictions ("speech codes") that violate the First Amendment across hundreds of U.S. institutions of higher education. Progress in reducing the number of clear policy violations has appeared slow but steady—until the most recent report. "For the first time in 15 years," FIRE writes in its 2023 report, "the percentage of schools earning an overall red light rating increased. Of the 486 schools included in FIRE's Spotlight database, 94 earn an overall 'red light' rating for maintaining policies that clearly and substantially restrict free speech."[3]

Furthermore, "324 earn an overall 'yellow light' rating for maintaining policies that impose vague regulations on expression." FIRE explains that yellow-light policies are also unconstitutional. Meanwhile,

[1] https://rankings.thefire.org/
[2] Kissel, A., Beltz, L., and Robinson, J. A. (2022). Free Speech at West Virginia Colleges and Universities: Peril and Promise. Cardinal Institute for West Virginia Policy. https://cardinalinstitute.com/publication/free-speech-at-west-virginia-colleges-and-universities-peril-and-promise/
[3] FIRE. (2023). Spotlight on Speech Codes 2023. https://www.thefire.org/research-learn/spotlight-speech-codes

"Just 60 schools earn an overall 'green light' rating for maintaining policies that do not seriously imperil free expression."[4]

The main motivations for revising unconstitutional policies, in my experience, include: (1) The positive press that results from earning a "green light" rating from FIRE; (2) The negative press that results from free-speech violations and controversies.

In contrast, the prospect of losing free-speech litigation, in itself, has extremely little deterrent effect on institutions of higher education. It is hard to win against a private institution, which in most states involves a contract question rather than free speech alone (apart from California's "Leonard Law," which gives free speech rights to students at secular private colleges).[5] Public colleges, when they lose a lawsuit regarding a speech code, generally have to pay only nominal damages (near zero) and simply must stop enforcing the speech code and must revise it. Judgments with monetary damages over $100,000 are extremely rare and, for most colleges, very affordable.

Free speech at public institutions of higher education is a fundamental right, and it is a positive right given by most private institutions of higher education. Yet, private-sector pressure from organizations such as FIRE and court judgments over the course of decades have done little to protect students, faculty, and staff against unconstitutional infringements of this right. This is a core reason why additional incentives are needed. 34 CFR §§ 75.500 and 76.500, sections (b) and (c), require free-speech compliance from Department of Education grantees.

When a grantee violates section (a) of these regulations, which require nondiscrimination on the basis of race, sex, and other categories, the Department's Office for Civil Rights investigates and makes a determination. Ultimately, all colleges comply with applicable nondiscrimination laws in order not to lose Education Department grants. Not losing federal funding is a powerful incentive. The same incentive applies in the free-speech context.

Notably, the Department of Education does not inquire about section (a) of these regulations, which could help the Department of Education inform Congress about the impact of the relevant laws at colleges and universities. Yet, the positive and negative incentives involved are much the same.

Additional points:

(1) Litigation is costly for plaintiffs and defendants alike, in terms of money, time, and trouble. Plaintiffs tend not to litigate close calls to the appellate level because of the costs and lower likelihood of succeeding. Accordingly, precedential decisions that help shape First Amendment law in the context of higher education are rare. Instead, most cases win or lose, and then end, at the level of district courts, without hard questions being presented. Generally these are straightforward cases where a student has exhausted internal remedies and has no recourse but to the court.

This means that in the majority of cases, a college has refused to uphold free speech and has stood firm in violation of a fundamental right until required by a court to reverse course. Such colleges need the

[4] FIRE. (2023). Spotlight on Speech Codes 2023. https://www.thefire.org/research-learn/spotlight-speech-codes-2023

[5] Calif. Education Code § 94367.

additional incentive of 34 CFR §§ 75.500 and 76.500, beyond nominal damages, to stop violating free speech rights.

Additionally, since litigation is so costly for plaintiffs, paragraphs (b) and (c) do not appreciably change the incentives for on-campus complainants. Even if they were aware of paragraphs (b) and (c), the vast majority of accused students, faculty, and staff merely want to get out of the campus judicial process and move on with their lives.

For those who would issue a facial challenge to a speech code, first of all, they are almost always right because they are almost always supported by First Amendment attorneys who know the law. Second, such attorneys would want the speech code to be revised whether or not paragraphs (b) and (c) would incentivize a college to capitulate sooner. Third, all parties should welcome a faster end to litigation or a just resolution that avoids litigation.

(2) Because precedential decisions that advance free speech rights on college campuses are rare, I understand that some parties may be nervous that colleges will sometimes settle the case before reaching the end of litigation. But colleges that expect to lose will already have a strong incentive to settle. So will colleges that want to avoid an embarrassing precedential case featuring the name of their college.

The additional incentive to settle because of potentially losing a federal grant is very small. This is because colleges know, just as in the paragraph (a) context, that all colleges eventually comply and none of them—I believe the number is indeed zero—lose federal funding over a discrimination complaint. Likewise, colleges know that the Department of Education will eventually bring them around to compliance and they will not in fact lose federal funding. As with the paragraph (a) incentive, the paragraphs (b) and (c) incentive accomplishes its goal without causing the loss of federal funds in practice.

In other words, any nervousness that colleges might settle court cases because of paragraph (b) or (c) is unwarranted.

(3) Rather than rescind paragraphs (b) and (c), the Department of Education has an opportunity to model free speech protection on the processes of paragraph (a). In particular, when the Office for Civil Rights (OCR) makes a determination of discrimination, OCR frequently requires the institution to enter a resolution agreement in which the institution agrees to heightened reporting requirements—the institution agrees not to discriminate in the future and to demonstrate compliance. In the (b) and (c) context, the Department of Education could advance free speech on college and university campuses by similarly requiring grantees to report on and demonstrate compliance with the First Amendment or their own guarantees of free speech.

(4) The prospect of facing Department of Education action after losing in court provides public and private colleges with additional incentive to reform their speech codes and adjudication processes ahead of time. Engaging with the Department of Education involves obligation of expensive campus resources, including legal and administrative time and expense.

This incentive would be stronger if the Department of Education shows that it will use resolution agreements to enforce paragraphs (b) and (c). Colleges do not want to have such agreements on the

public record, they do not want the additional compliance requirements, and they may have to disclose investigations and resolutions agreements when applying for other federal grants.

When a college acts proactively to align its policies and procedures with free speech obligations and guarantees, it preserves free speech immediately across its entire relevant population. Such a decision has wide-ranging, immediate benefits. Paragraphs (b) and (c) serve to encourage this proactive action. In contrast, a college that begrudgingly changes a speech code after a loss in court—following years of litigation—has meanwhile denied free speech across its entire relevant population for just as long (absent an earlier court injunction).

In other words, the benefit of a rare precedent-setting court decision is outweighed by incentivizing colleges nationwide to act proactively before having to go to court and potentially facing executive as well as judicial action.

(5) FIRE has long argued, correctly in my view, that most private colleges promise free speech because they want to. Free inquiry and free expression are core values of almost every college. Any nervousness that paragraphs (b) and (c) would tip the balance of incentives to make a private college abandon its core values is therefore misplaced.

(6) The exceptions to free speech are generally clear and well-defined. Paragraphs (b) and (c) are likely to incentivize training of campus officials to better understand when speech is protected and when speech is unprotected, to avoid the potential of executive as well as judicial action. This training will cause more free speech controversies to be resolved correctly at the campus level, meaning more accurate findings of guilt and innocence (or, as colleges often designate the terms, responsibility or non-responsibility).

FIRE's annual free speech rankings show considerable self-censorship among students. From my long experience observing free speech controversies on campus, I have observed that campus pressures tend to cause innocent students and faculty members to be found guilty much more often than the reverse. (This is why FIRE always has had so much defense work to do since its founding in 1999.) Paragraphs (b) and (c), far from causing unprotected speech to be incorrectly determined to be protected, instead are likely to cause campus adjudications to be more accurate. This analysis is equally relevant to public and private institutions.

Thank you for the opportunity to comment. I would be delighted to answer any questions about my responses.

Sincerely,

/s/

Adam Kissel
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