Comment of the Foundation for Individual Rights and Expression in response to the Department of Education's Request for Information

Department of Education
Request for Information
Docket No. ID ED-2023-OPE-0029

First Amendment and Free Inquiry Related Grant Conditions

Submitted on March 24, 2023

Joseph Cohn, Legislative and Policy Director
Greg Y. Gonzalez, Legislative Counsel
Foundation for Individual Rights and Expression
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
(215) 717-3473

Introduction

The Foundation for Individual Rights and Expression (FIRE; thefire.org) is a nonpartisan nonprofit dedicated to defending the rights of all Americans to free speech and free thought — the essential qualities of liberty. Because colleges and universities play an essential role in preserving free thought, FIRE places a special emphasis on defending these rights on our nation's college campuses. Since 1999, FIRE has successfully defended the rights of students and faculty nationwide.

We write to offer our input on the Department of Education's review of 34 C.F.R. §§ 75.500 and 76.500, paragraphs (b) and (c), which add material conditions relating to First Amendment freedoms and free inquiry to Department grants. In 2020, FIRE submitted a comment commending the Department's efforts during the regulatory process to include these important protections.[1] While we also suggested some changes in our comment, FIRE was "cautiously optimistic"

[1] FIRE, COMMENT OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF THE DEPARTMENT OF EDUCATION'S PROPOSED REGULATIONS ON ELIGIBILITY OF FAITH-BASED ENTITIES (Feb. 18, 2020), https://www.thefire.org/research-learn/fire-comment-religion-ed-regulations-feb-18-2020 [https://perma.cc/5AHW-EW2Y].

about the final regulations released in September 2020 and their "potential to incentivize institutional respect for and attention to core civil liberties."[2]

We write today in defense of 34 C.F.R. §§ 75.500 and 76.500, paragraphs (b) and (c), which provide important free speech protections for students at our nation's colleges and universities. Put simply, these regulations require public institutions of higher education to protect the First Amendment rights of their students — a responsibility they are already required to uphold, but too often fail to meet. Further, the regulations require of private institutions what many courts already demand of them: that they live up to the promises made in their published institutional policies. As the Department commences its review, it is important to remember that these regulations have been in place for less than three years. More time is needed before the impact of the regulations, good or bad, is fully realized, and assessment now is premature. The Department's review should conclude that there is insufficient data to justify a repeal of these regulations.

Analysis

I. The regulations have had no noticeable effect on First Amendment or free speech-related litigation in court.

As these regulations were finalized only two and a half years ago, it is premature to gauge how they have affected decisions related to litigation in federal and state courts. The regulations require public institutions to comply with the First Amendment as a material condition of receiving grants from the Department, but noncompliance is only determined after a final judgment in court. The regulations state:

> The Department will determine that a public institution has not complied with the First Amendment only if there is a final, non-default judgment by a State or Federal court that the public institution or an employee of the public institution, acting in his or her official capacity, violated the First Amendment.[3]

Given that litigation may proceed for several years before obtaining a final judgment, it is unreasonable to expect that enough cases were both filed and reached a final resolution in less than three years to gauge any trends. Further,

[2] Press Release, FIRE, Education Dept. issues important new free speech and religious liberty regulations, (Sept. 9, 2020), https://www.thefire.org/news/education-dept-issues-important-new-free-speech-and-religious-liberty-regulations [https://perma.cc/7TSK-C6DJ].

[3] 34 C.F.R. § 75.500(b). *See also* 34 C.F.R. §§ 75.500(b), 76.500(b)–(c).

changes to student life due to remote learning and the COVID-19 pandemic may have affected the likelihood and speed of litigation.

In our comment in response to the Department's notice of proposed rulemaking, we noted that the reliance on judicial opinions could have an unexpected impact on litigation in First Amendment cases.[4] When the final regulations were issued, we explained that they were "not without risk":

> Because institutions risk losing access to federal grants if they lose a First Amendment lawsuit, there is a possibility that institutions will change the way they litigate those lawsuits. It may also affect the way judges decide First Amendment cases, knowing that large federal grants may be at stake.[5]

Our concerns notwithstanding, preexisting regulations pertaining to grants allow discretion by the Secretary when determining remedial actions, meaning that attempts institutions take to cure violations may be considered. As the Department noted in the discussion of the final rule:

> The Department wishes to emphasize that the final rule will not compel the Secretary to take any particular remedial action with respect to a grant in the event of a final, non-default judgment by a State or Federal court that a public institution violated the First Amendment or a private institution violated its stated institutional policies regarding freedom of speech, including academic freedom. . . . The final rule includes a broad range of pre-existing potential remedial actions described in subpart G of Part 75 and Subpart I of Part 76 of Title 34 of the Code of Federal Regulations, including imposing special conditions, temporarily withholding cash payments pending correction of the deficiency, suspension or termination of a Federal award, and disbarment. Indeed, the Secretary would retain discretion to, for example, take remedial action where the institution has demonstrated a pattern of non-compliance or deliberate indifference, or opt not to take remedial

[4] *Id.* ("[I]t may also alter the behavior of litigants and courts in unpredictable ways. For example, a court deciding an issue under the First Amendment may be deterred from ruling against an institution if it perceives the potential loss of federal research dollars as too grave a consequence.").

[5] Press Release, FIRE, *supra* note 2.

action where the institution promptly implemented appropriate corrective measures to remedy the violation.[6]

As such, the regulations have not negatively affected litigation or jurisprudence in the short time the regulations have been in place, and we remain cautiously optimistic they will not do so in the future.

II. Since the Department enacted the regulations, FIRE has measured a reduction in speech-restrictive policies at both public and private institutions.

So long as the Department's regulations are carefully crafted to avoid intentionally or inadvertently proscribing certain speech, potential federal penalties for institutions that violate students' constitutional rights are beneficial. Further, the potential for federal sanctions on institutions increases the likelihood that they will proactively review and amend their policies and practices to protect students' free speech rights.

Since 2020, when the regulations were implemented, FIRE's annual survey of college and university speech codes has indicated a decrease in the percentage of institutions that maintain policies that clearly and substantially restrict constitutionally protected speech. FIRE rates these as "red light" policies, which include unreasonable restrictions on public expression and overbroad harassment policies.[7] Further, 98 university administrations or faculty bodies have now adopted free speech policy statements modeled after the University of Chicago's "Report of the Committee on Freedom of Expression" (the "Chicago Statement"), actively committing their institutions to upholding freedom of expression.[8] In fact, more than 20 institutions have adopted or endorsed the

[6] Direct Grant Programs, State Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 59916, 59927 (Sep. 23, 2020).

[7] *See* FIRE, SPOTLIGHT ON SPEECH CODES 2023 (2022), https://www.thefire.org/research-learn/spotlight-speech-codes-2023 [https://perma.cc/E8FE-T9WH] [hereinafter *2023 Spotlight Report*] (indicating that 19.3% of rated institutions have a "red light" ratings); FIRE, SPOTLIGHT ON SPEECH CODES 2020 (2019), https://www.thefire.org/research-learn/spotlight-speech-codes-2020 [https://perma.cc/ZZ62-W5VR] [hereinafter *2020 Spotlight Report*] (showing that in the year prior to the regulations being finalized, 24.2% of rated institutions had a "red light" rating).

[8] Chicago Statement: University and Faculty Body Support, FIRE (Mar. 22, 2023) https://www.thefire.org/research-learn/chicago-statement-university-and-faculty-body-support [https://perma.cc/36TH-B2G4].

Chicago Statement or a substantially similar statement since these regulations were finalized.[9]

At the same time, however, changes in other Department regulations would encourage institutions to adopt practices and policies that burden free speech. Specifically, in June 2022, the Department proposed changes to Title IX regulations that reject the Supreme Court's speech-protective definition of sexual harassment in favor of a definition that threatens free speech rights. Overbroad harassment policies commonly stifle campus expression. While the First Amendment and corresponding free speech promises do not protect discriminatory harassment — properly defined — the Supreme Court has required a clear standard in the educational setting that is carefully tailored to fulfill public schools' twin obligations to respect freedom of speech and prevent discriminatory harassment. In *Davis v. Monroe County Board of Education*, the Court defined student-on-student (or peer) harassment in the educational context as targeted, unwelcome, discriminatory conduct that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[10]

Given the countless examples of institutions inappropriately citing obligations under federal antidiscrimination laws to investigate and punish speech that is unequivocally protected expression and thus not peer harassment, the potential rollback of speech-protective regulations in the Title IX context makes it imperative that 34 C.F.R. §§ 75.500 and 76.500, paragraphs (b) and (c), remain intact.[11]

---

[9] *Id.*

[10] 526 U.S. 629, 651 (1999).

[11] *See, e.g.*, Lauren del Valle, *Their fraternity is expelled. They're removed from classes. And another disturbing Syracuse frat video surfaces*, CNN (Apr. 23, 2018), cnn.com/2018/04/23/us/new-video-syracuse-university-theta-thau-frat/index.html [https://perma.cc/ECT2-ZBGK] (reporting on an incident where Syracuse University, citing an overbroad anti-harassment policy, suspended 18 members of an engineering fraternity for participating in satirical skits mocking bigoted beliefs); Susan Kruth, *At U. of Alaska Fairbanks, Months-Long Investigations of Student Newspaper Chill Speech*, FIRE (Dec. 12, 2013), https://www.thefire.org/news/u-alaska-fairbanks-months-long-investigations-student-newspaper-chill-speech [https://perma.cc/F762-2QHJ] (discussing a 10-month investigation by the University of Alaska Fairbanks' into the student newspaper because a professor repeatedly claimed that two articles constituted sexual harassment prohibited by Title IX). The Department's potential rollback of speech protective Title IX regulations is partially to blame for the Minnesota State Colleges and Universities system adopting an overbroad harassment

With regard to private institutions, FIRE is hopeful that the potential of losing federal grant funding,[12] as set forth by the regulations, will motivate the institutions to review and amend their policies to avoid violating their published commitments to free expression and academic freedom. Although the First Amendment does not bind private universities, a vast majority of the 111 private schools rated in our database promise their students free speech rights in their written materials, with only six private schools earning a "Warning" rating from FIRE for clearly and consistently placing other values above free expression in their written materials.[13] Prior to 2020, 44.8% of private universities reviewed by FIRE earned a "red light" rating for maintaining at least one policy that clearly and substantially restricts free speech.[14] In our most recent report, that number dropped to 37.8%.[15] Thus, while lagging behind public universities, private institutions of higher education have also shown improvement since the regulations were implemented. However, far too many private schools are still not living up to their promises.

Lastly, any concerns about the regulations incentivizing private colleges to retreat from speech-protective policies have thus far proven unfounded. As mentioned above, institutions of higher education, including private universities, continue to abandon speech-restrictive policies and make commitments to protecting free speech, such as by adopting the Chicago Statement.

III. Any costs imposed by compliance with these regulations are worth incurring in order to protect free speech on college campuses.

Any costs on institutions of higher education associated with compliance with the regulations should be minimal. Public institutions of higher education are already bound by the U.S. Constitution, including the First Amendment, regardless of the regulations.[16] As such, these provisions imposed no new legal obligation upon public colleges and universities. Likewise, with respect to

---

policy which cause all of its rated schools to be downgraded to an overall "red light" rating. *See 2023 Spotlight Report*, *supra* note 4.

[12] *See Agency Profile Department of Education*, U.S. DEP'T OF THE TREASURY, BUREAU OF THE FISCAL SERVICE, Spending.gov (Mar. 22, 2023), https://www.usaspending.gov/agency/department-of-education?fy=2023 [https://perma.cc/92B4-7RSF].

[13] *2023 Spotlight Report*, *supra* note 7.

[14] *2020 Spotlight Report*, *supra* note 7.

[15] *2023 Spotlight Report*, *supra* note 7.

[16] *See Healy v. James*, 408 U.S. 169, 181 (1972).

private institutions, these regulations only apply to those that promise free speech protections to their campus communities, meaning they should already be living up to those commitments regardless of any potential loss of federal grants.[17]

Further, even if additional costs are imposed due to compliance with these regulations, such costs should have little to no bearing on the necessity of the regulations. The Department has not let potential costs on institutions impede implementation of other regulations that are necessary to protect student rights, including its Title IX regulations. The Department's Title IX regulations have led to significant compliance and litigation costs, but the Department has not argued the costs to institutions require modification of the Department's enforcement of the regulations.

While additional costs associated with the regulations should be minimal, any extra expense is worthwhile to protect free speech for students and faculty at our nation's institutions of higher education.

Conclusion

34 C.F.R. §§ 75.500 and 76.500, paragraphs (b) and (c), are important regulations that give additional incentives to universities, both public and private, to foster an environment of free speech. Further, these regulations were implemented far too recently to gauge their full effectiveness. Nevertheless, in that short time, institutions have already made strides in protecting the free speech of students and faculty, and the regulations may have been a key part of those improvements. FIRE stresses the importance of these regulations and urges the Department to keep them in place.

Respectfully submitted,

Joe Cohn
Legislative and Policy Director

Greg Y. Gonzalez
Legislative Counsel

[17] To be clear, the regulations did not add causes of action for aggrieved parties, only potential consequences for institutions for violating the First Amendment or institutional free speech promises.