

March 24, 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—0001

Dear Secretary Cardona:

The Louis D. Brandeis Center for Human Rights Under Law (LDB)¹ writes in response to the U.S. Department of Education’s “Request for Information Regarding First Amendment and Free Inquiry Related Grant Conditions,” regarding the Free Inquiry Rule.² Specifically, we urge the Department to retain the Free Inquiry Rule and provide additional technical assistance to ensure that it continues to provide effective protections for students’ civil liberties.

I. The Free Inquiry Rule Plays a Vital Role in Protecting Student Free Speech

The Free Inquiry Rule provides essential provisions that alert universities to civil liberties abuses and protect Jewish students and all students. These provisions ensure that public and private institutions of higher education (IHEs) that receive U.S. Education Department (ED) grants uphold free speech principles to the extent that they are bound by either the First Amendment or contractual obligations. The risk of a State or Federal court finding them in violation may now include additional sanctions from ED, including possible loss in funding. This liability serves as an important deterrence mechanism, as we have seen in practice.

These provisions are important for protecting students, including Jewish students, who are silenced through intimidation or harassed and punished for their speech. We frequently see how Jewish students who express aspects of their ethnic and shared ancestral identity connected to Israel, are denied their rights to free speech, expression, and association on campus. By simply sharing and celebrating their heritage and affinity for their ancestral homeland, Israel, online or on campus, Jewish students have been ostracized, forced out of student government positions, and coerced into silence. The Final Rule has been a useful tool to deter such misconduct, and rescinding it would expose students to further abuse.

In our experience, the Free Inquiry Rule acts as a strong deterrent against the potential infringement of free speech and equal associational rights by private institutions. At Duke

¹ LDB engages in research, education, and legal advocacy to combat the resurgence of anti-Semitism on college and university campuses, engaging directly with students who suffer First Amendment violations and IHE decision-makers.

² The Department notes, in its Request for Information, that the Free Inquire Rule “added provisions related to free inquiry (§ 75.500(b) and (c) for Direct Grant Programs, and § 76.500(b) and (c) for State-Administered Formula Grant Programs.”

University, a Zionist student group composed of students who support Israel was denied recognition by the Duke Student Government over an Instagram post that described the group's support for Israel. No other non-Jewish student organization was singled out, subjected to special scrutiny, and denied recognition for expressing an aspect of their identity. LDB notified Duke of their legal obligation to adhere to their own free speech policies on campus or else risk their funding. Duke took the appropriate steps and reinstated the student group, thereby protecting the students' rights.³ Without the threat of losing funding from ED, we would likely have seen additional encroachments.

The problem at Duke is not an isolated incident. LDB has assisted students who have been punished for expressing their Jewish identity on numerous other public university campuses as well. At the State University of New York at New Paltz, for example, two Jewish women were expelled from a sexual assault survivor group because they posted infographics on social media expressing pride in the Jewish people's ethnic and ancestral connection to the Land of Israel.⁴

LDB has also assisted students who have faced free speech violations on private university campuses. At Tufts University, a Jewish pro-Israel member of the Tufts Community Union Judiciary was harassed, threatened with a baseless disciplinary hearing, and muted during a Zoom meeting to prevent him from expressing his views because he was a Zionist.⁵ At the University of Southern California, a Jewish student was harassed and forced to resign from her student government position because she expressed pride in her Zionist identity.⁶

In all these cases, Jewish students should have been able to openly express their identities and beliefs while engaging freely with their campus communities; instead, they were harassed and intimidated by attempts to silence them. Jewish students on campus are too often forced to choose between engaging in free speech and risking repercussions, or staying quiet and hiding their identity in order to avoid negative consequences. An LDB poll reveals that 65% of openly Jewish students feel unsafe on campus, and 50% actively hide their Jewish identity; in other words, Jewish students are increasingly being forced to stay quiet about their identity and beliefs.⁷ It is no wonder that Jewish students are fearful of speaking up, especially in light of rising antisemitism across the country. ED should be alarmed by this and provide additional protections, rather than rolling back existing ones.

³ "Brandeis Center Commends Duke's Decision to Reinstate SSI." Louis D. Brandeis Center for Human Rights Under Law, February 24, 2022. <https://brandeiscenter.com/brandeis-center-commends-dukes-decision-to-reinstate-ssi/>.

⁴ "Bandler, Aaron. "Two Jewish College Students Claim They Were Excluded from Sexual Assault Survivors Group Because of Pro-Israel Views." Jewish Journal, August 23, 2022. <https://jewishjournal.com/news/united-states/350832/complaint-filed-to-education-dept-after-jewish-students-allege-suny-new-paltz-sexual-assault-survivors-group-excluded-them/>.

⁵ Svirsky, Meira, and Sean Savage. "Following 'Incessant Anti-Semitic Harassment,' Tufts Student Calls on University to Intervene." Jewish News Syndicate, March 1, 2021. <https://www.jns.org/following-anti-semitic-harassment-tufts-student-seeks-administrative-help/>.

⁶ Vera, Amir, and Stella Chan. "US Department of Education Opens Investigation into USC after a Student Accused the School of Allowing Antisemitism on Campus." CNN, July 27, 2022. <https://www.cnn.com/2022/07/27/us/usc-antisemitism-complaint-us-education-department-reaj/index.html>.

⁷ "Anti-Semitism @ College." The Louis D. Brandeis Center for Human Rights Under Law, 2021. <https://brandeiscenter.com/wp-content/uploads/2021/09/Brandeis-Survey-Findings.pdf>.

II. The Arguments Against the Free Inquiry Are Incorrect

The arguments that have been raised against the Free Inquiry Rule are baseless canards:

1. “The regulation unnecessarily goes beyond what is required by the courts.”

The opposite is true. The final rule is narrowly tailored to what is required by the courts, since a prior judicial determination is required for ED to determine an IHE has violated a material condition of the Department’s grant. Both §§ 75.500(b) and (c) and 76.500(b) and (c) stipulate that IHEs are in compliance with an ED grant until a State or Federal court issues “a final, non-default judgment” stating that the institution or an employee of that institution violated these provisions. This important feature ensures that ED’s work is well aligned with the courts.

2. “The regulation encourages campus community members to pursue litigation more frequently.”

Not so. This regulation limits the necessity of litigation by (i) providing legal clarity about IHEs’ responsibilities regarding free speech, (ii) incentivizing IHEs to establish policies that avoid the violation of students’ rights, and (iii) incentivizing IHEs to voluntarily resolve students’ claims rather than face the potentially substantial expenses that would follow from adverse judicial determinations.

In the absence of legal clarity, litigation abounds. These provisions provide campus community members with a clear understanding of what duty their university owes to them. Therefore, unnecessary litigation is avoided. By creating an incentive for IHEs to establish strong free speech policies, students enjoy an environment where free speech is promoted, and when a violation occurs, their university has a policy in place to remedy it. There’s no need for expensive litigation when students’ rights are upheld and violations are appropriately remedied.

Even if this were not true, litigation to protect the civil rights and liberties of students is an important part of our judicial system. It should not be obstructed when justly pursued.

3. “The regulation undermines existing campus processes related to free speech violations.”

The fact that an IHE has a preexisting process for dealing with free speech violations does not mean it has a sufficient or effective process. These provisions have established a standard that IHEs should already be following. Public IHEs should uphold the First Amendment. Private IHEs should uphold their stated free speech policies. Unfortunately, free speech violations do occur on campuses, and ED needs a way to ensure that IHEs are following through on their commitments to free speech and appropriately meeting the needs of their students. Without the Free Inquiry Rule, ED could allow free speech violations to go unchecked.

4. “The regulation raises institutional costs as a result of increased litigation and prompts institutions to change their approach to litigation, such as being more likely to settle.”

Fortunately, IHEs do not need to spend unnecessary funds on litigation if they simply comply with students’ fundamental rights. Rescinding this regulation over concerns of raising institutional costs creates a slippery slope for ED. The same argument could be made about ED’s other existing work to support students’ basic rights, including all work done by the Office of Civil Rights (OCR).

Fear of settlement is also unfounded. In some cases, settlement is appropriate and reasonable.

If IHEs have any remaining concerns about litigation costs or settlement, ED may provide technical assistance to IHEs on how they can protect students’ rights, rather than working with them to eviscerate students’ protections.

5. “The regulation incentivizes private colleges to limit, eliminate, or reconsider their policies on free speech for fear of losing grant funds.”

This argument presumes that private colleges and universities are not serious about upholding their stated commitment to free speech. It suggests that universities would not have established free speech policies and made such commitments to students and members of their community if they knew that they would be compelled to actually honor those policies. This argument, if made by IHEs, should be dismissed as what it is: scandalously disreputable.

Higher education’s free speech policies are worthless if universities have no intent to honor them. The Free Inquiry Rule ensures that universities honestly represent their intent to protect free speech by holding universities accountable for non-compliance. Only universities that do not intend to actually protect speech would consider withdrawing their free speech policies rather than abide by them. If ED withdraws its enforcement mechanism in the face of such threats, it will be providing cover to the universities that have no actual intent to protect speech and will be making it easier for those universities to violate students’ free speech rights.

III. Final thoughts:

ED states that “The Biden-Harris Administration deeply values the First Amendment, including its guarantees of free speech and free exercise.” Undermining the Free Inquiry Rule would send the opposite signal, especially in light of other recent actions by ED that appear to curtail First Amendment protections. Last year, the OCR removed the First Amendment provision from their Case Processing Manual, which previously read “OCR interprets its statutes and regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles.”⁸ ED also proposed Title IX regulations which hinder

⁸ Atlas, Kaitlin. “OCR Releases Revised Case Processing Manual with New Updates to Complaint Process.” Title IX Insights, August 9, 2022. <https://www.titleixinsights.com/2022/08/ocr-releases-revised-case-processing-manual-with-new-updates-to-complaint-process/>.

First Amendment protections of students on campus.⁹ Finally, ED has allegedly played a role in urging the Department of Justice (DOJ) to investigate parents who chose to speak out at school board meetings over COVID-19 policies, school curriculum, and other issues affecting their children.¹⁰ IHEs may give less attention to their own compliance with free speech policies if they believe ED’s current leadership lacks commitment to First Amendment protections.

Furthermore, while ED says it lacks the regulatory bandwidth to respond to historical levels of anti-Semitism by issuing a long-promised regulation, it still manages to have the bandwidth to question basic civil liberties protections that are important to Jewish students.¹¹ If ED has the time to question student protections, it should spend that time protecting students' rights instead.

With free speech under attack on campuses from coast to coast, this is potentially the worst time for ED to roll back speech protections. Students – especially Jewish students – are facing severe civil rights abuses on their campuses. With numerous complaints before the OCR, ED is well aware of this pandemic. More protection, not less, is essential to curtailing this trend.

Sincerely,

The Louis D. Brandeis Center for Human Rights Under Law

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⁹ “FIRE’s Comment to Department of Education: Your Proposed Title IX Regulations Are Unconstitutional.” The Foundation for Individual Rights and Expression, September 14, 2022. <https://www.thefire.org/news/fires-comment-department-education-your-proposed-title-ix-regulations-are-unconstitutional>.

¹⁰ Grayer, Annie. “‘No Legitimate Basis’ for 2021 DOJ Memo on School Board Threats, House GOP Alleges in New Report.” CNN, March 22, 2023. <https://www.cnn.com/2023/03/22/politics/house-gop-report-garland-memo/index.html>.

¹¹ Bandler, Aaron. “Education Dept. Delays Regulation Codifying IHRA for a Year.” Jewish Journal, January 15, 2023. <https://jewishjournal.com/news/354785/education-dept-delays-regulation-codifying-ihra-for-a-year/>.