SPEECH FIRST

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VIA ELECTRONIC SUBMISSION

Jean-Didier Gaina
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202
Attn: Docket ID No. ED-2019-OPE-0080

Re: Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program; Docket ID No. ED-2019-OPE-0080

Dear Mr. Gaina:

Speech First is a nationwide membership organization of students, alumni, and other concerned citizens. Speech First is dedicated to preserving civil rights secured by law, including the freedom of speech guaranteed by the First Amendment. Speech First seeks to protect the rights of students and others at colleges and universities through litigation and other lawful means.

We write in strong support of the Department's proposed rules. Historically, colleges and universities have been bastions of free speech, fostering discussion and debate about the most important political, social, and economic ideas of each generation. But today, colleges and universities around the country are ceding that prized role in American history, as they seek to shield students from uncomfortable or unpopular ideas. Indeed, universities across the country are failing to protect the free speech rights of their students, leaving some students afraid to speak at all. Speech First has fought back against this chilling trend by challenging "bias response teams," speech codes, and attempts to shut down discourse and debate in the public square—practices and policies that unconstitutionally deter, suppress, and punish speech at universities across the country.

The proposed rule is another important tool to fight this trend. Requiring public universities to comply with the First Amendment and private universities to comply with their own speech policies as a condition for receiving certain federal grants will incentivize those universities to protect students' fundamental free speech rights.

Currently, the proposed rule allows the Department to determine that a university is out of compliance with the First Amendment or its stated institutional policies only if a final judgment has been entered against a university. But universities are often able to avoid final judgments by changing their offending policies after being sued and mooting the cases against them. The proposed rule should account for this practice and should be amended to give the Department discretion to determine that a university is not in compliance when the university strategically repeals its offending policies to avoid a finding of liability.

I. Free Speech Is Critically Important on College Campuses

"The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

As the Supreme Court has long recognized, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools [of higher education]." *Healy v. James*, 408 U.S. 169, 180 (1972). American universities are "peculiarly the marketplace of ideas," training future leaders "through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (cleaned up). "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. N.H. ex rel. Wyman*, 354 U.S. 234, 250 (1957).

Put simply, "First Amendment protections [do not] apply with less force on college campuses than in the community at large," *Healy*, 408 U.S. at 180, and the "mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency,'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973).

II. Freedom of Speech at Universities Is Under Attack.

Despite the importance of free speech on college campuses, universities across the country are failing to protect the free speech rights of their students. Some universities encourage students to report their fellow students for committing "bias incidents," which almost always means disfavored speech. Others enact speech codes

to prevent students from engaging in offensive or unpopular speech in the first place. These policies are taking a toll on students. A 2019 Knight Foundation study found that over two-thirds of college students believe the climate on their campus prevents people from speaking freely. *See* Knight Foundation, *College Students Support the First Amendment, but Some Favor Diversity and Inclusion Over Protecting the Extremes of Free Speech*, May 13, 2019, kng.ht/31Qsz8w. That number is astonishing and unacceptable.

This erosion of First Amendment protections is taking its toll on academic diversity in higher education as well. For example, a poll conducted by College Pulse on behalf of the College Fix found that in a survey of 1,000 Republican and Republican-leaning college students, nearly three-quarters of them have withheld their political views in class for fear their grades would suffer. *See* Jennifer Kabbany, *Poll: 73 percent of Republican students have withheld political views in class for fear their grades would suffer*, College Fix, Sept. 4, 2019, bit.ly/37rR1hP. That is unsurprising given how hostile universities and some faculty can be to opposing viewpoints. For example, last year a visiting professor at Gonzaga University Law School published an article in the American Bar Association Journal about how he interpreted a student wearing a Make America Great Again hat in his class as possibly "directing a hateful message toward" him personally. Jeffrey Omari, *Seeing Red: A professor coexists with 'MAGA' in the classroom*, ABA Journal, July 3, 2019, bit.ly/2UQwml2.

Even former mayor of New York City Michael Bloomberg has noticed this dangerous trend on campuses; as he says in a recent column, "[o]ne of the most disturbing aspects of the retreat from liberal political discourse can be found on the training grounds for tomorrow's leaders: college campuses." Michael Bloomberg, *Democracy Requires Discomfort*, Bloomberg Opinion, Sept. 15, 2019, bloom.bg/2HjY2Xd. Not only is that retreat from discourse bad for the personal development of students, but it is also harmful to the country. A real threat occurs when dangerous ideas are silenced and forced underground where they do not have the benefit of being refined and tested against other arguments; and where ideas can lose outside perspective and become dangerously singular in focus. Higher education is supposed to be the first line of defense to combat radical ideology by seeking transparency, objectivity, and understanding. It is impossible for a university to foster honest discourse in the classroom when mainstream political viewpoints are discouraged and chilled.

III. Litigation Is Frequently Necessary to Stop Universities from Infringing Students' Speech Rights.

Speech First has fought back against this chilling trend by challenging various practices and policies that unconstitutionally deter, suppress, and punish speech at universities across the country. We highlight three of these policies.

a. Bias Response Teams

In recent years, colleges and universities across the country have created "bias response teams" charged with documenting, investigating, and punishing students who engage in "bias." Universities cast a wide net when defining "bias." The vast majority borrow categories like race, sex, sexual orientation, etc., from discrimination statutes, while others investigate bias against categories like "smoker status," "shape," "intellectual perspective," and "political affiliation." FIRE, *Bias Response Team Report 2017*, at 4, bit.ly/2UPmibW (FIRE Report). "Bias" is almost always in the eyes of the beholder. As one university's bias response team put it, "the most important indication of bias is your own feelings." Grace Kay, *University Sued Over Constitutionality of Bias Response Team*, Michigan Daily, May 8, 2018, bit.ly/2WCFE5i.

Bias response teams typically claim that their goal is to foster "'a safe and inclusive environment' by providing 'advocacy and support to anyone on campus who has experienced, or been a witness of, an incident of bias or discrimination.'" Jeffrey Snyder & Amna Khalid, *The Rise of "Bias Response Teams" on Campus*, The New Republic (Mar. 30, 2016), bit.ly/1SaAiDB. But in reality, as one study found, these teams frequently lead to "a surveillance state on campus where students and faculty must guard their every utterance for fear of being reported to and investigated by the administration." FIRE Report, *supra*, at 28. Speech on issues of public policy, social issues, and politics dealing with, among other things, race, religion, gender, immigration, and sexual orientation are often deemed "biased" and then reported to the bias response team. *Id*. at 15-19.

As two Carlton College professors have explained, bias response teams often "result in a troubling silence: Students, staff, and faculty [are] afraid to speak their minds, and individuals or groups [are] able to leverage bias reporting policies to shut down unpopular or minority viewpoints." Snyder & Khalid, *supra*. "While universities should certainly be listening to their students and offering resources to those who encounter meaningful difficulties in their lives on campus, the posture taken by many Bias Response Teams is all too likely to create profound risks to freedom of expression, freedom of association, and academic freedom on campus." FIRE Report, *supra*, at 5.

This chilling effect has led a few universities to shut down their bias response teams. The University of Northern Colorado, for example, shuttered its bias response team in 2016, explaining that its so-called "voluntary" processes "made people feel that we were telling them what they should and shouldn't say." *Full Text of Univ. of N. Colo. President Kay Norton's State of the University Speech*, Sept. 7, 2016, bit.ly/2WgBjFv. Similarly, the University of Iowa scrapped its plans to create a bias response team because of the "high failure rate in the [bias response teams] at other institutions" and their tendency to "become almost punitive." Jeff Charis-Carlson, *UI*

Changing Course on Bias Response Team, Iowa City Press-Citizen, Aug. 18, 2016, bit.ly/2JQOiai.

Speech First has been on the forefront of challenging bias response teams through litigation, bringing four lawsuits in the last two years against the bias response teams used by the University of Michigan, University of Texas at Austin, University of Illinois at Urbana-Champaign, and Iowa State University. Bias response teams lead to numerous First Amendment concerns. In addition to posing problems of overbreadth, vagueness, and prior restraints, bias response teams typically employ highly subjective definitions of "bias" and "bias incident" that gravely threaten free speech on campus.

For example, Speech First recently sued the University of Michigan over its bias response team. *See Speech First, Inc., v. Schlissel*, No. 2:18-cv-11451 (E.D. Mich. 2018). The University's bias response team encouraged offended students to submit complaints of "bias" and "bias incidents" against their fellow students. The bias response team would collect these complaints, investigate the "bias incidents," and refer the alleged offenders to the University for punishment. According to the University, "bias incidents" could be intentional or unintentional, and they could "be a hurtful action based on who someone is as a person." *Schlissel* Compl. ¶ 4. In determining whether a bias incident occurred, the University told students that "[t]he most important indication of bias is your own feelings." *Schlissel* Compl. ¶ 4. Based on such a subjective standard, a student whose speech is merely interpreted by another student as "hurtful" to his or her "feelings" could receive a knock on the door from a team of University officials threatening to refer the student to formal disciplinary authorities unless he or she submits to "restorative justice," "individual education," or "unconscious bias training." *Schlissel* Compl. ¶ 55. After prevailing before the U.S. Court of Appeals for the Sixth Circuit, *see Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), the University of Michigan entered into a settlement agreement with Speech First, abolishing its Bias Response Team.

Similarly, Speech First sued the University of Illinois at Urbana-Champaign. *See Speech First, Inc., v. Killeen*, No. 3:19-cv-03142 (C.D. Ill. 2019). Like the University of Michigan, the University of Illinois has created and deployed a bias response team to investigate and punish "biased" actions by students, including speech and expression. The University defines bias incidents as "action[s] or expression[s]" that are "motivated, at least in part, by prejudice against or hostility toward a person (or group) because of that person's (or group's) actual or perceived age, disability/ability status, ethnicity, gender, gender identity/expression, national origin, race, religion/spirituality, sexual orientation, socioeconomic class, etc." Compl. ¶ 4. Actual examples of "biased-motivated incidents" that were reported to the bias response team include students who planned a "Meeting with the Chief" program in support of bringing back Chief Illiniwek as the University's mascot and a student who posted a meme on Facebook suggesting that women are automatically admitted into engineering programs. *Killeen* Compl. ¶ 40. That litigation is ongoing.

b. Speech Codes

Instead of promoting the "robust exchange of ideas," universities are often more interested in protecting students from ideas that make them uncomfortable. Universities do this by adopting policies and procedures that discourage speech by students who dare to disagree with the prevailing campus orthodoxy. One tried-and-true method of accomplishing this feat is the campus speech code.

Speech codes, according to the Foundation for Individual Rights in Education (FIRE), are "university regulations prohibiting expression that would be constitutionally protected in society at large." FIRE, *Spotlight on Speech Codes 2019* at 10, bit.ly/2GAyfKJ. Recycled ideas from the 1980s, speech codes punish students for undesirable categories of speech such as "harassment," "bullying," "hate speech," and "incivility." Because they impose vague, overbroad, content-based restrictions on speech, these policies violate the First and Fourteenth Amendments. Federal courts almost always strike them down. *Id*. at 10, 26. Today, more than a quarter of universities have speech codes that earn a "red light" rating from FIRE because they "both clearly and substantially restrict[] protected speech." *Id*. at 2.

For example, Speech First recently sued the University of Texas at Austin over the university's speech codes. *See Speech First, Inc., v. Fenves*, No. 1:18-cv-1078 (W.D. Tex 2018). Before Speech First filed suit, the university maintained multiple speech codes: (1) it broadly banned "verbal harassment" which extended to "offensive" speech, including "insults, epithets, ridicule, [and] personal attacks" "based on the victim's … personal characteristics, or group membership, … ideology, political views, or political affiliation"; (2) it prohibited electronic communications that are "uncivil," "rude," or "harassing" under its technology policy; and (3) it maintained a residence hall manual which proscribed yet another version of "harassment," which it defined as including "racism, sexism, heterosexism, cissexism, ageism, ableism, and any other force that seeks to suppress another individual or group of individuals." *Fenves* Compl. ¶ 3. These policies all encompassed protected speech and provided no clear guidance about how to comply, yet the University threatened to investigate and discipline students who violated them.

Similarly, before Speech First filed its lawsuit, the University of Michigan maintained a disciplinary code that broadly prohibited "harassment" or "bullying," and doled out extra punishments if those actions were motivated by "bias." The university interpreted and applied those amorphous concepts in a way that captured staggering amounts of protected student speech and expression. For example, the university defined "harassment" as "unwanted negative attention perceived as intimidating, demeaning, or bothersome to an individual." *Schlissel* Compl. ¶ 3. This meant that a student could face significant penalties (up to and including expulsion) if another student perceived his or her speech as "demeaning" or "bothersome." Under that regime, an overly sensitive student could effectively dictate other students' speech. Additionally, that policy failed to provide clear notice about what was

prohibited conduct and had a profound chilling effect on protected speech and expression.

c. Public Expression on Campus

Universities also shield students from uncomfortable ideas by preventing or discouraging them from speaking in the public square. Some universities do this by requiring students to get pre-approval before they can share their message. Others go so far as to ban popular places and methods of speaking altogether.

For example, Speech First recently challenged an anti-speech policy at the University of Illinois at Urbana-Champaign. *See Killeen*, No. 3:19-cv-03142. Before Speech First's lawsuit, the University prohibited "post[ing] and distribut[ing] leaflets, handbills, and any other types of materials" about "candidates for non-campus elections" unless and until that individual receives "prior approval" from the University. *Killeen* Compl. ¶ 3. The University provided students with no published guidance as to whether or when it will approve or deny permission to engage in political speech. This rule was an unconstitutional prior restraint on student speech and forced students who did not wish to submit to such prior restraint to engage in self-censorship. Not surprisingly, the University of Illinois eliminated this policy shortly after Speech First filed its lawsuit.

Similarly, Speech First recently sued Iowa State University over its prohibition on "chalking"—*i.e.*, writing messages on campus sidewalks with chalk. *See Speech First, Inc., v. Wintersteen*, No. 4:20-cv-00002 (S.D. Iowa 2020). Chalking is a popular way for students to express their views on a host of topics. In fact, political chalking on college campuses was so prevalent during the 2016 elections that it spawned a nationwide movement called "#TheChalkening." On the University's campus specifically, many diverse individuals and groups have used chalking to communicate political messages, such as support for Governor Kim Reynolds and President Trump, criticisms of Congressman Steve King, and competing pro-life and pro-choice arguments about abortion. But in November 2019, after students chalked competing messages about abortion, the University promulgated a new chalking policy in order to shut down speech on controversial issues. The new policy allows only registered student organizations to advertise certain events, to the exclusion of all other students and messages. Under the University's policy, students who "chalk" an unauthorized message face discipline. This litigation is ongoing.

IV. The Department's Proposed Rules Will Provide Extra Incentive for Universities to Protect Students' Free Speech Rights.

Given the importance of these issues, Speech First supports the proposed rulemaking's attempts to confront the campus free speech crisis. Although universities should not need an incentive to protect the most fundamental constitutional rights of their students, the proposed rule is an appropriate way to

confront universities who refuse to protect or actively stifle student speech on campuses.

First, Speech First supports the Department's proposal to "requir[e] public institutions of higher education that are grantees or subgrantees to comply with the First Amendment to the U.S. Constitution, as a material condition of the grant." 85 Fed. Reg. 3210. Federal regulations already require grantees of the Department's direct grant programs and State-administered formula grant programs to comply with various nondiscrimination laws and regulations, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act. *See* 34 CFR 75.500, 76.500. Requiring grantees to respect free speech is a necessary addition to those regulations. Historically, free speech was a tool in the fight for those very nondiscrimination laws. Only by exercising their speech rights were the powerless able to convince the wider world of the validity of their views. It is critical to protect the rights of students today to do the same.

Second, Speech First supports the Department's proposal to "require private institutions of higher education that are grantees or subgrantees to comply with their stated institutional policies regarding freedom of speech, including academic freedom, as a material condition of the grant." 85 Fed. Reg. 3210. Although private schools typically are not bound by the First Amendment, they often hold themselves out as bulwarks for freedom of thought and expression. They should be held to those standards. Moreover, private universities could be held liable under a theory of contract law if they promise students a place for free speech yet do not deliver.

V. The Department Should Reserve Discretion to Find Non-Compliance When a University Repeals Its Offending Policies to Avoid a Final Judgment.

Under the proposed rule, 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." 85 Fed. Reg. 3210. Similarly, the Department will determine that a private institution has not complied with stated institutional policies regarding freedom of speech or academic freedom only if there is a "final, non-default judgment by a State or Federal court to the effect that the private institution or an employee of the private institution, acting on behalf of the private institution, violated its stated institutional policy regarding freedom of speech or academic freedom." *Id.* Confining the trigger for a finding of non-compliance to final judgments does not account for the fact that universities often strategically avoid final judgments by changing their policies mid-litigation.

The proposed rule should be amended to give the Department discretion to determine that a university is not in compliance with the First Amendment or its stated institutional policies when the university repeals its offending policies to avoid a final judgment. Universities frequently revise their policies after they are sued, seeking to moot the case against them and avoid a final judgment. And they have a notoriously bad track record of amending their policies during litigation, only to reenact them later. *See, e.g.*, Greg Lukianoff & Adam Goldstein, *Speech Code Hokey Pokey*, Volokh Conspiracy (Sept. 12, 2018), bit.ly/2rFNc9u; Brief *Amicus Curiae* of FIRE et al. in *Speech First Inc., v. Schlissel*, No. 18-1917 (6th Cir. 2018); *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 723 n.3 (2010) (Alito, J., dissenting) (noting the university's "practice of changing its announced policies" to moot cases). If universities continue this trend, they will be able to avoid compliance with the proposed rule.

This fear is not unfounded. In all of Speech First's cases, the universities have repealed their policies after Speech First sued and then argued that the issue is moot so no final judgment can be entered. For example, the University of Michigan revised its student codes. *See Schlissel*, No. 18-cv-11451 (E.D. Mich.) (Dkt. 35-1). The University of Texas, while the case was on appeal, modified its policy on verbal harassment and completely deleted the challenged portions of its technology policy and residence hall manual. *See Fenves*, No. 19-50529 (5th Cir.) (Dkt. 515155105). The University of Illinois eliminated its requirement that students receive prior approval before engaging in political speech about non-campus elections. *See Killeen*, No. 3:19-cv-03142 (Dkt. 23). And Iowa State University recently notified Speech First in the middle of trial-court briefing that it had changed its chalking policy in response to Speech First's lawsuit.

FIRE also has detailed a host of similar cases. *See* Brief *Amicus Curiae* in *Schlissel* at 6-11. For example, after a student challenged California Citrus College's free speech zones, the College changed its policy and entered into a settlement agreement. A few years later, however, the college adopted yet another regulation imposing a free speech zone. *Id.* at 7-8; *see Stevens v. Citrus Comm. Coll. Dist.*, No. 2:03-cv-03539 (C.D. Cal. 2003). Similarly, after a student challenged a speech code at Shippensburg University in Pennsylvania, the school adopted a verbatim speech code after having agreed to drop the code as part of a settlement. *Id.* at 8; *see Christian Fellowship of Shippensburg Univ. of Pa. v. Ruud*, No. 4:08-cv-00898 (M.D. Pa. 2008). Although courts usually view "maneuvers designed to insulate a decision from review . . . with a critical eye," *Knox v. SEIU*, 567 U.S. 298, 307 (2012), some universities ultimately succeed in their efforts, *see, e.g.*, *Uzuegbunam v. Preczewski*, 781 F. App'x 824, 825 (11th Cir. 2019) (affirming a finding of mootness where a student challenged a school policy in part because the school modified the policy).

By limiting its inquiry to cases with "final judgments," the Department would be unable to make an independent determination that certain schools are not in compliance with the First Amendment or their stated institutional policies. The

Department should retain its discretion to find a university in non-compliance when the Department determines that the university's policy changes were "not genuine" but merely an attempt to moot the case. *Schlissel*, 939 F.3d at 769. Unless the Department has discretion to do so, universities will be able to evade punishment by both the courts and Department, while also retaining their ability to restore bad policies later. Speech First thus recommends that the Department reserve discretion to find non-compliance when a university strategically repeals its offending policies to avoid a final judgment.

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For all these reasons, Speech First supports the Department's efforts to hold universities accountable for violating the free speech rights of their students.

Respectfully submitted,

/s/ Nicole Neily

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