



SPEECH FIRST

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March 23, 2023

VIA ELECTRONIC SUBMISSION

Ashley Clark
U.S. Department of Education,
400 Maryland Avenue SW, Room 2C185,
Washington, DC 20202
Attns: Docket ID No. ED-2022-OPE-0157-0001

**Re: Direct Grant Programs, State Administered Formula
Grant Programs; Docket ID No. ED-2022-OPE-0157-
0001**

Dear Ms. Clark:

Speech First, Inc., 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 college students through litigation and other lawful means. *E.g.*, *Speech First, Inc. v. Khator*, 603 F. Supp. 3d 480 (S.D. Tex. 2022); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022); *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019); *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020).

We write to oppose the Department’s notice of proposed rulemaking. *See* 88 Fed. Reg. 10,857 (Feb. 22, 2023) (“Notice”). The Department desires to take away an important tool to fight the trend of universities targeting and chilling speech, including “religious ... speech.” 34 C.F.R. §§75.500(d), 76.500(d). It should not.

I. Freedom of speech—especially of speech supporting religious views—is under attack at universities.

The Notice fails to consider that free-speech rights—including religious views—are under attack at universities and colleges across the country. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American [universities].” *Healy v. James*, 408 U.S. 169, 180 (1972). That is because “[c]olleges and universities serve as the founts of—and the testing grounds for—new ideas. Their chief mission is to equip students to examine arguments critically and, perhaps even more importantly, to prepare young citizens to participate in the civic and political life of our democratic republic.” *Cartwright*, 32 F.4th at 1128.

Doubly so when it comes to speech expressing religious views. The Free Speech and Free Exercise Clauses of the First Amendment “work in tandem.” *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). “Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities.” *Id.* This is “no accident”; it “is a natural outgrowth of the framers’ distrust of government attempts to regulate religion and suppress dissent.” *Id.* “In Anglo–American history, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.” *Id.* (cleaned up).

Unfortunately, religious views are increasingly under attack because universities, their officials, and other students find them “offensive.” But “[s]uppressing speech—or religious practice—simply because it expresses an idea that some find hurtful is a zero-sum game.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1925 (2021) (Alito, J., concurring in the judgment). It is thus especially important to keep safeguards that protect against assaults on religious speech. As Justice Alito explained:

In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding. The same fundamental principle applies to religious practices that give offense. The preservation of religious freedom depends on that principle. Many core religious beliefs are perceived as hateful by members of other religions or nonbelievers.... In *Obergefell v. Hodges*, 576 U.S. 644 (2015), the majority made a commitment. It refused to equate traditional beliefs about marriage, which it termed “decent and honorable,” with racism, which is neither. And it promised that “religions, and those who adhere to religious

doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.” An open society can keep that promise while still respecting the “dignity,” “worth,” and fundamental equality of all members of the community.

Id. at 1924-25 (Alito, J., concurring in the judgment) (citations omitted); *see also, e.g., Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1593 (2022) (“When a government does not speak for itself, it may not exclude speech based on ‘religious viewpoint’; doing so ‘constitutes impermissible viewpoint discrimination.’”); *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018) (explaining that “religion[]” is a “controversial subject[],” a “sensitive political topic[],” and “undoubtedly [a] matter[] of profound value and concern to the public” (cleaned up)).

In sum, rather than promote the “robust exchange of ideas,” *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967), universities are now 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 are campus speech codes. Speech codes, according to the Foundation for Individual Rights and Expression (FIRE), are “university regulations prohibiting expression that would be constitutionally protected in society at large.” Spotlight on Speech Codes 2022 at 9, FIRE, perma.cc/4P23-HJWV. Speech codes punish students for undesirable categories of speech such as “harassment,” “bullying,” “hate speech,” and “incivility.”

On top of speech codes, universities are increasingly turning to a new, more insidious way to deter disfavored speech—so-called “bias reporting systems” (sometimes also called “bias response teams”). *See* Free Speech in the Crosshairs: Bias Reporting on College Campuses, Speech First (2022), perma.cc/DX37-LX3F (“BRS Report 2022”). “Bias Reporting Systems are university teams or procedures that are specifically designated to solicit, receive, investigate, and respond to reports of ‘bias incidents’ or other similar speech at their institutions.” *Id.* at 4. Living up to their Orwellian name, bias-reporting systems encourage students to monitor each other’s speech and report incidents of “bias” to the University (often anonymously). *Id.* “Bias” is defined incredibly broadly and covers wide swaths of protected speech; in fact, speech is often labeled “biased” based solely on the listener’s subjective reaction to it. *Id.* at 4-5.

After receiving reports of a bias incident, bias-reporting systems typically log the incident, investigate it, meet with the relevant parties, attempt to reeducate the “offender,” and can recommend formal or informal discipline. *Id.* at 4-6.

Although some universities claim this process is entirely voluntary, they know students do not see it that way. As the Sixth Circuit has explained, an “invitation from [an official within a bias-reporting system] to meet could carry an implicit threat of consequence should a student decline the invitation.” *Schlissel*, 939 F.3d at 765. Even when “there is no indication that the invitation to meet contains overt threats,” the University’s disciplinary “referral power lurks in the background.” *Id.*

A 2017 report from FIRE found that bias-response teams monitor protected expression and 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.” Bias Response Team Report 2017 at 28. “[T]he posture taken by many Bias Response Teams,” the study found, “is all too likely to create profound risks to freedom of expression, freedom of association, and academic freedom on campus.” *Id.* at 5.

Things did not improve in 2022. Speech First’s 2022 report explained that bias-reporting systems “intimidate and silence students whose viewpoints do not conform to the dominant social, political, and cultural narratives on campus.” BRS Report 2022 at 6. “By design, these teams create an environment of fear that chills speech and dialogue between students of diverse beliefs and perspectives, ultimately silencing speech through self-censorship.” *Id.*

And these systems “have been spreading rapidly.” *Id.* at 3. In 2017, FIRE identified 232 bias-reporting systems. *Id.* In 2022, Speech First identified “456 [bias-reporting systems] twice as many as identified by FIRE just five years ago.” *Id.* But the number is likely even higher. *See id.* (noting that the “report is largely based on information that universities publicly report. It is very likely that some BRSs are not publicized, and so these reporting systems are far more pervasive than we know.”).

University professors have similarly observed that bias-reporting systems “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, The Rise of “Bias Response Teams” on Campus, *The New Republic* (Mar. 30, 2016), perma.cc/CS56-LQ7B; *see also* Keith Whittington, *Free Speech and the Diverse University*, 87 *Fordham L. Rev.* 2453, 2466 (2019) (“[E]fforts

[by bias-reporting systems] to encourage students to anonymously initiate disciplinary proceedings for perceived acts of bias or to shelter themselves from disagreeable ideas are likely to subvert free and open inquiry and invite fears of political favoritism.”).

Courts have likewise recognized the chilling effect of bias-reporting systems. After *Speech First* challenged similar bias-reporting systems at the University of Texas, the University of Michigan, and the University of Central Florida, all three schools disbanded their teams. The Sixth Circuit held that Michigan’s team imposed an “objective chill” on speech because it “act[ed] by way of implicit threat of punishment and intimidation to quell speech.” *Schlissel*, 939 F.3d at 765. The Fifth Circuit agreed, stressing that Texas’s team “represent[ed] the clenched fist in the velvet glove of student speech regulation.” *Fenves*, 979 F.3d at 338. The Eleventh Circuit likewise held that “the average college-aged student would be intimidated—and thereby chilled from exercising her free-speech rights—by subjection to [Central Florida’s] bias-related-incidents policy.” *Cartwright*, 32 F.4th at 1124.

Unsurprisingly, the rise of bias-reporting systems and speech codes is matched by a parallel rise in the percentage of college students who feel like they cannot express controversial opinions on campus. According to a September 2020 survey of more than 20,000 American college students, an astonishing 42 percent of students believe their university would punish them for making an offensive or controversial statement. 2020 College Free Speech Rankings, at 19, FIRE (Sept. 2020), perma.cc/TSJ6-HRE7. A separate survey found that, among non-freshman college students, nearly half reported that “sharing ideas and asking questions without fear of retaliation, even when those ideas are offensive to some people,” had become “more difficult” in the Fall 2020 semester than in previous semesters. Campus Expression Survey Report 2020, at 3, Heterodox Academy (Mar. 2021), perma.cc/6RZA-SUE9. And according to a September 2021 survey, “[m]ore than 80% of students reported self-censoring their viewpoints at their colleges at least some of the time, with 21% saying they censor themselves often.” 2021 College Free Speech Rankings, at 3, FIRE (Sept. 2021), perma.cc/6JY3-MHM7.

II. The Department does not justify rescinding a rule that provides an extra incentive for universities to protect student’s free-exercise and free-speech rights.

The Notice provides several justifications for rescinding the rule. But they are unavailing.

For starters, the Notice suggests that litigation in courts provide ample support for protecting free-speech and free-exercise rights. But the regulations

provide a prophylactic measure to deter the future violation of these constitutional rights. Universities try anything and everything to evade judicial review of their unconstitutional policies. For example, universities' main argument is that plaintiffs have no right to be in court, not that the challenged policies are constitutional. *See, e.g., Speech First v. Schrum*, 5:23-cv-29-J (W.D. Okla.). And universities try to moot cases with new policies that still arguably violate the Constitution. *See, e.g., Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *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); FIRE-ADF Br. *Amicus Curiae* in *Schlissel* at 6-11 (detailing a host of similar cases).

Yet the Notice does not engage with this dilemma in its analysis, even though the regulations the Department wishes to revoke would give it discretion to vindicate First Amendment rights when universities strategically change offending policies to avoid liability through the courts. It is also no answer to say that the other speech protection the Department is leaving untouched negates these concerns. The whole point is that universities are taking great pains to evade judicial review and thus final judgments, which is required to enforce that other rule.

Finally, the Notice also suggests that investigations "would be unduly burdensome" because First Amendment issues are "typically very fact-intensive." Notice at 10,861; *see also id.* at 10,863 ("fact-specific"). But there are many circumstances when First Amendment violations are not fact intensive. *See, e.g., Carson v. Makin*, 142 S. Ct. 1987 (2022). The Department has not considered alternatives that could preserve investigating and penalizing universities and colleges in non-fact-intensive cases.

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For at least these reasons, Speech First opposes the Department's efforts to unravel measures that can hold universities accountable for violating the free-speech and free-exercise rights of their students.

Respectfully submitted,

/s/ Cherise Trump

Cherise Trump
Executive Director of
Speech First, Inc.