ASSOCIATION OF PUBLIC & LAND-GRANT UNIVERSITIES

March 24, 2023

Ms. Ashley Clark
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: Request for Information Regarding First Amendment and Free Inquiry Related Grant Conditions [Docket ID ED—2023—OPE—0029]

Dear Ms. Clark,

Thank you for the opportunity to provide comments in response to the Department of Education's (ED) Request for Information (RFI) regarding Trump administration era regulations creating a new, unusual, unnecessary, and inappropriate role for the Department of Education in First Amendment matters best left to the judicial branch. As president of the Association of Public and Land-grant Universities (APLU), I am pleased to offer feedback to inform ED as it considers its next action on the regulation. In short, APLU urges ED, consistent with its proposed action on the other component of the "Free Inquiry Rule" related to student organizations, to fully repeal the regulation.

APLU is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities. With a membership of more than 250 public research universities, land-grant institutions, state university systems, and affiliated organizations, APLU's agenda is built on the three pillars of increasing degree completion and academic success, advancing scientific research, and expanding engagement. Annually, our U.S. member campuses enroll 4.2 million undergraduates and 1.2 million graduate students, award 1.2 million degrees, employ 1.1 million faculty and staff, and conduct $48.7 billion in university-based research.

In a blog posting announcing the proposed rescission of the student organization component of the rule, Assistant Secretary Nasser Paydar wrote, "the Department believes it is not necessary in order to protect the First Amendment right to free speech and free exercise of religion given existing legal protections, it has caused confusion about schools' nondiscrimination requirements, and it prescribed a novel and unduly burdensome role for the Department in investigating allegations regarding public institutions' treatment of religious student organizations… Where complex questions over the First Amendment arise, Federal and State courts are best equipped to resolve these matters.[1]" APLU strongly believes ED proposed the correct course of action on the student organization rule and that all of the associated arguments in support of repeal are equally applicable to the component of the rule subject to the RFI.

[1] Update on the Free Inquiry Rule - ED.gov Blog

Foreseeable Deleterious Consequences Merit Regulatory Rescission

In the RFI, ED requests examples of "how the current regulations have affected or are reasonably expected to affect decisions surrounding First Amendment and free speech-related litigation in Federal and State court." We understand the Department may have not yet received many examples of harm in the field. Please know the concerns APLU expresses in the comments below regarding unintended consequences of making institutions less likely to defend in litigation all the way through to a non-default, final judgment and impacts to behavior of plaintiff attorneys are very sensitive areas of legal craft that are very unlikely to play out publicly. Therefore, providing such concrete examples is challenging. While we understand ED's interest, we urge that the examples not be a prerequisite to repealing a policy that very clearly has/will create such foreseeable dynamics.

Below APLU reiterates our substantive concerns with the policy.

Harmfully Raises the Stakes of Litigation

APLU is greatly concerned the regulation significantly and inappropriately raises the stakes of First Amendment litigation. By tying all of an institution's Department of Education funding (excluding Title IV student aid) to the outcome of First Amendment litigation, the rule adds a catastrophic penalty to a public university losing a case. The consequences, including unintended ones, has also been noted by the Foundation for Individual Rights in Education (FIRE), which strongly opposed such a move[2].

The policy shifts the dynamics of litigation. Facing the prospect of such a severe, extreme penalty that would upend the work of institutions, faculty, researchers, and students, public universities could be forced to litigate every case as if the world depends on the outcome. The costs of related litigation may skyrocket. This means public universities would be forced to spend more resources on lawyers and less on fulfilling their academic, research, and community engagement mission. The alternative is to not litigate at all, meaning public universities are intimidated from defending themselves when they in good faith believe the actions of the institution or an employee acting in their official capacity comport with the First Amendment. The threat against public universities will not go unnoticed or underutilized by plaintiffs' attorneys who know they can force institutions into settlements, financial and otherwise, when previously an institution may have defended itself in court. It is reasonable to expect that unscrupulous attorneys would look for clients on campuses, which would lead to a significant increase in the filing of frivolous litigation. Plaintiffs' attorneys can push the envelope threatening public universities with the possible loss of its Department of Education funding if they do not agree to demands. Such developments would undermine the very purpose of state sovereign immunity enumerated in the Constitution in protecting states.

APLU urges the Department to consider how raising the stakes of litigation could make it more challenging for public universities to defend cases the Department of Education would want public universities to vigorously defend.

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[2] https://www.thefire.org/news/department-education-must-avoid-these-pitfalls-when-crafting-regulations-campus-free-speech

Uncertain Litigation Outcomes Attached to Severe Penalties

While APLU would never claim public universities get everything right under all circumstances, it is important to recognize that cases are seldom simple. For a large public research university, the environment includes tens of thousands of students and thousands of faculty members in a setting in which intellectual exchange on controversial matters are core to the mission. The application of the First Amendment to this unique setting is not always clear cut. Courts may not always agree. Different circuits and judges may reach different conclusions. As an example, issues involving property as designated or limited public forums are very complicated and the outcome of litigation is far from certain. Circuits could easily split on these issues. Additionally, there is a vast difference between cases involving clearly-established Supreme Court precedent than a matter of law or application that continues to evolve such as the First Amendment and new technological methods of communication. The rule as initially envisioned by the prior administration appears to presume that a public university would only lose a First Amendment case if some egregious action was committed. However, the application of facts to law is often incredibly complicated. An institution can, in good faith, defend itself in a matter of unsettled law and lose in split decisions as judges chart new territory in First Amendment jurisprudence.

Thank you for your consideration of APLU's views. Please do not hesitate to contact me if we can be a resource as ED considers its next action on this regulation.

Sincerely,

Mark Becker
President
Association of Public and Land-grant Universities