March 24, 2023

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Docket ID ED—2023—OPE—0029

Dear Secretary Cardona,

On behalf of the higher education associations listed below, representing two- and four-year, public and private colleges and universities, I write to provide comments in response to the Department of Education's (the Department) request for information entitled, "First Amendment and Free Inquiry Related Grant Conditions," seeking input on the final regulations issued in the 2020 regulatory package commonly referred to as the "Free Inquiry Rule" ("2020 final rule").

We have previously expressed grave concerns regarding the 2020 final rule, as it was proposed and later finalized, and those concerns have not abated. Of fundamental concern is the fact that these regulations undermine rather than support institutional efforts to foster environments that promote open, intellectually engaging debate on diverse topics on campus. The 2020 final rule, and its rationale in the preamble, reflect a deeply flawed understanding of how First Amendment and free-speech protections work on a campus and how these important rights are protected through institutions, their communities, and the courts. The presence of these regulations in the code has created harm and sets a dangerous precedent, which invites future mischief. For these, and the reasons discussed below, we strongly urge the Department to rescind these deeply troubling and problematic regulations as soon as possible.

Sections 75.500(b) and (c) and 76.500(b) and (c) require public institutions to comply with the "First Amendment, including protections for freedom of speech, association, press, religious, assembly, petition, and academic freedom," and private institutions to comply with their "stated institutional policies regarding freedom of speech, including academic freedom," as a "material condition" of receiving a grant.[1]

Under the 2020 final rule, the Department would find an institution out of compliance if there is a "final, non-default judgment" by a state or federal court that the institution or any

[1] The 2020 final rule covers only direct and indirect grants made by the Department to institutions and does not apply to Title IV student aid funding (such as Pell Grants and student loans) received by institutions on behalf of students.

of its employees, acting in their official capacity, violated the First Amendment, in the case of a public institution, or its stated policies, in the case of a private institution. The 2020 final rule further requires institutions to notify the Department of any such final judgment within 45 days of its issuance, and the Department may then determine, in its discretion, whether and to what extent it will impose penalties, including but not limited to withholding grant funds.

Colleges and universities are committed to fostering environments that promote free speech and academic freedom and take seriously their responsibilities to comply with all applicable federal and state laws, including the First Amendment for public institutions, as well as their stated institutional free-speech policies. Fostering academic freedom and open, engaging, and diverse intellectual and civic inquiry and debate is fundamental to our campuses and to their educational missions.

As the 2020 final rule acknowledges, and the Department reiterates, public institutions are already legally required to comply with the First Amendment, and private institutions are required to comply with their stated policies on freedom of speech. Because of these obligations and the ability to pursue claims of an infringement of a First Amendment or free speech policy infringement through the courts, the 2020 final rule provides no additional protections of these rights.

Rather than enhance protections for these free speech rights, the 2020 final rule actually diminishes these rights by conditioning of a loss of federal grant funding on a single "final, non-default judgement" by a court against an institution or any of its employees. The concept is breathtaking in its reach, and its real-world application is chilling and could lead to a variety of unintended consequences. The 2020 final rule creates the very real possibility that the Department of Education could terminate federal funding based on an isolated federal or state court decision stemming from a single speech-related incident occurring on a campus that results in a final judgment. Even more problematic, the negative consequences of the 2020 final rule would grow should other agencies adopt a regulatory framework similar to the one contained in the 2020 final rule. For these and other reasons discussed below, we strongly encourage the Department to rescind the 2020 final rule.

I. The 2020 final rule encourages excessive and frivolous litigation in ways that undermine efforts to promote free inquiry on campus.

The 2020 final rule also encourages excessive and frivolous litigation in ways that will undermine the Department's and academia's shared goals of maintaining broad protections for campus speech.

Not all issues are best resolved by lawsuits. Particularly in college and university environments, a variety of forums are available for raising concerns and working through the sort of dialogue, debate, and learning (including by those who administer and teach) that are hallmarks of educational institutions. Due to the "single judgment" trigger and potentially extreme penalty, the 2020 final rule undermines dialogue and the free exchange of ideas by encouraging litigation as a first-choice means of resolving a campus issue concerning First Amendment or other institutional policy matters. The fact that the Department has not, yet, seen an increase in the number of lawsuits or final judgments being reported does not mean that the 2020 final rule has not had this effect, or will not have this effect in the future.

Even in instances where such lawsuits may have merit, their filings are likely to come at the expense of more immediate and effective means of campus dispute resolution, delaying and perhaps preventing the sort of resolutions that would address the near- term issue and have long-term benefits for the institution and its community of students, scholars, researchers, faculty, and other employees. In addition to increasing the amount of speech-related litigation, the 2020 final rule discourages institutions from treating each lawsuit, and the events or concerns that triggered them, with the sort of distinction and attention we would all hope to see. Instead, institutions must engage in a calculus of whether a case should be settled early on, or whether it is determined to pursue a "win-at-all-costs" litigation battle to the end. For colleges and universities attempting to avoid the rule's trigger and a potential loss of grant funding, there is no middle ground. Moreover, by tying federal grant dollars to the outcome of speech-related disputes, the 2020 final rule provides new incentives for plaintiffs' attorneys to add free speech/academic freedom claims, no matter how tenuous, to every lawsuit involving a university to gain more leverage and to try to force a settlement.

The 2020 final rule also creates a powerful disincentive for institutions to do what other entities and businesses decide routinely: to choose not to appeal a judgment following a trial or a hearing and instead reach a post-trial/pre-appeal resolution with the plaintiff, or modify their policies or practices in a manner consistent with the trial court ruling, or both.

With respect to private institutions that, as the Department properly recognizes, are not subject to the First Amendment, the 2020 final rule creates powerful incentives to truncate or eliminate institutional policies designed to protect free expression and academic freedom on campus, a result that runs completely counter to the stated goal of the rule. While we are unable to determine whether and to what extent this has occurred, the 2020 final rule clearly incentivizes institutions to narrow their speech policies to limit the likelihood that they are found in violation. Again, this undermines, rather than promotes, the goals of promoting free speech on campuses.

The 2020 final rule also increases the potential for False Claims Act (FCA) liability for private institutions, which are magnified because of the potential damages and the FCA's "bounty provisions," which call for sharing recoveries with the relator. This creates a significant incentive for private individuals or organizations to file so-called qui tam cases. The 2020 final rule threatens to unreasonably amplify those incentives, resulting in a flood of frivolous lawsuits. Even in the absence of an active lawsuit, the risk of liability is a serious and ongoing concern that will remain as long as the 2020 final rule is in place.

II. By granting the Department the discretion to terminate grant funding, the 2020 final rule inappropriately involves the Department in decisions better left to the courts.

The 2020 final rule also raises serious concerns regarding when and how the Department will determine whether to terminate federal grant funding following the notification of a final, non-default judgment by a state or federal court. Existing Department regulations provide Department officials with wide discretion when determining the appropriate remedy for non-compliance with a grant term or condition. In many contexts, this discretion is central to ensuring that appropriate remedies are applied, with consideration of the context and circumstances surrounding a violation. However, when it comes to determining sanctions for speech-related violations, this discretion raises the potential for politicized inquiries and judgments to invade the process.[2] As a result, it is easy to envision that one institution might lose all its grant funding while another would merely get a slap on the wrist, particularly in an environment in which higher education institutions have increasingly become the target of political attacks.

As the Department itself notes in its Feb. 22, 2023, proposed rule regarding the free inquiry regulations regarding student religious organizations, "[p]rior to the 2020 final rule, the Department's longstanding practice was to defer to courts to adjudicate First Amendment matters . . . and to order appropriate remedies <u>*without Departmental involvement*</u>" (emphasis added). The Department then further concludes it should "leave adjudication of these complex constitutional questions to the institutions themselves, their communicates, and the judiciary."

We believe the same rationale applies equally with respect to the provisions of the 2020 final rule. We urge the Department to remove itself from these determinations by striking the 2020 final rule, and to leave resolution of these complex issues to institutions, their communities, and the courts.

III. The 2020 final rule conflates the concept of academic freedom with the concept of free speech, and inappropriately permits the Department to withhold grant funding on this basis.

Finally, we are concerned with the specific reference in the 2020 final rule to the concept of "academic freedom" and the convoluted and confused discussion of this concept in the preamble. The ways in which academic freedom and freedom of speech both intertwine and are distinguished from one another is a highly complex jurisprudential topic, one that has been the subject of significant study and analysis among legal scholars and experts. The 2020 final rule wrongly suggests that freedom of speech and academic freedom are coextensive and fails to recognize the distinctions between institutional and individual academic freedom. For example, academic freedom may be used to refer to the institutional academic freedom of colleges and universities to hold academics accountable to the special responsibilities that accompany membership in the academic profession, as affirmed in the 1940 Statement of Principles on Academic Freedom and Tenure published by the American Association of University Professors and the 1970 interpretive comments to the statement. Presumably, the Department does not intend to constrain institutional authority to require that faculty perform their duties to teach and engage in scholarship with integrity and consistent with professional standards. We believe the inclusion of this term in the 2020 final rule's text confuses these issues in a way that is not helpful, and mistakenly puts the Department in the position of withdrawing federal grant funds on this basis.

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[2] Our concern about the risk of inconsistent sanctions under the 2020 final rule would apply regardless of the political party in charge of the agency.

Conclusion:

Given the serious concerns outlined above, we strongly encourage the Department to begin a rulemaking process to rescind these harmful regulations.

Sincerely,

Ted Mitchell
President

On behalf of:

American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Catholic Colleges and Universities
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
CCCU - Council for Christian Colleges & Universities
College and University Professional Association for Human Resources
Council of Graduate Schools
NASPA - Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
State Higher Education Executive Officers Association