

program support. These additional items will result in an increase in non-MDE cost of \$500 million, causing a revised total cost for non-MDE of \$1.76 billion. Major Defense Equipment (MDE) will remain \$.04 billion. The total estimated case value will increase by \$500 million to \$1.8 billion.

(iv) *Significance*: The proposed articles and services will support Australia's efforts to modernize its Electronic Warfare support capability and increases interoperability between the U.S. Air Force and the Royal Australian Air Force (RAAF).

(v) *Justification*: This proposed sale will support the foreign policy goals and national security objectives of the United States by improving the security of a major Non-NATO Ally that is a key partner of the United States in ensuring peace and stability around the world.

(vi) *Sensitivity of Technology*: The Sensitivity of Technology Statement contained in the original notification applies to items reported here.

(vii) *Date Report Delivered to Congress*: August 26, 2020

[FR Doc. 2020-21632 Filed 9-29-20; 8:45 am]

BILLING CODE 5001-06-P

## DEPARTMENT OF EDUCATION

### Notice of Investigation and Record Requests

**AGENCY:** Office of the General Counsel, Department of Education.

**ACTION:** Notice.

**SUMMARY:** The Department publishes a letter, dated September 15, 2020, notifying Binghamton University of an investigation and request for records and transcribed interviews.

**FOR FURTHER INFORMATION CONTACT:** Patrick Shaheen, U.S. Department of Education, Office of the General Counsel, 400 Maryland Avenue SW, Room 6E300, Washington, DC 20202. Telephone: (202) 453-6339. Email: [Patrick.Shaheen@ed.gov](mailto:Patrick.Shaheen@ed.gov).

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service, toll free, at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:** The Department publishes this letter, dated September 15, 2020, notifying Binghamton University of an investigation under 20 U.S.C. 1094 to determine if Binghamton's conduct related to events occurring between November 14 and November 19, 2019, as more particularly set forth in Appendix A, violated applicable statutory, regulatory, or contractual

provisions. The letter to Binghamton University is in Appendix A of this notice.

**Accessible Format:** Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotope, or compact disc) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

**Electronic Access to This Document:** The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at [www.govinfo.gov](http://www.govinfo.gov). At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at [www.federalregister.gov](http://www.federalregister.gov). Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

**Reed D. Rubinstein,**

*Principal Deputy General Counsel.*

### Appendix A

September 15, 2020

President Harvey Stenger SUNY-Binghamton, P.O. Box 6000, Binghamton, NY 13902-6000 via electronic mail

Re: Notice of 20 U.S.C. 1094 Investigation/ Request for Records and Transcribed Interviews/Binghamton University

Dear President Stenger:

The U.S. Department of Education ("Department") has become aware of facts suggesting representations made by Binghamton University ("Binghamton"), part of the State University of New York, promising, inter alia, institutional protection for free speech and free inquiry rights are misleading to students, parents, and consumers in the market for education credentials. Instead, there seems to be evidence suggesting Binghamton selectively applies its stated policies and procedures to discriminate against students based on the content of their speech and their decision to associate with groups such as the College Republicans and Young Americans for Freedom/Young America's Foundation ("YAF"). Consequently, the Department is opening an investigation to determine if Binghamton's conduct related to events occurring between November 14 and November 19, 2019, as more particularly set forth below, violated applicable statutory, regulatory, and/or contractual provisions.

The reported facts are as follows:

On November 14, 2019, beginning around 10:00 a.m., fewer than ten Binghamton

students who were members, associated with, or supporters of a recognized Binghamton University student group called "College Republicans" began "tabling" using two folding tables displaying fliers and other promotional materials in a common area of campus used to promote on-campus speeches, activities, and political causes. The College Republicans handed out fliers promoting a November 18, 2019, lecture by the prominent economist, Dr. Arthur Laffer. Other literature from a different organization supporting the Second Amendment but unrelated to the College Republicans was displayed on a nearby table. At approximately 2:00 p.m., approximately 200 persons surrounded the College Republicans and their tables, shouting threats and obscenities. They allegedly destroyed the College Republicans' materials and tables and attempted to chase them away. See Matthew Benninger, "Binghamton University says 'provocative' displays by political student organizations led to campus protest" (Nov. 18, 2019), <https://wbng.com/2019/11/18/binghamton-university-says-provocative-displays-by-political-student-organizations-led-to-campus-protest/>. Contemporaneous video footage demonstrates the University's police did not impede or prevent the conspirators' violence and intimidation. See [https://www.youtube.com/watch?v=\\_X2-96gt9MI](https://www.youtube.com/watch?v=_X2-96gt9MI).<sup>1</sup>

Preliminary information suggests these persons were acting in concert pursuant to a conspiracy. Contrary to law, the express object of this conspiracy was to injure, oppress, threaten, or intimidate the College Republicans in the free exercise or enjoyment of their First Amendment rights. See 18 U.S.C. 241; 42 U.S.C. 1985(3). Reported social media messages confirming the conspiracy's purpose included, inter alia, "[y]eah there's not that many but f— em [sic] up anyways" and "[t]oday on the spine Trump supporters are actively advocating for the Trump administration and gun violence. Join us at 2 as we disrupt this disgusting space that Binghamton has allowed students to create and protect the racism, homophobia, and xenophobia that has erupted from Trump and his supporters". See Editorial, "To protect free speech, SUNY Binghamton must throw the book at these

<sup>1</sup> On November 14, 2019, less than thirty minutes before the College Republicans began tabling, a shooter at a California high school killed two fellow students and injured three others before killing himself. On November 18, Binghamton's Vice President for Student Affairs, Brian Rose, imputed knowledge of this shooting to the College Republicans without any evidence the College Republicans knew or could have known of it at the time they commenced their protected activity. He said: "The [College Republicans] display included provocative posters with gun imagery, this being the same day as the Saugus High School shooting [so] the [College Republicans] intended to be provocative." See Benninger, supra <https://wbng.com/2019/11/18/binghamton-university-says-provocative-displays-by-political-student-organizations-led-to-campus-protest/>. The Department is concerned because Rose's statement seemingly contextualizes the police's failure to stop the threats, intimidation, and violence, and provides reason to believe Binghamton may harbor systemic bias and animus toward students with Republican or conservative political views.

bullies" (Nov. 19, 2019), <https://nypost.com/2019/11/19/to-protect-free-speech-suny-binghamton-must-throw-the-book-at-these-bullies/>. These social media strongly suggest that many of the conspirators agreed to injure, oppress, threaten, or intimidate the College Republicans because of and/or to prevent their exercise of constitutional rights, and many of the persons who acted pursuant to that conspiracy, were Binghamton students.

On November 15, 2019, YAF's General Counsel contacted Binghamton attorney Barbara Scarlett seeking assurances Binghamton would protect students' constitutional rights to freedom of assembly and association during an upcoming lecture by Dr. Arthur Laffer. Scarlett refused to provide any such assurances. Consequently, YAF hired two protective agents from Pinkerton Consulting & Investigations, Inc. ("Pinkerton") to protect Dr. Laffer.

On November 18, 2019, Dr. Laffer was scheduled to give his lecture.

On that day, Vice President Rose issued a statement in his official capacity blaming College Republicans and "another group known as Turning Point" for displaying "provocative" posters and intending to be "provocative." He said Binghamton's response "was and will be guided by principles and values related to safety, equity, free expression and reason." He said the conspirators who pulled down the College Republicans' tables "acted in a manner that may have violated University rules. In the context of the incident and in keeping with the principles and values noted above, the University did not seek to identify or charge any protesters." (Emphasis added.) He said, apparently referring to criticism regarding Binghamton's failure to protect a student political organization duly recognized by Binghamton and their First Amendment rights from conspiratorial violence and intimidation: "We acknowledge the larger political context in our country that is polarizing our society. It is unfortunate that interests external to the campus have seized upon this incident and attempted to mischaracterize it to feed their own narrative and to attempt to influence our response. We will not be responding to those external voices or altering our approach as a result of external pressure." (Emphasis added.) Rose never mentioned the First Amendment. See "A message from Vice President for Student Affairs Brian Rose" (Nov. 18, 2019), <https://www.binghamton.edu/president/statements.html>.

Also, on that day, representatives of the College Republicans and YAF met with Binghamton police and administrative personnel to discuss lecture security. The police advised of social media posts threatening lecture disruptions (widely-published images included those of Dr. Laffer receiving the Medal of Freedom from President Trump, with black boxes blocking the eyes of both Dr. Laffer and the President, and calling for protesters to "Come out and support BING PLOT, gathering voices to speak out against College republicans [sic] and Turning Point USA (angry and middle finger emojis) come out to lecture hall 8!!!at

6:45pm to hear the LIES they are feeding republicans !!!!we must put an end to this clownery. See you there (more emojis))." Another social media post with the same images included the message "COLLEGE REPUBLICAN AND TURNING POINT [sic] HAVE INVITED ARTHUR LAFFER, AN ECONOMIST/LIAR WHOSE THEORIES HAVE BEEN USED TO JUSTIFY TAX CUTS FOR THE RICH, AND RAISES ON THE POOR. F— THIS & THEM." The post was captioned "LET'S SHOW UP, SPEAK OUT, AND DISRUPT." These conspiratorial threats to disrupt the lecture and violate "republicans" and "TURNING POINT" members' civil rights included threats by the Binghamton, New York "Progressive [sic] Leaders of Tomorrow ("BING PLOT")."

Binghamton told the College Republicans and YAF the lecture was being moved to a different hall to provide better egress if university police decided it was necessary to remove Dr. Laffer from the lecture. However, notwithstanding clear evidence of a conspiracy by persons with a history of violence and lawlessness to violate the civil rights of College Republicans' and YAF's members,

Binghamton informed the College Republicans and YAF it was also providing an adjacent room, connected by a doorway to the lecture hall, where "protesters" would be allowed to gather.

Dr. Laffer arrived at a nearby airport en route to the lecture. Upon disembarking from his plane, he and two aides were intercepted by two university police officers at the airport.<sup>3</sup> They informed him of their security concerns for the event, discussed social media posts threatening to disrupt the event, and asked him to abandon his speaking commitment and return to his plane. Dr. Laffer refused and affirmed his commitment to give the lecture as planned.

At approximately 6:30 p.m., roughly an hour before the lecture, Binghamton officials informed the Pinkerton agents that they expected Dr. Laffer's lecture to be disrupted by PLOT and the "College Progressives." University police officers informed the agents that if the anticipated disruption neared the podium, the Pinkerton agents would be ordered to remove Dr. Laffer from the lecture venue. The police officers also instructed Dr.

<sup>2</sup> BING PLOT is an "anti-capitalist", "radical", and violent organization aiming to "create a culture of high-quality accomplices [sic] willing to put their bodies . . . on the line in the pursuit of justice." See <https://www.facebook.com/BingPLOT/>. For example, on October 14, 2019, PLOT halted Binghamton's Columbus Day Parade and several of its members were arrested and criminally charged. See Amy Hogan, "Binghamton Mayor Condemns Community Group PLOT, Challenges Other Elected Officials To Do The Same" (Oct. 15, 2019), <http://www.wicz.com/story/41184593/inghamton-mayor-condemns-community-group-plot-challenges-other-elected-officials-to-do-the-sa>.

<sup>3</sup> Customarily, university officials greet visiting dignitaries like Dr. Laffer upon arrival at the university. On this occasion, unique in Dr. Laffer's decades of lecturing experiences at American universities, not a single Binghamton administrator or faculty member welcomed him publicly or privately. Since the event, not one Binghamton (or other SUNY) administrator or faculty member has communicated publicly or privately with Dr. Laffer.

Laffer's driver to remain with the vehicle to facilitate Dr. Laffer's escape if the anticipated disruptions occurred.

Shortly thereafter, the doors opened to the lecture hall. Hundreds of students and non-students filled the hall, including many conspirators. Dozens wore masks and clothing with indicia of PLOT affiliation, including armbands, pins, and red shirts. Conspirators remained standing, blocked access to seating, and stood in the aisles. Facilitated by Binghamton, the room adjacent to the lecture hall also filled with conspirators. Upon information and belief, the object, purpose, and intention of the conspirators' agreement were combined action to deny and intimidate Dr. Laffer, YAF members, College Republican members, and other community members in the exercise of their First Amendment and other constitutional rights. Also, upon information and belief, Binghamton had both actual and constructive knowledge of the wrongs conspired to be done and about to be committed. It also had the power to prevent or aid in preventing the commission of the same, yet it appears to have neglected or refused so to do. See 42 U.S.C. 1986.

YAF and the College Republicans asked for assistance from the University police officers in getting attendees seated. A university police officer made a single announcement about the fire code and requested that attendees be seated. Binghamton took no further action to enforce the request or to inform the crowd that disruptions of Dr. Laffer's lecture would be inappropriate, a violation of the University's policies, illegal, or the subject of University discipline. While many officers were present, they remained standing against the walls of the room—making no effort to bring order to the room.

At 7:30 p.m., the College Republicans' President introduced Dr. Laffer, first announcing to all attendees that all comments or questions should occur at the end of Dr. Laffer's lecture, specifically welcoming the comments of those who may wish to express disagreement. Dr. Laffer went to the podium and, within seconds, conspirators in the second row began shouting to prevent him from speaking. One emerged from the side of the hall to hand a bullhorn to the shouting protester, thereby preventing Dr. Laffer from being heard. Others joined in the hostile display, drowning out Dr. Laffer and denying other students the right to hear his views. See [https://www.youtube.com/watch?v=eTqlmDar\\_hg](https://www.youtube.com/watch?v=eTqlmDar_hg).

Instead of making a good faith effort to restore order to allow the lecture to continue, university police ordered Dr. Laffer's removal by the Pinkerton agents. This ended the lecture, allowing the conspirators to unlawfully deny and intimidate Dr. Laffer and the students who came to listen in the exercise of their First Amendment rights. Only after the protester with the bullhorn fell from the chair on which he/she was standing did the university police approach the leading protester around whom other protesters then formed a human barricade. Conspirators from the adjacent room (provided by Binghamton to facilitate their activities) flooded the lecture hall and joined

the disruption. For approximately an hour, the protesters continued to occupy the lecture hall.

On November 19, 2019, the College Republicans received email notification that its status as a chartered student organization was being suspended for failure to obtain proper approval prior to its November 14, 2019, tabling.

There is no record of Binghamton investigating, disciplining, or imposing any penalty on or sanctioning any other students or student organization involved in any of the above-described events.

In exchange for the annual payment of approximately at least \$10,201.00 in tuition and fees, Binghamton promises students that they will have the freedom to speak, learn, challenge, and dissent. These promises are not merely aspirational goals but rather are representations to students, parents, and consumers intended to create reliance and induce attendance. Binghamton's problematic representations include but are not limited to:

- Binghamton fosters "open dialogue." See <https://www.binghamton.edu/about/mission-vision-values.html#>.

- Binghamton requires all members of the University community to conduct themselves "lawfully, maturely and responsibly, and to share the responsibility of maintaining standards of behavior that are essential to the smooth functioning of the institution." See <https://www.binghamton.edu/student-handbook/policies/index.html>

- The "full exercise of First Amendment rights is encouraged and protected." See <https://www.binghamton.edu/student-handbook/policies/index.html>.

- "Conduct that interferes with or threatens the operation of the University or the rights of others, either in or out of the classroom, is not condoned". See <https://www.binghamton.edu/student-handbook/policies/index.html>.

- "Every member of the University community has a right to feel secure in person and property and has the responsibility to respect and protect the rights of others." See <https://www.binghamton.edu/student-handbook/policies/index.html>.

- Dissent and demonstrations must occur "in an orderly and peaceful manner." See <https://www.binghamton.edu/student-handbook/policies/demonstrations.html#~text=Students%20are%20free%20to%20voice,normal%20functioning%20of%20the%20University.>

- Students must "conduct themselves in a manner that supports and respects the rights of others". See <https://www.binghamton.edu/student-handbook/pdfs/accessible-version-of-student-code-of-conduct-2020-21.pdf>.

- Binghamton demands "respectful discourse, allowing all members to express themselves in a manner that enables others to feel personally safe and emotionally secure both in and out of the classroom." See <https://www.binghamton.edu/student-handbook/pdfs/accessible-version-of-student-code-of-conduct-2020-21.pdf>.

- Binghamton promises "[t]he safety of our students and the entire campus community" is the "highest priority" and its police "are

fully empowered, state law enforcement officers trained to address the unique needs of the University campus" with "comprehensive programs and procedures to help every member of the University community remain safe." See <https://www.binghamton.edu/about/campus-safety.html>.

- Binghamton has generally applicable conduct rules, and these rules will be enforced consistently for "any conduct system to be credible, consistency must be a central element." Specifically, "Rule #8" provides "[e]ndangering, threatening, causing, or attempting to cause physical harm to any person or causing reasonable apprehension of such harm" and may lead to sanctions including a period of disciplinary/final probation, suspension or expulsion, educational intervention(s), and a loss of housing. "Rule #19" provides "disorderly conduct," which includes disrupting a classroom and blocking access to a roadway, office, or building, may lead to sanctions based on "the level of disruption, the impact on the learning environment, the duration of the disruption, and safety concerns." See [https://www.binghamton.edu/student-conduct/resources/1920\\_sanctioning\\_guidelines.pdf](https://www.binghamton.edu/student-conduct/resources/1920_sanctioning_guidelines.pdf).

- Binghamton is "absolutely committed to upholding free speech" and "will not tolerate efforts to disrupt or shut down gatherings where academic and personal freedoms are being exercised." "An end-of-the-year message from President Harvey Stenger", (Dec. 23, 2019) <https://www.binghamton.edu/president/statements.html>

- "As an institution of higher education, freedom of speech is fundamental to our core mission; academic inquiry and the exchange of ideas rest on the principle that all have a right to express their beliefs." "A message from President Stenger" (Nov. 15, 2019) <https://www.binghamton.edu/president/statements.html> (*emphasis in original*).

The facts regarding Binghamton's conduct during the subject time are not fully developed. Therefore, it is unclear whether Binghamton's actions and omissions were due to management failures; political bias and animus against College Republicans, YAF, and political conservatives; or other factors. Regardless, those actions and omissions suggest serious reason for the Department to be concerned that Binghamton's many representations about free speech and student conduct to students, parents, and consumers in the market for education certificates may be false, erroneous, or misleading, in violation of 20 U.S.C. 1094(c)(3)(B) and 34 CFR 668.71(c). Therefore, the Department's Office of Postsecondary Education, in consultation with the Department's Office of the General Counsel, is opening this investigation.

As you are aware, the Secretary may commence a fine proceeding, among other measures, if the Department ultimately concludes Binghamton has made substantial misrepresentations about the nature of its educational program. The Department is aware of the challenges posed by COVID-19 to institutions of higher education. However, the critical gravity of Binghamton's representations compels the Department to

move this investigation forward with all appropriate speed.

The Department requests Binghamton produce the requested records, make available the identified employees for transcribed interviews under oath, and answer the specified questions in accordance with the deadlines specified below. See 20 U.S.C. 1094(a)(17); 20 U.S.C. 1097a; U.S. v. Morton Salt, 338 U.S. 632, 642-63 (1952); U.S. v. Powell, 379 U.S. 48, 57 (1964); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 216 (1946); see also U.S. Dep't of Educ., Notice of Proposed Rulemaking, 85 FR 3190, 3213 n.137 (Jan. 17, 2020) ("The Department notes that public and private institutions also may be held accountable to the Department for any substantial misrepresentation under the Department's borrower defense to repayment regulations"); Standard Form 424B; Executive Order 13864, Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities, 84 FR 11401 (Mar. 21, 2019); and Final Rule: Direct Grant Programs, State-Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, available at [https://www2.ed.gov/about/offices/list/ope/freeinquiryfinalrule\\_unofficialversion09092020.pdf](https://www2.ed.gov/about/offices/list/ope/freeinquiryfinalrule_unofficialversion09092020.pdf) (Sept. 9, 2020). Please be advised the Department considers your answers to these requests to be matters within the jurisdiction of the executive branch of the Government of the United States for the purposes of 18 U.S.C. 1001. Accordingly, Binghamton should make every effort to answer our requests fully and completely.

#### I. Records Production

Please produce the following records within twenty-one (21) calendar days:

1. All records concerning, regarding, referring to, or relating to the events of November 14 through 19, 2019, as described above. The relevant time for this request is January 1, 2019 to the present.

2. All records concerning, regarding, referring to, or relating to the content of and statements made in "A message from Vice President for Student Affairs Brian Rose" (Nov. 18, 2019) <https://www.binghamton.edu/president/statements.html> and "A message from President Stenger" (Nov. 15, 2019) <https://www.binghamton.edu/president/statements.html>. The relevant time for this request is November 13, 2019 to the present.

3. All records concerning, regarding, referring to, or relating to actual or potential discipline of any student and/or any sanction of an organization due to or arising out of any statement, action, or conduct during or related to the events of November 14 through 19, 2019, described above. The relevant time for this request is November 14, 2019, to the present.

4. All records concerning, regarding, or relating to PLOT (a.k.a. Progressive Leaders of Tomorrow), the College Republicans, and Young Americans for Freedom/Young American's Foundation. The relevant time for this request is June 1, 2016, to the present.

5. All records concerning, regarding, or relating to Jeffrey Coghlan. The relevant time

for this request is November 1, 2019, to the present.

6. All records concerning, regarding, or relating to John Restuccia. The relevant time for this request is June 1, 2016, to the present.

7. All records concerning, regarding, or relating to Jon Lizak. The relevant time for this request is June 1, 2016, to the present.

8. All records concerning, referencing, or relating to the Stipulation of Settlement and Discontinuance Pursuant to Rule 41(A), Center for Bio-Ethical Reform v. Black, 1:13-cv-00581-RJA-HBS (W.D.N.Y. June 2, 2017), ECF No. 30 (Exhibit A).

9. All records of the University police concerning, referring, or relating to Dr. Laffer, College Republicans, Young Americans for Freedom/Young America's Foundation, College Progressives, PLOT, Jeffrey Coghlan, John Restuccia, Jon Lizak, Pinkerton Consulting & Investigations Inc. (a.k.a. Pinkerton), and the events of November 14–19, 2019, as described above. The relevant time frame for this request is January 1, 2018, to the present.

10. A true copy of Binghamton's safety plan in support of Dr. Laffer's lecture and all records concerning, regarding, or relating thereto. The relevant time frame for this request is November 1, 2019, to the present.

11. A list of Binghamton employees who determined (a) Dr. Laffer's lecture should be moved to a larger hall, (b) that the adjacent hall would be provided for those opposing Dr. Laffer's lecture, and (c) that Dr. Laffer would be ordered removed if his lecture was disrupted by protesters.

12. A list of all Binghamton employees responsible for or involved in Binghamton's decision not to seek to identify or charge any "protesters" involved in the events of November 14, 2019.

13. All records about, concerning, or noting meetings with University officials and University police officers about the College Republicans, Young Americans for Freedom/Young America's Foundation, College Progressives, or PLOT, including all records shared, distributed, or discussed at such meetings. The relevant time for this request is June 1, 2016, to the present.

14. All records of any student organization, including a chartered student organization, that was suspended, disciplined, or otherwise reprimanded. The relevant time frame for this request is June 1, 2016, to the present.

15. All records of any policies or statements regarding the provision of security at events organized by any student organizations, including chartered student organizations. The relevant time frame for this request is January 1, 2018 to the present.

Your production should utilize the following procedures:

- For purposes of this request, records shall be produced in their entirety, without abbreviation, modification, or redaction, including all attachments and materials affixed thereto.

- All records should be produced in the same order as they are kept or maintained in the ordinary course, or the records should be organized and labeled to correspond to the categories of the records requested.

- If the request cannot be complied with in full, it shall be complied with to the extent

possible, with an explanation of why full compliance is not possible. Any document withheld in whole or in part due to privilege, or for any other reason, shall be identified on a privilege log submitted with response to this request. The log shall state the date of the document, its author, his or her occupation and employer, all recipients, the title and/or subject matter, the privilege claimed, and a brief explanation of the basis of the claimed privilege.

- Records shall be produced in electronic form instead of paper productions. Records shall be delivered as delimited text with images and native files. Alternatively, all records derived from word processing programs, email applications, instant message logs, spreadsheets, and wherever else practicable, shall be produced in text searchable PDF format. Spreadsheets shall also be provided in their native format. Audio and video files shall be produced in their native format, although picture files associated with email or word processing programs shall be produced in PDF format along with the document it is contained in or to which it is attached.

- Other than native files produced along with TIF images, records should be sequentially numerically indexed (a.k.a. Bates stamping) and reference should be made to the request to which the records are responsive (e.g., Item 1). All files produced shall be numerically identified within the range that the file contains (e.g., University-00001-University-000050).

- Searches for records in electronic form should include searches of all relevant mobile devices, hard drives, network drives, offline electronic folders, thumb drives, removable drives, records stored in the cloud, and archive files, including, but not limited to, backup tapes. Do not time stamp or modify the content, the create date, or the last date modified of any record and do not scrub any metadata (other than to numerically index, as described above). Electronic records should be produced in native format. For emails, please place responses in one .pst file per employee. For .pdf files, please provide searchable file format and not image file format.

- All email searches should be conducted by the agency's information technology department, or its equivalent, and not by the individuals whose records are being searched. Please provide the name and contact information of the individual(s) who conducted the search, as well as an explanation of how the search was conducted.

- Should you have any questions about the method or format of production please contact the undersigned to coordinate.

As used in this Notice of Investigation and Records Request:

"Record" means all recorded information, regardless of form or characteristics, made or received, and including metadata, such as email and other electronic communication, social media posts, texts, word processing documents, PDF documents, animations (including PowerPoint™ and other similar programs) spreadsheets, databases, calendars, telephone logs, contact manager information, internet usage files, network access

information, writings, drawings, graphs, charts, photographs, sound recordings, images, financial statements, checks, wire transfers, accounts, ledgers, facsimiles, texts, animations, voicemail files, data generated by calendaring, task management and personal information management (PIM) software (such as Microsoft Outlook), data created with the use of personal data assistants (PDAs), data created with the use of document management software, data created with the use of paper and electronic mail logging and routing software, and other data or data compilations, stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form. The term "recorded information" also includes all traditional forms of records, regardless of physical form or characteristic

## II. Transcribed Interviews

Please make the following individuals available for transcribed interviews:

1. President Harvey Stenger
2. Vice President for Student Affairs Brian Rose
3. Chief of Police John Pelletier
4. A duly authorized corporate designee to testify regarding Binghamton's (a) representations, as specified above, and (b) the contents and application of its policies or practices regarding free speech, free inquiry, and the First and Second Amendments to the U.S. Constitution.

5. The university police officers who appeared at the airport to meet Dr. Laffer on November 18, 2019.

6. The university police officers in command (including onsite command) of the security effort relating to Dr. Laffer's lecture.

7. The university police officers in command (including onsite command) regarding the events of November 14, 2019.

If Binghamton asserts attorney-client or attorney-work product privilege for a given record, then it must prepare and submit a privilege log expressly identifying each such record and describing it so the Department may assess the claim's validity. Please note that no other privileges apply here. Your record and data preservation obligations are outlined at Exhibit B.

This investigation will be conducted by the Department's Office of the General Counsel with support from the Office of Postsecondary Education. Your legal counsel will be contacted by Paul R. Moore, the Department's Chief Investigative Counsel, to schedule the transcribed interviews, and by the Office of the General Counsel's electronic discovery attorney, Kevin D. Slupe, to arrange for records transmission. Additionally, please be advised that by copy of this letter we are referring Binghamton to the U.S. Department of Justice's Civil Rights Division for such additional investigation and action as may be appropriate.

Thank you in advance for your cooperation.

Sincerely yours,  
Robert L. King  
Assistant Secretary, Office of Postsecondary Education  
Enclosure (Exhibits A and B)

cc: John B. Daukas, Principal Deputy Assistant Attorney General Civil Rights Division, U.S. Department of Justice  
 Reed D. Rubinstein, Principal Deputy General Counsel delegated the Authority and Duties of the General Counsel  
 Paul R. Moore, Chief Investigative Counsel  
 Kevin D. Slupe, Special Counsel Chancellor  
 Jim Malatras  
 The State University of New York  
 [FR Doc. 2020-21649 Filed 9-29-20; 8:45 am]

BILLING CODE 4000-01-P

## DEPARTMENT OF EDUCATION

### Guidance Regarding Department of Education Grants and Executive Order 13798

**AGENCY:** Office of the General Counsel, Department of Education.

**ACTION:** Notice.

**SUMMARY:** The Department publishes this guidance, dated August 7, 2020, pursuant to a memorandum from the Office of Management and Budget (OMB) directing all grant administering agencies to publish policies detailing how they will administer Federal Grants in compliance with Executive Order 13798, titled “Promoting Free Speech and Religious Liberty,” the Attorney General’s October 6, 2017 Memorandum on Federal Law Protections for Religious Liberty, and OMB’s Memorandum.

**FOR FURTHER INFORMATION CONTACT:** Patrick Shaheen, U.S. Department of Education, Office of the General Counsel, 400 Maryland Avenue SW, Room 6E300, Washington, DC 20202. Telephone: (202) 453-6339. Email: [Patrick.Shaheen@ed.gov](mailto:Patrick.Shaheen@ed.gov).

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service, toll free, at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:** The Department issues this guidance to comply with the law and to protect religious liberty in the administration of its grant programs. The guidance details the ways in which the Department’s specific regulations protect the religious freedoms of institutions and individuals and introduces a process by which both faith-based organizations and individuals can inform the Department of a burden or potential burden on religious exercise under the Religious Freedom Restoration Act (RFRA). The guidance is in the Appendix of this notice.

**Accessible Format:** Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotope, or compact disc) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

**Electronic Access to This Document:** The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at [www.govinfo.gov](http://www.govinfo.gov). At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at [www.federalregister.gov](http://www.federalregister.gov). Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

**Reed D. Rubinstein,**

*Principal Deputy General Counsel delegated the authority to perform the functions and duties of the General Counsel.*

### Appendix—Guidance Regarding Department of Education Grants and Executive Order 13798

#### I. Purpose and Background

On May 4, 2017, the President signed *Executive Order 13798*, titled “Promoting Free Speech and Religious Liberty.”<sup>1</sup> This decree, among other things, directed the Attorney General to provide guidance to Federal agencies on the requirements of Federal laws and policies protecting religious liberty. Accordingly, on October 6, 2017, the Attorney General issued a memorandum advising agencies on such laws and policies, including how they apply to the awarding of grants (Attorney General Memorandum).<sup>2</sup> Subsequently, the Office of Management and Budget (OMB) issued its own guidance on January 16, 2020 (OMB Memorandum), directing all grant administering agencies “within 120 days of the date of this Memorandum . . . [to] publish policies detailing how they will administer Federal grants in compliance with E.O. 13798, the Attorney General’s memorandum, and this Memorandum.”<sup>3</sup>

<sup>1</sup> Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

<sup>2</sup> Exec. Order No. 13798, 82 FR 21675 (May 4, 2017).

<sup>3</sup> Jeff Sessions, *Federal Law Protections for Religious Liberty*, Memorandum for All Executive Departments and Agencies (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001891/download>.

<sup>4</sup> Office of Mgmt. & Budget, Exec. Office of the President, M-20-09, *Guidance Regarding Federal Grants and Executive Order 13798* (January 16, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/01/M-20-09.pdf>.

The OMB Memorandum and the Attorney General’s Memorandum remind agencies that religious organizations are entitled to compete on equal footing with secular organizations for Federal financial assistance, as clarified most recently by the Supreme Court of the United States in *Espinoza v. Montana Department of Revenue*<sup>4</sup> and *Trinity Lutheran Church of Columbia, Inc. v. Comer*.<sup>5</sup> In particular, rules or grant terms that “expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character” violate the Free Exercise Clause, unless the government can prove that such rules or terms are the least restrictive means of achieving a compelling government interest.<sup>6</sup> This is unconstitutional because it forces a religious institution to choose between “participat[ing] in an otherwise available benefit program or remain[ing] a religious institution.”<sup>7</sup> As a result, Department grants must be available to all qualified organizations, regardless of their religious or non-religious character, and to all eligible individuals, regardless of their religion.

Furthermore, all agency actions—including, but not limited to, agency rules and grant terms—that impose a substantial burden on an organization or individual’s exercise of religion violate the Religious Freedom Restoration Act (RFRA)<sup>8</sup> if they do not survive strict scrutiny.<sup>9</sup> RFRA thus must inform all agency rulemaking.<sup>10</sup>

The Department of Education (ED or Department) issues this guidance to comply with the law and to protect religious liberty in the administration of its grant programs. The sections that follow detail the ways in which the Department’s specific regulations<sup>11</sup> protect the religious freedoms of institutions and individuals, the process by which both faith-based organizations and individuals can inform the Department of a burden or potential burden on religious exercise under RFRA, and the role within the Department that the Center for Faith and Opportunity Initiatives plays as a resource on issues of religious liberty.

#### II. Equal Treatment of Religious Organizations and Students in Department of Education Programs

##### a. Equal Participation of Religious Organizations

The Free Exercise Clause, Supreme Court jurisprudence, and Federal grant regulations

<sup>4</sup> *Espinoza v. Mont. Dep’t of Revenue*, No. 18-1195 (U.S. June 30, 2020).

<sup>5</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

<sup>6</sup> *Id.* at 2021.

<sup>7</sup> *Id.* at 2021-22.

<sup>8</sup> 42 U.S.C. 2000bb, *et. seq.*

<sup>9</sup> *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, No. 19-431, slip op. at 7 (U.S. July 8, 2020).

<sup>10</sup> *See id.* at 21-22.

<sup>11</sup> Note that amendments to the regulations at 34 CFR parts 75, 76, 106, 606, 607, 608, and 609, as well as 2 CFR part 3474 have been proposed, as announced in the notice of proposed rulemaking issued by the Office of the Secretary. *See* 85 FR 3190 (January 17, 2020).