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Ted Mitchell
President

February 18, 2020

Secretary Betsy DeVos
c/o Jean-Didier Gaina
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Docket ID ED-2019-OPE-0080

Dear Secretary DeVos:

On behalf of the higher education associations listed below, I write to provide comments in response to the Department's January 17, 2020, notice of proposed rulemaking ("NPRM" or "proposed rule"). Our comments focus specifically on the proposed amendments to sections 75.500 and 76.500 of Title 34 of the Code of Federal Regulations and the related discussion in "Part 2 – (Free Inquiry)" of the preamble.

In the preamble, the Department indicates it is proposing these regulatory changes in response to Executive Order 13864, *Improving Free Inquiry, Transparency and Accountability at Colleges and Universities*, issued March 21, 2019 ("executive order"). The executive order states "it is the policy of the Federal Government to encourage institutions to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions." The executive order directs the Secretary of Education, as well as other covered-agency heads, to "take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies."

All colleges and universities take seriously their responsibilities to comply with all applicable federal and state laws, including the First Amendment for public institutions, as well as with their stated institutional policies. Fostering academic freedom and open, engaging, and diverse intellectual and civic inquiry and debate is fundamental to our campuses and to our institutions' educational missions.

We appreciate the opportunity to comment on these matters of fundamental importance to colleges and universities. We also appreciate the portions of the proposed rule that recognize the importance of an institution's autonomy to set, within legal confines, its own policies, consistent with institutional mission and culture.

At the same time, sections 75.500 and 76.500 of the proposed rule create 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. It creates other significant problems as well, which we discuss further below.

While we share the Department's goal of ensuring that robust debate and a diversity of ideas flourish on campus, we have grave concerns that rather than "promot[ing]" and "encouraging" free speech, as the executive order directs, the proposed rule is likely to curtail or limit it, particularly at private institutions. Even more problematic, the negative consequences of the proposed rule would grow exponentially should other covered agencies adopt a regulatory framework similar to the one proposed by the Department of Education.

We describe these concerns further and provide recommendations below to allow the Department to better satisfy the executive order's goals while avoiding many of the pitfalls generated by the current proposal. The suggested alternatives should not be interpreted as support for the underlying proposals or premise of the NPRM. Rather, they are suggestions on how to partially reduce the harms to colleges and universities and the communities we serve that would stem from the proposed rule.

Furthermore, we urge the Department to reopen and extend the comment period for an additional 30 days, to allow more comments from stakeholders. An extended comment period seems warranted, particularly if the Department is to become the model for other agency efforts.

1. Conditioning federal grants on a final court judgment that an institution violated the First Amendment or its stated policies on freedom of speech.

The proposed rule would require public institutions to comply with the "First Amendment, including protections for freedom of speech, association, press, religious, assembly, petition, and academic freedom," as a "material condition" of receiving a grant from the Department.[1] Similarly, the proposed rule would require private institutions to comply with their "stated institutional policies regarding freedom of speech, including academic freedom," as a "material condition" of a grant. 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 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 proposed rule further requires institutions to notify the Department of any such final judgment within 30 days of its issuance.

The Department and the public reasonably expect that public institutions will strive to comply with the First Amendment and that private institutions will endeavor to comply

[1] The proposed rule covers only direct and indirect grants made by the Department to institutions. Consistent with executive order 13864, it does not apply to Title IV student aid funding (Pell grants, student loans . . .) received by institutions on behalf of students.

with their own stated policies regarding freedom of speech. We agree with the Department's articulation of expectations in that regard.

Our concerns center on the breadth of the proposed rule's 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.

A. The proposed rule would encourage excessive and frivolous litigation in ways that undermine the Department's and academia's shared goal to maintain 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 proposed rule would undermine this dialogue and 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.

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 proposed rule could discourage 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, each case would either be settled early on, or it would be a "win-at all-costs" litigation battle to the end. There would be no middle ground as colleges and universities attempt to avoid the rule's trigger for a potential loss of grant funding—namely, "a final, non-default judgment in a State or federal court."

As the Foundation for Individual Rights in Education (FIRE)[2] wrote in December 2019 in response to the forthcoming rule, "institutions would have incentives to either (1) settle every claim brought before them, regardless of how frivolous, or (2) fight each case to the bitter end." For institutions, the predictable increase in the number and duration of speech-related litigation will only serve to escalate college and university costs at a time when affordability is a critical issue for many American families. Groups challenging institutional polices will also see increased litigation costs and delay as institutions are obliged to appeal any adverse final judgment. By tying federal grant dollars to the outcome of speech-related disputes, the rule provides new incentives for plaintiffs' attorneys to add free speech/academic freedom claims, no matter how

2 https://www.thefire.org/the-department-of-education-must-avoid-these-pitfalls-when-crafting-regulations-on-campus-free-speech/

tenuous, to every lawsuit involving a university to gain more leverage and to try to force a settlement.

Furthermore, it appears that the proposed rule would create 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. Such sensible options could become untenable under the proposed rule. Due to its reference to a "final, non-default judgement," the un-appealed judgment would be "final" and thus the trigger for the institution's loss of federal grant funding.

For these reasons, the Department's stated objectives of the proposed rule are ill-served by discouraging responsive and immediate resolution with the plaintiff and modification of institutional policies where necessary and desirable. But that is exactly what the proposed rule will encourage, because accepting an adverse judgment without an appeal would subject institutions to the peril of being deemed in violation of a material condition of their grant.

Should other agencies follow the Department's lead and adopt similar regulations, we would see the negative effects of the rule compound as the amount of federal funding at stake grows. Universities would be under even more pressure to avoid final adverse judgments by either settling before trial or appealing.

With respect to private institutions that, as the Department properly recognizes, are not subject to the First Amendment, the proposed rule could create 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 proposed rule and the executive order.[3] Simply put, a private institution might feel compelled to narrow speech policies to limit the likelihood that the institution could be deemed in violation of its policies. Narrower policies would seriously undermine the aims of encouraging and promoting free speech and open inquiry articulated in the proposed rule and executive order.

The trigger covers not only final non-default court judgments against a private institution but also judgments against "any of its employees acting in their official capacity." By including employees, the proposed rule would threaten institutional funding based on the actions of a single rogue (or unthinking) employee in contravention of institutional policies, even when the institution had terminated or otherwise disciplined the employee. In these cases, we believe the threat of a loss of grant funding is particularly unwarranted.

[3] The Department itself admits that with respect to private institutions, the proposed rule "do[es] not require a private institution to ensure freedom of speech (unless it chooses to do so through its own stated institutional policies)."

Finally, we are concerned about the proposed rule's discussion of the False Claim Act (FCA) and the potential it presents for increased FCA liability for private colleges and universities. Under the preamble to the proposed rule, the Secretary may require private institutions to "certify they have complied with their own freedom of expression policies as a material condition for receiving education grants." Failure to certify provides a basis to deny grants, and an inaccurate certification "may give rise to a cause of action under the [False Claims Act] FCA." The preamble also notes that either the Attorney General or a private party (a relator) may initiate an FCA action, which can result in treble damages plus substantial penalties. Those sanctions are severe. Moreover, because of the magnitude of the potential damages and the statute's "bounty provisions," which call for sharing recoveries with the relator, there is a significant incentive for private individuals or organizations to file so-called *qui tam* cases. As drafted, the proposed rule would unreasonably amplify those incentives resulting in a flood of frivolous lawsuits.

While the proposed rule may link noncompliance with institutional policy to the issuance of a "final, non-default judgment," it does not *preclude* the filing of a *qui tam* case in the absence of such a judgment. Thus, it is highly likely that as drafted, the proposed rule will encourage the filing of numerous frivolous *qui tam* cases alleging, even absent a final judgment, that institutional policies, a material condition of award under the NPRM, were violated and that the grant should therefore not have been awarded. These cases, even if frivolous and/or brought for profile-raising purposes by advocacy groups, would impose a substantial burden on college and university defendants in the form of disruption and cost. If the proposed rule becomes final, to manage the risk of nuisance suits created by it, private institutions may be forced to adopt policies that are *less* protective of free inquiry and expression—just the opposite of the what the Department aims to accomplish. While the FCA serves a valuable public policy purpose, it should not be used lightly and certainly not in a way that would encourage frivolous *qui tam* cases. Exacerbating that concern, the preamble of the proposed rule could be misconstrued to establish a regime whereby a final judgment would be perceived as a *per se* violation of the FCA. Yet, the FCA is a stand-alone statute with its own elements that a plaintiff must meet. The proposed rule ignores that issue.

For all of these reasons, we would strongly encourage the Department to remove the link between compliance with institutional policies on free inquiry and potential liability under the FCA.

B. Courts will reach different conclusions as to whether an institution violated the First Amendment or its stated policies, even when looking at the same or similar set of facts.

We agree with the Department that it should not make determinations whether an institution has complied with the First Amendment or its stated policies—it would be unwise and inappropriate to do so. However, relying on judicial branch decisions arising from a singular event or issue on campus raises its own set of problems. The risk of differing and inconsistent rulings from court to court and across jurisdictions in an area of jurisprudence as complex and nuanced as speech is not theoretical: It is real. Federal funding ought not rise and fall on the differing perceptions of judges and juries spread

throughout our 50 states, or for that matter, on the unique talents of the lawyers pressing and defending the cases before them.

For example, it is reasonable to assume that the majority of cases against private institutions would arise in state courts under breach of contract or tort theories. There is significant variation in state law, even in such basic questions as whether institutional policies constitute a "contract." In the federal system, specific cases and holdings on First Amendment questions vary from district to district and circuit to circuit. State and federal courts in different jurisdictions employ varying approaches and sometimes quite different standards for resolving First Amendment and other speech-related litigation, resulting in unpredictable or inconsistent results depending on the court that hears the case. Indeed, the jurisprudence associated with First Amendment litigation over many decades makes clear just how nuanced and unpredictable judicial rules in such cases can be.[4] Because different courts will reach different conclusions as to whether an institution violated the First Amendment or its stated policies—even when considering a similar set of facts—determinations regarding institutional compliance will not be consistently or fairly applied. The end result could be an arbitrary loss of federal grants for some and not for others, even when the same or similar conduct is at issue.

C. Unique considerations in the freedom of speech context call for greater clarity in defining when the Department may terminate federal grant funding.

Existing Department regulations provide Department officials with wide discretion when determining the appropriate remedy for noncompliance with a grant term or condition. The NPRM clarifies that this existing authority would also apply when determining the remedy for non-compliance based on a speech-related violation.

Citing existing regulations, the preamble lists factors that the Department may consider, including: the "actual or potential harm or impact that results or may result from the wrongdoing," the "frequency of incidents and/or duration of the wrongdoing," "whether there is a pattern or prior history of wrongdoing," "whether the wrongdoing was pervasive within [the institution of higher education]," and whether the institution's "principals tolerated the offense."

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.[5] 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.

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[4] This is perhaps best exemplified by Justice Potter Stewart's famous line in *Jacobellis v. Ohio*, 378 U.S. 184 (1964) to describe his threshold test for obscenity exempt from First Amendment protections: "I know it when I see it."

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

The Department itself recognizes in the preamble the importance of "withdrawing certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." Just as the NPRM wisely removes determinations about whether there is a speech violation from the Department's purview, we think it is important to precisely define the amount of discretion afforded Department officials in determining the sanction. Department officials should be permitted to suspend or terminate grant funding only in situations where certain aggravating factors have been met—for example, when there is a pattern of violations or deliberate indifference by a particular institution.

D. The proposed rule confuses the concepts of freedom of speech and academic freedom.

The proposed rule adds the words "academic freedom" into proposed regulatory text, even though the executive order makes no mention of these words or reference to this concept. 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.[6] As such, this concept is particularly ill suited to the federal rulemaking process and should not be included in the proposed text of an actual regulation.

Moreover, the Department references Section 112 of the Higher Education Act (20 U.S.C. 1011a) as justification for its proposal, even though this "Sense of Congress" provision makes no mention of the term "academic freedom," nor does the executive order on which the Department bases its rulemaking activity.

Given these facts, we do not think the Department should explicitly mention this term in the rule nor put itself in the position of withdrawing federal grant funds on this basis.

RECOMMENDATIONS:

Given the serious concerns outlined above, and the ways in which the proposed rule is unlikely to meet its mission of ensuring "institutions promote free inquiry" as required by the executive order, we recommend substituting the actual text of the executive order in place of the current proposed language. Alternatively, the Department could make these same changes through subregulatory guidance explaining the Department's expectation that grantees comply with applicable law, including the First Amendment,

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[6] The proposed 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 preamble's discussion confuses these issues in a way that is not helpful.

and with their stated policies. By removing the link between a court judgment and the possibility of loss of grant funding, this alternative would mitigate concerns about inconsistencies that might result under its proposed trigger. The alternative would also address concerns that the proposed rule is not consistent with the requirements of the executive order by incorporating its exact language into the Department's grant terms.

If the Department is determined to proceed with its proposed rule, we offer the following recommendations to minimize some of the more problematic aspects:

- *Modify the trigger for when an institution is deemed to be out of compliance with the First Amendment or its stated policies.*

There is widespread agreement across the higher education community that the proposed trigger is too low: a single adverse ruling in a single lawsuit should not result in the potential loss of federal funding, especially if the institution elects to accept a lower court judgment and change its policies rather than appeal the decision in hopes of a reversal. We urge the Department to take steps to significantly limit the reach of the proposed rule. For example, an institution could be deemed out of compliance only if there is a pattern of final non-default judgments finding serious violations of the First Amendment or stated institutional policies regarding free speech. In addition, the trigger could be modified to apply only in cases where the institution has failed to immediately comply with a final court ruling. We strongly encourage the Department to consider these and other options to more narrowly focus the trigger and limit the chance that a single, isolated case would have a disproportionate impact on an institution.

- *Provide clearer criteria under which the Department will attempt to terminate or suspend a federal grant.*

We also recommend the Department more clearly define the circumstances under which it may terminate or suspend grant funding. While there is a long history of the Department applying sanctions in a variety of other contexts, such as student aid violations, there is no record established that would permit institutions to understand how the Department would treat potential speech violations in the context of determining whether to take away federal funding. The Department should be required to calibrate its actions to the demonstrated harms done and should first be required to work with the institution to achieve compliance. Finally, debarment or suspension of funds should be a remedy that is limited to situations where there is a systematic pattern and practice at the institutional level of speech violations.

- *Strike from the text of the regulation references to "academic freedom" as well as the clause that attempts to enumerate specific rights under the First Amendment.*

As discussed above, this language is unnecessary and likely to cause confusion; moreover, the phrase "academic freedom" is not contained in the executive order. We also strongly recommend you delete the discussion of academic freedom from the preamble. This topic does not lend itself to a discussion in an NPRM—attempts to

include it are unlikely to capture and reflect the many complexities and nuances of this concept. The Department lacks the expertise to make these decisions.

- *Extend the window for submitting notice of a final judgment to the Department.*

While the time for submitting an appeal on a judgment is commonly 30 days in the federal courts, there are circumstances when this period should be extended. Some state courts also permit longer time periods for submitting an appeal. We recommend you modify the proposed rule to require institutions to submit notice of any final non-default court judgment "no later than 30 days following the expiration of the period for filing a notice of appeal."

- *Remove the phrase: "or an employee of the private institution, acting on behalf of the private institution."*

In some cases, this language could subject private institutions to a loss of grant funding based on the actions of a single individual, even though those actions are a violation of the institution's policies and inconsistent with its values, and even when the institution has disciplined or terminated the employee. Try as they might, organizations cannot always prevent rogue employees from violating established policies and procedures.

- *Remove language from the preamble that would require private institutions to certify to the Secretary compliance with institutional policies on free inquiry as a material condition of an award.*

Requiring a certification of compliance with institutional policies to increase potential FCA exposure will likely result in an explosion of frivolous *qui tam* cases that will impose substantial burdens on private, nonprofit colleges and universities. If the Department is determined to maintain this certification requirement, at a minimum, it should clarify that the FCA is an independent statute with complex jurisdictional, procedural, and merit-based elements, all of which must be met for a court to find a violation. For example, making clear to potential relators that the FCA is a stand-alone statute, which requires proving by a preponderance of the evidence numerous elements, would perhaps mitigate, but certainly not eliminate, the risk of frivolous lawsuits.

Finally, while we disagree that there should be any link at all between compliance with institutional policies on free inquiry and the FCA, any connection that remains as the NPRM moves forward should be reframed in a manner consistent with our views expressed earlier, namely that there must be a pattern of noncompliance before the Department considers a grantee to have FCA exposure. Even then, as noted above, all elements of the FCA must be met.

II. Prohibiting public institutions from denying a religious student group the rights, benefits, and privileges afforded to other organizations because of the religious student group's beliefs or practices.

Sections 75.500(d) and 76.500(d) of the proposed rule state that public institutions shall not deny religious student organizations any "right, benefit, or privilege (including full access to the facilities of the public institution and official recognition of the organization) afforded to other student organizations" because of the religious student organization's "beliefs, practices, policies, speech, membership standards, or leadership standards . . . ." This regulation would preclude – without any statutory basis – something that the Supreme Court clearly and unambiguously permits. *See Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).[7]

In *Martinez,* the U.S. Supreme Court specifically held that the University of California Hastings College of the Law did not run afoul of the First Amendment by deciding that only student organizations with "all-comer" policies will be officially recognized by the school. The Department's proposed rule is completely at odds with that ruling. Under the guise of advancing First Amendment interests, its adoption would place colleges and universities in the unenviable position of putting Departmental funding at risk by choosing to do precisely what the Supreme Court has ruled to be constitutionally permissible. This is an untenable choice for an institution and not one that the Department should promote, let alone require.

The primary concern here is not about whether *Martinez* was rightly or wrongly decided, or even whether an "all-comer" policy should be lauded or questioned. It is about the appropriateness of the Executive Branch foreclosing legally permitted decision-making by public colleges and universities. We believe that these decisions are best left to institutions as informed by their own state laws. Moreover, this provision violates the clear directive of the executive order, namely that agencies ". . . take appropriate steps, ***in a manner consistent with applicable law. . .*** " (emphasis added).

The choice the proposed rule offers some public institutions is between aligning with state and local non-discrimination laws and maintaining eligibility for federal grant funding. Colleges and universities that choose to maintain eligibility for Departmental grant funding by revising their protocols to allow for recognition of faith-based student organizations without all-comer policies would, in some jurisdictions, expose themselves to legal challenge grounded in state and local nondiscrimination laws.

The proposed rule also includes language which is worrisome in its vagueness, as it prohibits public institutions from denying rights to a religious student organization based on the group's "practices, policies, . . . and leadership standards." This language is untethered to religious beliefs or religious speech. The Department should not want

[7] We also note that a portion of the preamble directly contradicts *Martinez* principles by stating that based on the right of freedom of association student religious organizations "should be able to restrict the membership and leadership in their student organizations on the basis of acceptance or adherence to the religious beliefs or tenets of the organization."

colleges and universities to abdicate their responsibility to set reasonable and appropriate standards for student organizations, and it certainly ought not compel that abdication. For example, no college or university should be encouraged or compelled to turn a blind eye to hazing because it is occurring within a religious student organization.

Finally, sections 75.500 (d) and 76.500(d) provide no indication of how the Department will determine that a public college or university has violated this requirement. Absent indications to the contrary, we can only conclude that the Department will make this determination entirely by itself. This type of inquiry is inappropriate for the Department to engage in and is one it is ill-equipped to make.

RECOMMENDATIONS:

The Department should not, through regulation, undermine a Supreme Court decision, nor should it interfere with the rights of states and institutions to make decisions about all-comer policies. For the reasons outlined above and in the memorandum attached as Appendix A to our comments, we urge the Department to strike sections 75.500(d) and 76.500(d), as well as related portions of the preamble, from the proposed rule.

CONCLUSION

We thank the Department for its consideration of our views. In light of the many complex issues and serious concerns raised by this NPRM, we again urge the Department to provide an additional 30 days for comments by stakeholders.

Sincerely,

Ted Mitchell

On behalf of:

ACPA-College Student Educators International
American Association of Colleges for Teacher Education
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
American Dental Education Association
American Indian Higher Education Consortium
American Library Association
Association of American Colleges and Universities
Association of American Universities
Association of College and Research Libraries

Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Public and Land-grant Universities
Association of Research Libraries
College and University Professional Association for Human Resources
Consortium of Universities of the Washington Metropolitan Area
Council for Advancement and Support of Education
Council for Higher Education Accreditation
Council on Governmental Relations
Council on Social Work Education
EDUCAUSE
The Freedom to Read Foundation
Hispanic Association of Colleges and Universities
NASPA - Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
Phi Beta Kappa Society

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M E M O R A N D U M

TO: Peter McDonough
Vice President and General Counsel
American Council on Education

FROM: Audrey Anderson
Counsel, Bass, Berry & Sims

DATE: February 14, 2020

RE: U.S. Department of Education's Notice of Proposed Rulemaking on First Amendment Rights: Requirement of Equal Treatment by Public Institutions of Student Religious Organizations

This memorandum discusses controlling legal authority that is highly relevant to the January 17, 2020 Notice of Proposed Rulemaking (Proposed Rule) issued by the Department of Education (the Department or ED) pertaining to compliance with the First Amendment and principles of academic freedom by colleges and universities.[1] It appears that the authority discussed below did not inform the Proposed Rule, and may not have been considered by the Department.

The focus of this memorandum is on the provisions of the Proposed Rule that require public colleges and universities to "treat religious and nonreligious student organizations the same," including by prohibiting public institutions from denying recognition of religious student organizations based on the organization's requirements for membership or leadership positions.[2] Whether intentional or accidental, it is clear that by requiring that public institutions treat religious and non-religious student groups "the same," regardless of the groups' requirements for members and officers, the Proposed Rule does not protect the First Amendment rights of students. Instead, at least as regards to certain policies, it requires public colleges and universities to provide religious student groups with rights that go beyond what the First Amendment requires.

As discussed below, controlling Supreme Court authority establishes that public colleges and universities do not violate students' First Amendment rights of speech, association or religious freedom by evenly applying an "all comers" policy to grant recognition to religious student groups only where those groups open their membership and leadership positions to all

[1] See 85 Fed. Reg. 3190 (Jan. 17, 2020); https://www.regulations.gov/docket?D=ED-2019-OPE-0080.
[2] 85 Fed. Reg. 3214.

students.[3] The Proposed Rule also limits the ability of public institutions in some states to further the goals of state laws that prohibit discrimination against students on the basis of certain protected characteristics. Finally, because the Proposed Rule also prohibits state institutions from denying recognition to religious student groups based on "practices" or "policies", not just their religious beliefs, public institutions that comply with the Proposed Rule to maintain their eligibility for federal grants could potentially be faced with liability under other state or federal laws that prohibit discrimination.

I. The Department's Basis for the Proposed Rule's Requirement that Public Institutions Grant Religious Student Groups the "Same" Benefits as Non-Religious Student Groups

We start the discussion by describing the regulatory provisions in the Proposed Rule pertaining to treatment of religious student groups by public colleges and universities that receive grants from ED, as well as related provisions in the proposed regulations. The memorandum then discusses the preamble to these proposed regulations in which the Department explains the legal basis for the requirements in the Proposed Rule that public institutions treat religious student groups "the same" as non-religious student groups.

A. The Requirements in the Proposed Rule

The Department issued the Proposed Rule to implement Executive Order 13864, Improving Free Inquiry, Transparency and Accountability at Colleges and Universities, E.O. 13864. The focus of this memorandum is the requirement in proposed sections 75.500(d) and 76.500(d) which provide, in relevant part:

> A public institution shall not deny to a religious student organization at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including full access to the facilities of the public institution and official recognition of the organization by the public institution) because of the beliefs, practices, policies, speech, membership standards, or leadership standards of the religious student organization.[4]

Under the Proposed Rule, this requirement becomes a material condition of ED grant awards, meaning that institutions found to be non-compliant may be subject to a range of penalties, including potential suspension or debarment from federal grants and private suits under the False Claims Act.[5] The Proposed Rule does not address how the Department will determine if a public

[3] Christian Legal Soc. Chapter of the Univ. of Cal., Hastings College of Law v. Martinez, 561 U.S. 661, 698 (2010).
[4] 85 Fed. Reg. 3223, 3226.
[5] Id. at 3223 (§75.700); 85 Fed. Reg. 3226 (§76.700); see 85 Fed. Reg. 3214. The Proposed Rule adopts the definition of "federal research or education grants" from Executive Order 13864, specifically, "all funding provided

institution has denied a religious student organization "any right, privilege or benefit" afforded to other student organizations at the public institution because of the religious organization's "beliefs, practices, policies, speech, membership standards or leadership standards." This is unlike other provisions of the Proposed Rule which specify that a grantee college or university will only be found in non-compliance based on a final, non-default judgment by a state or federal court.[6] Presumably, under the Proposed Rule, a grantee public institution could face penalties up to debarment and suspension based on a determination by ED itself that the institution has denied a religious student organization the same rights as a non-religious student organization based on one of the prohibited grounds.

B. The Department's Legal Basis for Treating Religious Student Groups the Same as Non-Religious Student Groups

The Department states that the purpose of this portion of the Proposed Rule is to ensure that public colleges and universities that receive federal grants "comply with the First Amendment."[7] In discussing the legal basis for requiring public institutions to treat religious and non-religious student groups the same, the Department relies on the First Amendment right to freedom of association, citing Supreme Court decisions in NAACP v. Alabama[8] and Rosenberger v. Rector and Visitors of the University of Virginia,[9] as well as a decision from the Southern District of Iowa.[10] Examining the actual holdings in the cases relied on by the Department is instructive in determining whether the extent to which this provision in the Proposed Rule is required by the First Amendment.

The preamble begins its discussion of the right to freedom of association by citing NAACP v. Alabama, in which the Court held that the State of Alabama violated the rights of members of the NAACP to freedom of association when the State held the NAACP in contempt (with an accompanying fine of $10,000) for refusing to produce its list of Alabama members in order to do business in the state.[11] As ED notes in the preamble, while the NAACP Court performed its

by a covered agency directly to an institution but does not include funding associated with Federal student aid programs that cover tuition, fees, or stipends." 85 Fed. Red. 3196, n. 27 (quoting E.O. 13864, §3(c)).
6 See 85 Fed. Reg. 3210; id. at 3223 (§75.500(b), §75.500(c)); id. at 3226 (§76.500(b), §76.500(c)).
7 85 Fed. Reg. 3191.
8 357 U.S. 449 (1958).
9 515 U.S. 819 (1995).
10 Bus. Leaders in Christ v. Univ. of Iowa, 360 F. Supp. 3d 885 (S.D. Iowa 2019), appeal pending, No. 19-1696 (8th Cir. 2019) (Business Leaders in Christ has appealed the district court's determination that the University of Iowa was entitled to qualified immunity protecting it from a judgment of money damages).
11 As the Court explained: the NAACP "has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of [the NAACP's] Alabama membership is likely to affect adversely the ability

analysis under the Due Process Clause, the substantive right to freedom of association that the Court addresses is contained in the First Amendment.[12] The Court's discussion in NAACP provides insight into the right to freedom of association, but provides little guidance on the contours of that right in the context of a religious student organization that seeks state support through university recognition.

Next, ED relies on Rosenberger, in which the Court held that it was impermissible viewpoint discrimination under the First Amendment for the University of Virginia to deny funding to Wide Awake Productions, a student publication that addressed topics from a Christian perspective.[13] The Court in Rosenberger held that the University of Virginia had created a limited public forum by setting up a program through which student publications could apply to obtain university funding.[14] The Court made clear, however, that while the University could discriminate on the basis of content in a limited public forum, it could not discriminate on the basis of viewpoint.[15] The Rosenberger decision is very instructive on the question of student groups receiving public university funding, but it does not address freedom of association at all, or the situation where a religious student group seeks an exemption from an institution's non-discrimination policy.

The final case cited by the Department in the preamble to the Proposed Rule, Business Leaders for Christ v. University of Iowa,[16] is applicable to the question of recognition of religious student groups on campus. As discussed below, it uses the relevant test established by the Supreme Court and analyzed the most recent Supreme Court authority on the question, both of which the analysis in the preamble omit.

II. First Amendment Rights and "All Comers" Policies: Christian Legal Society v. Martinez

The Proposed Rule's requirement that public institutions treat religious and non-religious groups the same, including recognizing religious student groups that require their members and leaders to hold particular religious beliefs, does not appear to recognize the most recent Supreme Court authority on the topic. In Christian Legal Society v. Martinez, the Supreme Court held that the First Amendment was not violated when a public college evenly applies an "all-comers" policy to deny recognition to a religious student group that refuses to make membership or

of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate. . . " 357 U.S. at 462

[12] 85 Fed. Reg. 3212, n. 126 (citing NAACP, 357 U.S. at 452, 460).

[13] 515 U.S. at 832.

[14] Id.

[15] Rosenberger, 515 U.S. at 829-830.

[16] 360 F. Supp. 3d 885 (S.D. Iowa 2019).

leadership positions open to all students, regardless of belief.[17] The Martinez case states a clear rule to determine when a college or university has violated the rights to freedom of association of a religious student group. Any review of Martinez makes clear that the Proposed Rule, at least to the extent it prohibits an evenly-applied "all-comers" policy, does not protect First Amendment rights of students, but would instead require public colleges and universities to grant religious student groups rights beyond what the First Amendment requires.

A. The Supreme Court's Decision in Martinez

In Martinez, the Court addressed the attempts of the Christian Legal Society (CLS) to be recognized as a registered student organization (RSO) at the University of California, Hastings School of Law, in the face of Hastings' "all comers" policy. CLS had operated at Hastings for several years without RSO status but wanted to attain such status so that it would be eligible for RSO benefits.[18] To attain RSO status, Hastings required all student groups to agree to comply with the law school's non-discrimination policy which provided that Hastings "shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, race, sex or sexual orientation."[19] The parties had stipulated in proceedings before the district court that Hastings interpreted this non-discrimination policy, as it applies to the RSO program, to mandate acceptance of "all comers," that is to say, groups approved as RSOs must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs."[20]

CLS sought an exemption from the non-discrimination policy so that it could hold RSO status while continuing to require its members and officers to sign a "Statement of Faith" and agree to live by its tenets.[21] The Statement of Faith included the tenet that sexual activity should not occur outside of marriage between a man and a woman; accordingly, CLS sought to exclude students who engaged in "unrepentant homosexual conduct."[22] Hastings refused to provide CLS with the requested exemption.

The Court in Martinez concluded that Hastings did not violate the First Amendment rights of CLS or its student members in denying the group RSO status for refusing to abide by the all-comers policy. The Court made clear at the outset that it was only considering application of an "all-comers" policy and not a more selective non-discrimination policy that prohibits discrimination on the basis of some identified characteristics, without requiring student groups to accept all students as members and potential leaders: "[t]his opinion . . . considers only whether

[17] 515 U.S. at 669.
[18] 561 U.S. at 669-70.
[19] Id. at 670.
[20] Id. at 671.
[21] Id. at 672-74.
[22] Id. at 672.

conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution."[23] The Court used case law applicable to a limited public forum analysis, finding that those precedents "adequately respect both CLS's speech and expressive-association rights, and fairly balance those rights against Hastings' interests as property owner and educational institution."[24] Quoting from Rosenberger, the Court stated the relevant test from those precedents as follows: "the State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint."[25]

In applying this test, the Court determined that the Hastings all-comers policy was reasonable in light of the purpose of the RSO program. Hastings had a valid interest in ensuring that all groups with RSO status, which were funded with mandatory student activity fees, be open to participation by all students; it could reasonably impose the all-comers policy as a less intrusive means of enforcing the non-discrimination policy; it had a valid interest in promoting student experiences that brought together students with diverse backgrounds and beliefs; and it had a valid interest in acting consistently with the goals of state non-discrimination laws.[26] The Court also found it significant that CLS had substantial other channels available to exercise its First Amendment rights at Hastings. As for the viewpoint neutrality of the all-comers policy, the Court stated: "[i]t is . . . hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers."[27]

The decision in Martinez was closely divided, with Justice Alito, joined by Justices Thomas, Scalia and Chief Justice Roberts dissenting. The dissent sharply disagreed with the majority opinion as to the effect of the stipulation in the district court and analyzed the case as an application of Hastings' non-discrimination policy, rather than an "all-comers" policy. The dissent found that Hastings had applied the non-discrimination policy unequally, meaning it had allowed non-religious students groups to impose belief as well as "status" requirements for members and officers, but had not allowed religious groups to impose similar belief or status requirements.[28] On that basis, the dissenters concluded that Hastings had engaged in viewpoint discrimination in violation of the First Amendment rights of CLS and its members.[29]

[23] Id. at 678.
[24] Id. at 683.
[25] Id. at 685 (quoting 515 U.S. at 829) (omissions in quote from Martinez).
[26] Id. at 688-690.
[27] 561 U.S. at 694 (emphases in original).
[28] Id. at 711 (Kennedy, J., dissenting)
[29] Id. at 723-24.

B. Lower Court Decisions Addressing Registered Student Organizations

The Supreme Court's decision in Martinez makes the Proposed Rule's discussion of the First Amendment rights of religious student groups puzzling. Current constitutional law has established the relevant test to be applied and furthermore has held that a public college or university may constitutionally employ a true "all-comers" policy as long as it allows a religious student group other means to exercise its First Amendment rights of speech and association. The preamble to the Proposed Rule's requirement concerning recognition by public institutions of religious student groups, however, does not engage in any analysis under the applicable test, nor does it cite Martinez.

The case law since Martinez, moreover, does not question its holding. The Ninth Circuit is the only court of appeals to have addressed the question of application of a non-discrimination policy to a religious student group seeking recognition since Martinez[30], and it upheld the policy of San Diego State University (SDSU) "as written."[31] It reached this conclusion even recognizing that SDSU's non-discrimination policy would "have the effect of burdening some groups more than others" because it allowed student groups to premise membership on some beliefs (for example, political) but not others (religious).[32] This was allowable, the Ninth Circuit held, because in enacting the non-discrimination policy, SDSU did not have the purpose of suppressing the plaintiff group's viewpoint, or of suppressing any expression at all.[33] Faced, however, with record evidence that SDSU had applied its non-discrimination policy unevenly by, for example, recognizing other student groups that appeared to premise leadership positions on religious views while rejecting recognition of the plaintiff group on the same ground, the Ninth Circuit in Alpha Delta Chi remanded to the district court for further proceedings on SDSU's policy as applied.[34]

In the preamble, the Department cites Business Leaders in Christ v. Univ. of Iowa, but the district court in that case specifically noted that the University of Iowa policy at issue was not an "all-comers" policy.[35] The district court there applied the test from Martinez to invalidate the University of Iowa's non-discrimination policy because in practice the University had allowed some recognized student groups to impose membership requirements based on belief and status while refusing to recognize Business Leaders in Christ because it imposed membership

[30] Prior to Martinez, the Second Circuit in Hsu v. Roslyn Free Sch. Dist. No. 3, 85 F.3d 839 (2d Cir. 1996), and the Seventh Circuit in Christian Legal Society v. Walker, 453 F.3d 853 (7th Cir. 2006), had each held that efforts by public educational institutions to deny recognition to religious student groups violated the student's rights. In each of these cases, the courts found that non-discrimination polices (not all-comer policies) had been unequally applied by the defendant.

[31] 648 F.3d 790, 803 (9th Cir. 2011), cert. denied, 565 U.S. 1260 (2012).

[32] Id.

[33] Id. at 801.

[34] Id. at 804.

[35] 360 F. Supp. 3d 885, 889.

requirements based on beliefs that the University argued, in practice, also discriminated based on sexual orientation.[36]

In sum, the preamble's omission of any discussion or citation to Martinez is perplexing, especially in light of the fact that the most recent case law it does address, Business Leaders in Christ, uses the test provided in Martinez and cites it repeatedly.

III. The Proposed Rule Requires Public Institutions to Provide Religious Student Organizations Rights Beyond What the First Amendment Requires and Restricts their Ability to Further the Goals of Valid State Non-Discrimination Laws

Martinez holds that a public institution, under current law, is in compliance with the First Amendment when it evenly applies an "all-comers" policy to deny recognition to a religious student group that refuses to open its membership or leadership positions to all students whether based on belief, or on conduct that the religious organization determines is inconsistent with required beliefs. The preamble thus overreaches when it states that the "right to expressive association includes the right of a student organization to limit its leadership to individuals who share its religious beliefs without interference from the institution or students who do not share the organization's beliefs".[37] As support for this statement, the Department relies on Rosenberger, which does not address the issue of membership or leadership in student organizations at all, and Business Leaders in Christ v. Univ. of Iowa, in which the district court expressly stated it was not deciding the question in the context of a true "all-comers" policy of the kind that the Supreme Court upheld in Martinez. So, in the Proposed Rule, at least in the context of an evenly applied "all-comers" policy, the Department is seeking to expand the rights of religious student organizations beyond what is required by the First Amendment to prohibit policies that public institutions are constitutionally permitted to pursue today.

To be sure, a public institution is not at risk of violating the Establishment Clause by granting recognition to a religious organization without regard to whether membership or leadership positions are open to all students,[38] but under the First Amendment and Martinez, that is a decision that is open to the public institution. The Proposed Rule would remove that choice from public institutions unless they were willing to forfeit their ability to obtain federal grants from the Department.

Furthermore, in some states, the Proposed Rule, by prohibiting public institutions from enforcing neutral "all-comers" policies to require religious student groups to accept all students, regardless of belief or status, will prevent public institutions from furthering state law provisions

[36] Id. at 898-899.
[37] 85 Fed. Reg. at 3214.
[38] Martinez, 515 U.S. at 692-93.

that protect students from discrimination based on characteristics that may include religion, sexual orientation, or gender identity.[39] For example, in Martinez, the Court noted that one of the purposes Hastings relied on as justifying the reasonableness of its all-comers policy was that by incorporating state law proscriptions on discrimination, it "conveys the Law School's decision to decline to subsidize with public monies and benefits conduct of which the people of California disapprove."[40] The Court was referring to a California statutory provision which provides:

> No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or [other characteristics listed in identified state statutes] in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid.[41]

While a public institution in a state with a non-discrimination law similar to California's may not face liability for recognizing a student organization that applies religious requirements for membership or leadership provisions,[42] the outcome could be different if the religious student organization is perceived to discriminate on the basis of another characteristic that is protected under state law. This situation has come up with some religious student groups that interpret their religious tenets in a way that is perceived to preclude students from membership in the group based on sexual orientation.[43] While we have not found any litigation against a college or university on this basis, it could be a risk in some states.[44]

The broad wording of the Proposed Rule could pose an even greater risk. The Proposed Rule prohibits public institutions from denying recognition to religious student groups not only because of the group's "beliefs" but also based on the religious student group's "practices" or "policies" without any apparent tie to religious requirements.[45] As just one example, if a religious student group adopted a "practice" or "policy" that only students of one gender could hold leadership positions, this would leave the public institution to make a choice of refusing to recognize the student group (and risk losing its federal grant funding), or else recognize the

[39] See, e.g., Minn. Stat. §363A.02(Subd. 1)(a)(5) (stating it is "the public policy of the state" to secure freedom from discrimination in education on the basis of among other characteristics, religion and sexual orientation); N.Y. Educ. Law § 313 (1)(a)(stating that it is the "public policy of the state" that students be given access to all educational programs regardless of religion and sexual orientation, among other characteristics).
[40] 561 U.S. at 689-90.
[41] Cal. Educ. Code Ann. §66270.
[42] See Rosenberger, 515 U.S. at 840-41.
[43] See, e.g., Business Leaders in Christ, 360 F. Supp. 3d at 891.
[44] See, e.g., Cal Educ. Code Ann. §66270; Minn. Stat. §363A.13(1) (prohibiting discrimination on the basis of among other characteristics, sexual orientation).
[45] 85 Fed. Reg. 3223 (§75.500(d)); 85 Fed. Reg. 3226 (§76.500(d)).

student group, and risk being sued for gender discrimination under not only state statutes, but also federal law.[46]

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[46] See, e.g., Title IX of the Education Amendment Acts of 1972, 20 U.S.C. §§1681-1688.