

Comment of the Foundation for Individual Rights and Expression in
Opposition to the Department of Education's Proposed Regulations on
Eligibility of Faith-Based Entities
Department of Education Notice of Proposed Rulemaking
Docket No. ED-2022-OPE-0157, RIN 1840-AD72

Direct Grant Programs, State-Administered Formula Grant Programs

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Introduction

The Foundation for Individual Rights and Expression (FIRE; thefire.org) is a nonpartisan nonprofit dedicated to defending the rights of all Americans to free speech and free thought – the essential qualities of liberty. Because colleges and universities play an essential role in preserving free thought, FIRE places a special emphasis on defending these rights on our nation’s college campuses. Since 1999, FIRE has successfully defended the rights of students and faculty nationwide.

On February 22, 2023, the Department of Education published in the Federal Register a Notice of Proposed Rulemaking “to rescind regulations related to religious student organizations at certain public institutions of higher education (IHEs) that prescribe a novel role for the Department in enforcing grant conditions related to religious student organizations.” In issuing the Notice, the Department argued the regulations “are not necessary to protect the First Amendment right to free speech and free exercise of religion; have created confusion among institutions; and prescribe an unduly burdensome role for the Department to investigate allegations regarding IHEs’ treatment of religious student organizations.”

The stated justifications for rescinding these rights-protective regulations do not hold up to scrutiny. Despite decades of Supreme Court precedent that protects the rights of belief-based student organizations – including religious student groups – to organize on campus and have access to student fee dollars and campus amenities. However, many student groups continue to face unconstitutional barriers to gaining official recognition from their institution, sometimes resulting in lengthy and costly litigation to vindicate their rights. By ensuring that federal research dollars are not distributed to institutions that engage in viewpoint discrimination against student organizations, the current regulations stand as bulwark for students seeking to organize and find like-minded colleagues on campus. By proposing to repeal these regulations, the Department is sending exactly the wrong message to students and to institutions: that it will abandon campus civil liberties in order to ease the burden on powerful institutions. As detailed below, FIRE opposes the Department’s proposed rescission because it would strip important regulatory

protections for religious student organizations on campus.

Background

Religious liberty, freedom of association, and the equal protection of law are bedrock constitutional rights that are sometimes in tension on and off college campuses. The Department’s current regulations seek to address those tensions in several contexts. One in particular falls directly within the scope of FIRE’s mission: the ability of students to form religious student organizations that enjoy the same access to campus benefits and resources as their secular counterparts. Undoing this protection could have serious consequences for religious and other belief-based student organizations.

The First Amendment guarantees citizens the right to join their voices and associate with those of like mind in furtherance of a wide variety of purposes. Consistent with the right to associate with others around a particular set of beliefs is an accompanying right to choose *not* to associate, and to do so without undue governmental interference. In *NAACP v. Alabama*, a case in which Alabama tried to force the NAACP to disclose its membership rolls, Supreme Court Justice John Marshall Harlan II wrote: “It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”¹ Moreover, determining the conditions of one’s associations without undue government interference is a “crucial” aspect of freedom of association because it prevents state coercion of “groups that would rather express other, perhaps unpopular, ideas.”²

Freedom of association extends to students attending public universities and to the student organizations they may wish to form and have their institution recognize. In *Healy v. James*, the Supreme Court proclaimed, “[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [their] associational right . . .”³

¹ 357 U.S. 449, 460 (1958).

² *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000).

³ 408 U.S. 169, 181 (1972).

The Court applied this in particular to religious student organizations in *Widmar v. Vincent* holding that, by denying a religious student group the use of campus facilities for meetings, a public university violated the group’s right not only to the free exercise of religion, but also to the freedoms of speech and association.⁴

In recent years, however, public colleges and universities have created a new barrier to expressive association: nondiscrimination policies interpreted to prohibit not only invidious discrimination based on status or immutable characteristics, but also “discrimination” based on belief.

Despite the precedents established in *Healy* and *Widmar*, in *Christian Legal Society v. Martinez*, the Supreme Court concluded that a public university did not violate the First Amendment by attempting to address discrimination through a policy requiring its student organizations to accept any student as a voting member or leader, regardless of whether the student openly disagrees with or is even hostile to the group’s fundamental beliefs.⁵ These policies are often referred to as “all-comers” policies.

Importantly, the *Martinez* Court did not hold that the Equal Protection Clause of the Fourteenth Amendment *required* institutions to maintain all-comers policies. Since *Martinez*, institutions have remained free to allow belief-based organizations, including religious student organizations, to set their own membership and leadership requirements.⁶

⁴ 454 U.S. 263, 269 (1981).

⁵ 561 U.S. 661 (2010).

⁶ Despite the Supreme Court’s conclusion that all-comers policies pass constitutional muster when applied uniformly, institutions have repeatedly engaged in viewpoint discrimination by enforcing anti-discrimination policies selectively against some religious groups, while allowing secular belief-based groups to set belief-based membership and leadership criteria. *See Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 696 (8th Cir. 2021) (denying Christian student group recognition due to faith-based requirement of leadership while allowing another religious group to set its requirements); *InterVarsity Christian Fellowship v. Univ. of Iowa*, 408 F. Supp. 3d 960, 983–85 (S.D. Iowa 2019) (finding First Amendment violation when university deregistered Christian student group because of requirement of leadership to affirm faith); *InterVarsity Christian Fellowship v. Wayne State University*, 534 F. Supp. 3d 785, 811, 825 (E.D. Mich. 2021) (finding a university had violated a Christian group’s First Amendment rights

The Department's current regulations provide religious student organizations the right to maintain belief-based membership and leadership requirements and prohibit public institutions of higher education from withholding benefits and resources from those organizations who exercise that right. The rule does not contradict or overturn the decision in *Martinez*; rather, it reflects the Department's appropriate emphasis on pluralism and associational rights as the most principled means of promoting diversity and inclusion. The Department's proposed abandonment of these protections sends the message to both students and institutions that it does not value pluralism or associational freedom.

In a misguided effort to combat discrimination, some public institutions of higher education have adopted all-comers policies or other policies that prohibit belief-based student organizations, most notably religious and political groups, from making belief-based decisions about leadership and membership. Organizations that refuse to open their membership and leadership requirements to all students – even those who hold opposing views – are denied official recognition. Official recognition as a student organization is typically a condition of applying to receive student activity fee funds, obtaining the ability to reserve campus locations for meetings, enjoying access to campus mailing lists and e-mail systems to make announcements of group activities, and other benefits.

Analysis

Supporters of all-comers policies believe they are necessary to combat discrimination by preventing public dollars or support of any kind from going to student organizations that might exclude students from membership or leadership positions based on protected characteristics like religion or sexual orientation. Most non-belief-based organizations have no lawful reason to refuse students based on such protected characteristics. For example, a campus chess club has no legitimate reason for excluding students based on their real or perceived membership in a protected class, or their beliefs on ideological,

following de-recognition due to leadership faith prerequisite, in light of the institution's willingness to recognize other student organizations that limited leadership requirements based on sex and national origin).

political, social, or religious issues. All-comers and similar policies, then, offer little obstacle to the formation and operation of such student organizations.

The same is distinctly not the case when applying such policies to belief-based organizations. Indeed, applying all-comers policies, or others that prohibit belief-based decision-making, to belief-based organizations leads to absurd results. For example, at institutions with such policies, religious student organizations are unable to prohibit those of other faiths or no faith from serving in leadership positions. Likewise, College Democrats are forced into allowing Republican members, and vice-versa. An environmentalist group is required to admit those who support the expansion of hydraulic fracturing, while the College Libertarians must make room for members of the International Socialist Organization.

While it is very difficult to find, or even to imagine, a student who actually benefits from a scheme by which unwilling belief-based student groups are forced to admit students who have joined a group with which they don't even agree, it is easy to find students who have been disadvantaged by it. For instance, a federal court in Iowa ruled the University of Iowa discriminated against Business Leaders in Christ by denying it official recognition because of a requirement that its leaders embrace its statement of faith, while allowing other student groups to exclude those who do not share the organization's views from leadership.⁷ On appeal, the Eighth Circuit Court of Appeals agreed and found the violation so egregious that the responsible officials were not entitled to qualified immunity, and thus personally liable for money damages because of their discrimination.⁸ At Wayne State University, InterVarsity's organization was denied its renewal in a circumstance substantially similar to that of the University of Iowa case.⁹ The court there agreed that Wayne State discriminated against InterVarsity.¹⁰

At institutions that have all-comers policies or other policies that ban belief-based decision-making, belief-based student organizations have been forced to

⁷ *Business Leaders in Christ v. Univ. Of Iowa*, 360 F. Supp. 3d 885 (S.D. Iowa 2019).

⁸ *Business Leaders in Christ*, 991 F.3d at 986.

⁹ *InterVarsity Christian Fellowship*, 534 F. Supp. 3d at 825.

¹⁰ *Id.*

compromise their beliefs or be excluded from campus. Most end up choosing the former so that they may continue to exist on campus, but many have chosen the latter.¹¹ Neither is an acceptable outcome in our democratic and pluralistic society. Nor is it one that we accept outside the walls of campus. Churches and synagogues cannot be forced to accept nonbelievers as members, and political organizations need not admit opposing partisans to their meetings and conferences. On campus, however, these fundamental associational rights are under siege.

To ensure that religious student organizations have equal access to the benefits that official recognition offers to their secular counterparts, the current regulations state:

As a material condition of the Department's grant, each grantee that is a public institution shall not deny to any student organization whose stated mission is religious in nature and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs.¹²

In its 2020 rulemaking that led to the current regulations' adoption, the Department explained the rationale behind the provision on religious student organizations as follows:

that this proposed regulation is not a condition of participation in programs under title IV of the Higher Education Act, as amended. Student organizations enable individuals sharing common

¹¹ See, e.g., Michael Paulson, *Colleges and Evangelicals Collide on Bias Policy*, N.Y. TIMES (June 9, 2014), <https://www.nytimes.com/2014/06/10/us/colleges-and-evangelicals-collide-on-bias-policy.html?hpw&rref=us> [<https://perma.cc/9X9H-JZ5R>].

¹² 34 C.F.R. § 75.500(d); see also 34 C.F.R. §76.500(d).

characteristics or beliefs to unite towards common goals, even if those goals are not shared by a majority of the student body or the public institution's administration. This 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. Student organizations also have the right to support their membership, help members to carry out the goals of the organization in accordance with its religious mission, and define criteria for accepting new members. Student organizations at public educational institutions should be able to restrict membership and leadership in their student organization on the basis of acceptance or adherence to the religious beliefs and tenets of the organization. Under the proposed regulations, a public institution that fails to afford religious student organizations the same rights, benefits, and privileges provided to other student organizations would be considered in violation of a material condition of the grant, and the Department could pursue existing remedies for noncompliance, which include imposing special conditions, temporarily withholding cash payments pending correction of the deficiency, suspension or termination of a Federal award, and potentially debarment.¹³

FIRE agrees with the Department's reasoning. This provision protects the rights of religious student organizations and brings federal policy in line with the seventeen states that, as of the submission of this comment, have enacted laws to this effect.¹⁴ Rather than force diversity *within* belief-based organizations,

¹³ Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190, 3214 (Jan. 17, 2020).

¹⁴ See ALA. CODE § 16-68-3 (2019); ARIZ. REV. STAT. ANN. § 15-1863 (2019); ARK. CODE ANN. § 60-60-1006; (2019); IDAHO CODE § 33-107D (2 019); IND. CODE § 21-39-8-11 (2022); IOWA § 261H.3 (2019); KAN. STAT. ANN. § 60-5311-5313 (2019); KY. REV. STAT. ANN. § 164.348(2)(h) (2019); LA. STAT. ANN. § 17:3399.33 (2018); MONT. CODE § 20-25-518 (2021); N.C. GEN. STAT. § 115D-20.2, 116-40.12; OHIO REV. CODE ANN. § 3345.023 (2019); OKLA. STAT. tit. 70, § 70-2119.1 (2014); S.D. CODIFIED LAWS § 13-53-52 (2019); TENN. CODE ANN. § 49-7-156 (2017); TEX. EDUC. § 51.9315 (2019); VA. CODE ANN. § 23.1-400 (2013).

which compromises the identity and mission of those organizations, institutions should embrace pluralism and promote diversity *among* such organizations. As such, it is crucial the regulations remain in place.

Recommendations Regarding Religious Liberty and Freedom of Association

Regulations such as 34 C.F.R. § 75.500(d), that protect student associational rights are important and necessary. In fact, the Department should take this opportunity to strengthen these regulations, not dismantle them. We recommend that it add language to the regulation to clarify that it applies to *all* belief-based and ideological student organizations, whether religious or secular. This change will put all belief-based organizations on the same footing. Our proposed revision (with changes in bolded red font) reads:

As a material condition of the Department's grant, each grantee that is a public institution shall not deny to any student organization whose stated mission is religious in nature **or belief based** and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious **or belief based** student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs.

This modest revision, with a corresponding change in 34 C.F.R. § 76.500(d), would help ensure that all belief-based student organizations, including secular belief-based organizations, may be active in their campus communities without sacrificing their values and their purpose for existing in the first place.

Conclusion

Violations of students' right to religious liberty and freedom of association are, unfortunately, routine on college campuses. Public institutions of higher education are bound by the U.S. Constitution, including the First Amendment,

and private institutions receive billions of taxpayer dollars every year in federal grants. Federal protections for religious and associational freedom are, therefore, warranted. The Department must abandon its effort to repeal the existing regulations and instead promote student rights by holding accountable institutions that violate those rights and promises.

Thank you for your attention to FIRE's analysis and suggestions. If the Department has any questions regarding our input, please do not hesitate to contact us.

Respectfully submitted,



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