



March 24, 2023

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

Re: Docket ID ED-2022-OPE-0157

Dear Secretary Cardona,

On behalf of the higher education associations listed below, representing two- and four-year, public and private institutions, I write to provide comments in response to the Department of Education’s Feb. 22, 2023 notice of proposed rulemaking (“NPRM” or “proposed rule”), “Direct Grant Programs, State-Administered Formula Grant Programs.” We thank the Department for the opportunity to provide these comments. We strongly support the proposed rule, which would rescind the regulations related to religious student organizations at public colleges and universities contained in paragraph (d) of sections 75.500 and 76.500 of Title 34 of the Code of Federal Regulations.

Public colleges and universities are committed to upholding the First Amendment and all of its guarantees, including its protection of religious freedom. However, sections 75.500(d) and 76.500(d) of the regulations rest on a deeply flawed and troubling understanding of First Amendment jurisprudence and the proper obligations and roles of institutions, the Department, and the judiciary in upholding these guarantees. Although promulgated in response to Executive Order 13864, *Improving Free Inquiry, Transparency and Accountability at Colleges and Universities*, in fact, these regulations violate the clear directive of the executive order—namely that agencies issuing regulations do so “in a manner consistent with applicable law” (emphasis added). As we explain below, these regulations are **not** consistent with applicable law and for this, and other reasons, should be rescinded.

Sections 75.500(d) and 76.500(d) of the regulations prohibit a public institution from denying a religious student organization 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.”

As we have noted in prior comments, our fundamental objection to these regulations is that they inappropriately foreclose legally permitted decision-making by public colleges and universities regarding all-comer policies. Federal regulations should not interfere with these rights, nor should they put public institutions in the untenable position of losing Department grant funding for exercising these rights.

In *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), the U.S. Supreme Court held that the University of California College of the Law, San Francisco did not run afoul of the First Amendment by deciding that only student organizations with “all-comer” policies would be officially recognized by the school. The regulations in 75.500(d) and 76.500(d) are completely at odds with that ruling, by prohibiting a public institution from choosing to do precisely what the Supreme Court has ruled to be constitutionally permissible.

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 decisions about these policies are best left to institutions as informed by their own state laws.

For some public institutions, the current regulations have forced them to choose between aligning with state and local non-discrimination laws and maintaining eligibility for federal grant funding. For those public colleges and universities that choose to comply with the regulations, they run the risk of a legal challenge grounded in state and local non-discrimination laws. Public institutions should not be put in the position of risking legal challenges as a result of complying with federal grant conditions.

We agree with the Department’s concern that these regulations have caused confusion for institutions and note that the language is exceedingly vague. For example, the language prohibits public institutions from denying rights to a religious student organization based on the group’s “practices, policies, . . . and leadership standards”—yet this language appears untethered to the group’s religious beliefs or religious speech. The Department should not want 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.

As the Department notes, 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 is left to 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.

Public colleges and universities are deeply committed to upholding their obligations under the First Amendment, and this includes all First Amendment guarantees, including the

free exercise of religion. Nothing in the Department's proposed rule rescinding these regulations diminishes those guarantees. We appreciate the Department's invitation to comment and look forward to a final rule that removes these deeply troubling and problematic regulations, and returns to the prior practice of leaving resolution of these often complex constitutional issues to institutions, their communities, and the judiciary.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Mitchell". The signature is written in a cursive, somewhat stylized font.

Ted Mitchell
President

On behalf of:

American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Governing Boards of Universities and Colleges
Association of Public and Land-grant Universities
NASPA - Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
State Higher Education Executive Officers Association