

March 24, 2023

U.S. Department of Education  
Office of Postsecondary Education  
400 Maryland Avenue SW  
Washington, DC 20202  
Submitted electronically via [www.regulations.gov](http://www.regulations.gov)

Re: Written Comment re the Department of Education's proposed rulemaking of February 22, 2023 at 88 FR 10857. Docket ID ED-2022-OPE-0157. RIN 1840-AD72.

We write to offer our perspective as religious nonprofit organizations with student chapters on public college and university campuses. The undersigned represent diverse beliefs, but we agree on affirming the freedom of all students to organize based upon their shared religious beliefs. This freedom is essential to a free and truly pluralistic society. As a nation characterized by religious diversity, we must ensure that our public Institutes of Higher Education (IHEs) teach and model respect for diverse religious beliefs and practices.

The language of 34 CFR § 75.500(d) and § 76.500(d) is important because it helps ensure that faith-based student organizations will be treated like other student organizations. It is necessary because colleges often discriminate against religious clubs by prohibiting them from having faith-based leadership qualifications and/or denying them other student organization benefits.

We believe that the current NPRM, at 88 FR 10857, rescinding the 2020 regulations, improperly characterizes and dismisses the ongoing need for regulatory protection for religious student organizations. The following three reasons characterize its importance, detailed further below.

- Religious student organizations continue to need protective language to ensure that they remain a valuable presence on public IHEs.
- The language reduces confusion, providing guidance for public IHEs to balance important nondiscrimination interests without imposing specific policy language.
- It is appropriate for the Department of Education specifically to provide this clarity.

**First, religious student organizations continue to need protective language to ensure that they remain a valuable presence on public IHEs.** The need has not changed. Broad statements that the current regulation is unnecessary are wrong. There was an extensive record developed during the comment period of the 2020 Free Inquiry Rule's NPRM, 85 FR 59928-59937, describing the many benefits to the rule and the ongoing concerns that led to its adoption. In addition, it has been only a couple years since 34 CFR § 75.500(d) and § 76.500(d) were finalized, with more than half of that time passing in the midst of a pandemic.

There is a significant cost for religious students if universities misapply nondiscrimination policies to exclude their associations. Leadership within student organizations is important

because leaders in a particular organization represent their organization's voice. They articulate its beliefs and lead toward its goals. In religious settings, it is often particularly important for leaders to provide consistency and clarity of purpose and beliefs. The government has long recognized the importance of not getting entangled in the internal affairs of religious organizations (the church autonomy principle). Religious groups must not be put to the choice of either changing their sincerely held religious beliefs or facing exclusion. To do so undermines religious diversity, hinders inclusivity, and imposes secular values on religious groups.

It is unfortunately common, however, for universities to single out religious views for disfavor. Although First Amendment protections are strong, public IHEs often don't understand the complex ways they fit together. To protect religious expression requires a nuanced understanding. A policy is not "neutral" just because it has the same words applying to every group, if those words by definition uniquely impact one group differently and result in disparate treatment. This is true when the word "religion" in a nondiscrimination statement is unreasonably applied to religious organizations' selection of their leaders. That term means, applied to nonreligious groups, that they may not distinguish based on religious identity, but they may expect their leaders or members to agree with their group's non-religious purposes and beliefs. Applied to a religious group, however, it means that they may neither distinguish based on religious identity *nor* expect their leaders or members to agree with their purposes and beliefs, because those beliefs are religious.

Accordingly, the current rule's statement that religious groups must be given the same opportunities as other groups is not a special privilege, but a necessary clarification and a helpful reminder for universities. Diverse religious groups are in agreement that this clarification is crucial to preserve religious diversity and expression.

**Second, the language reduces confusion, providing guidance for public IHEs to balance important nondiscrimination interests without imposing specific policy language.**

IHEs often fail to acknowledge disparate treatment of religious groups. This policy does not create a conflict between protecting nondiscrimination or allowing religious groups to have authentic faith communities. It instead prevents discrimination by allowing diverse viewpoints, including sincerely held religious viewpoints, to be represented on campus by their adherents. Unfortunately, inconsistent policy applications and outcomes are particularly common when religious beliefs are involved, so it is even more important to be aware of the need to protect religious diversity and expression.

While the Department of Education claims in the NPRM that it "conducted outreach and held meetings with" various stakeholders in order "to hear from impacted groups that had diverging perspectives in their comments..." they did not reach out to the undersigned organizations to discuss whether the language had been helpful. Several organizations with religious student chapters expressed their concerns affirmatively to the Department prior to its [blog post](#) in August of 2021, but they were not then further consulted on the efficacy of the current regulatory language. This failure to reach out was irrational. Had the Department reached out to us, we

could have demonstrated many instances where the current language was successful in averting complicated and costly litigation.

In fact, there are many benefits to this language that the NPRM fails to acknowledge. Regulatory protections are particularly important in the university setting exactly because of how student organizations function. First, many students are unaware of their First Amendment rights and so will not even know that they can push back. Second, most students don't want to be in an antagonistic posture towards their university or college. This is especially true for religious students, who have the goal of quietly exploring, growing in and living out their faith within a context of safety and belonging. They are there to learn and to find community, not to fight and stir-up tension. Third, even for those who are willing to go to court, it is incredibly disruptive to their college experience. Court cases take years, and their time in college is only for about 2-5 years in most cases.

Having specific regulatory language is helpful because it is easier to explain and to point to, especially for groups without access to any legal advisors, rather than having to explain the complexities of First Amendment law. While First Amendment law is strong<sup>1</sup>, specific student life offices and student governments are still often confused about what it means to fairly and equally apply policies that disproportionately impact religious student groups. The regulatory language clarifies, without the cost and toll of a legal battle, that religious groups should not be treated differently because of their religious beliefs or leadership standards. That means that policies should not be applied to disadvantage religious groups by restricting their religious

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<sup>1</sup> A university risks violating both the First Amendment's free speech and free exercise clauses when it applies its policies in such a way as to exclude religious student groups. It is inconsistent with free speech in multiple ways. First, it is inconsistent with forum analysis, which clarifies that a religious voice within a forum, a space created for diverse voices, is not the voice of the school. Authentic religious expression is therefore not at risk of being confused with university speech; nor is it government action. Accordingly, accommodating religious expression is not in conflict with universities still being able to clearly express their beliefs and values. Second, it is inconsistent with the requirement of viewpoint neutrality. It violates free speech to exclude groups based on the religious content of their speech. See *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). When the government treats a group differently because of its specific point of view, it commits viewpoint discrimination. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

The Supreme Court has also clarified what the Free Exercise clause requires, and has indicated that in situations involving free speech, the Free Exercise Clause provides additional protection when religion is involved. See *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2421 (2022)(clarifying that "Where the [Free Exercise Clause](#) protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities"). Some key Free Exercise principles are that the government must not interfere in matters of faith and doctrine as taught by religious organizations, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049, 2060-61 (2020), and it must not exclude a group from a generally offered benefit just because that group is religious. *Trinity Lutheran Church v. Comer*, 137 S.Ct. 2012 (2017). The government also violates free exercise if its laws or policies target a group because of its religious beliefs or practices (through the law's formation, language, or application). See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542-46 (1993). In addition, if a law or policy allows for exceptions to its general application, then it is not a neutral law, and can involve dangerous forms of under-inclusiveness that can uniquely disadvantage religious groups. See *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1877 (2021).

expression or religious leadership standards. This clarity helps universities know how to balance the different considerations in play.<sup>2</sup>

In fact, student groups have already found the clarity the regulations have provided to be helpful. While most have not tried to file a complaint with the Department of Education, a number of groups have found it helpful to refer to the regulation in letters when asking the university to re-consider a threatened denial of student organization status or benefits. In most cases, the universities have then reasonably re-considered the application of their policies and granted the benefit to the religious student group. In this way, the regulation helps to avoid costly, divisive and time consuming lawsuits (a benefit occurring without the Department even having to initiate an investigation). It is therefore helpful to university communities, university administrators, and student organizations to have this clarity.

**Third, it is appropriate for the Department of Education specifically to provide this clarity.**

The Executive branch is specifically tasked with enforcing the US Constitution. In fact, clarity and expertise about how constitutional protections should be lived out in the context of higher education is exactly what the Department of Education can and should provide.

The Department of Education has stated its belief that “protecting First Amendment freedoms on public university and college campuses is essential,” yet it concludes that regulatory language is unnecessary because IHEs and aggrieved students have been able to work out the issues in court,

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<sup>2</sup> Some claim that the regulatory language could be read to contradict Supreme Court precedent. This is not true. The language in 34 CFR § 75.500(d) and § 76.500(d) confirms the landmark and clearly established caselaw described in footnote 1, and does not contradict *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). The regulatory language does, however, clarify the confusion caused by that case. *Martinez* addressed an uncommon policy that it called an “all comers policy.” In *Martinez*, the Court recognized that an “all comers policy” and a “nondiscrimination policy” are two different kinds of policies. The Court explicitly stated that it was not addressing the issue of whether a university nondiscrimination policy could constitutionally be applied to prohibit a religious student group from requiring its members and leaders to agree with its religious beliefs. The Court said it was only addressing an “all-comers” policy, a very narrow and uncommon type of policy (not allowing any group to have requirements based on any beliefs or statuses, not limited to protected categories, and without any exceptions). The Court ruled that a true “all-comers” policy that was uniformly applied to all groups without exception and was not pretextual was constitutionally permissible, but that an “all-comers” policy was not constitutionally required. Nor did the Court expect universities to implement “all comers” policies. In fact, the policy at issue in *Martinez* is so narrow and difficult to implement reasonably, that the vast majority of schools that claim to have an “all comers” policy do not actually have one. For example, any exceptions strip a policy of fitting within the rare *Martinez*-based framing, including the choice to allow single-gender fraternities or sororities, or club sports. See *Martinez*, 561 U.S. at 704 (J. Kennedy, concurring) (stating that “Here, the policy applies equally to all groups and views”), and consistent with the majority opinion, *Id.* at 691 (describing fraternities and sororities as examples, not of groups that would be recognized under such a policy, but as groups that sometimes function without recognition). Even in *Martinez*, it was not clear to the Court that the law school was uniformly applying an all-comers policy. The Court remanded the case for the lower courts to determine whether the school was applying its policy uniformly, something that is exceedingly difficult for a school to do. In light of this narrow definition of an all-comers policy, and the difficulty of applying such a policy uniformly, we have not seen true all-comers policies on any large university campuses. Instead, policies that schools claim that they are applying to “all comers,” frequently limit their review only to groups that consider beliefs or statuses commonly viewed as related to protected categories, and grant exceptions to some groups like fraternities and sororities. In other words, they are applying a nondiscrimination policy, not an “all-comers” policy, which does not align with *Martinez*. Such policies regularly result in religious groups singled out as the only student organizations asked to change their leadership standards, which means school administrators are engaging in selective enforcement. That violates both the Free Exercise and Free Speech Clauses.

so further protections are unnecessary. 88 F.R. 10859. This is not how the Executive branch has treated other Constitutional concerns because it knows that it is helpful and wise to give government institutions guidance about how to apply important constitutional interests in the context of university policies. To simply assert that it is unnecessary in the religious context therefore appears disingenuous. If the Department of Education truly wishes to discern the need for this regulation, it should very specifically ask universities “If a religious student organization applies for recognition, and requires agreement with its sincerely held religious beliefs as a qualification for its leaders, will you grant it recognition under your current policy?” Based on our experiences, we believe that, if the Department asked this question, it would learn that many universities incorrectly believe that recognizing such groups is improper.

The undersigned also respectfully ask the Department of Education if it holds, as a policy matter, that religious groups should be able to select religiously qualified leaders in the same way other groups select leaders who are in agreement with their purposes and goals? Is the Department willing to treat the concern that religious groups cannot flourish without the ability to have religiously qualified leaders, shared by wide-ranging and diverse religious groups, as a valid concern? The undersigned believe that this concern is not only valid, but firmly rooted in the First Amendment.

Another reason the Department of Education should promote fairness and accommodation for religious groups is that it is consistent with the Department’s desire to promote student wellness. “Invest in every student’s mental health and well-being” is one of 6 key strategies outlined by the Department of Education. We welcome this strategy, and believe that the “every student” focus must mean supporting wide ranging opportunities so that diverse students with diverse needs can tap into school-based and community-based support that will help them to find belonging and safety. Every student needs to be able to find communities formed around deeply shared values. Our focus should not be on whether every group’s values fit everyone (that is not possible in a pluralistic society), but on whether diverse options are available to students, and on whether our broader community can support diverse viewpoints by engaging in culture creation that promotes civility amidst disagreement.<sup>3</sup>

It affects all students on the campus, both religious and non-religious, when religious student organizations do not have space to authentically communicate and live out their faiths on campus, because exposure to different viewpoints and faiths promotes cooperation and understanding and breaks down barriers.<sup>4</sup> In fact, a 2022 poll specifically found “widespread agreement that a religious student group should not be kicked off campus for requiring its leadership to be members in good standing of its faith community.”<sup>5</sup> In addition, it improves the climate overall and increases student retention when students, particularly those of minority

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<sup>3</sup> See Rockenbach, A. N., Mayhew, M. J., Giess, M. E., Morin, S. M., Staples, B. A., Correia-Harker, B. P., & Associates. (2020). *IDEALS: Bridging religious divides through higher education*. Interfaith Youth Core, at 27 (concluding that colleges and universities should “send the message that your institution values all religious and worldview identities” by, for example, endorsing the formation of religiously-focused student organizations).

<sup>4</sup> See “Why Students’ Worldviews Matter at Public Universities: A Conversation with Dr. Frank Sanchez,” Interfaith America, Nov 21, 2022 (<https://www.interfaithamerica.org/interview-frank-sanchez/>).

<sup>5</sup> 2022 Religious Freedom Index, Fourth Edition, Becket Fund for Religious Liberty, December 2022, at 34 (finding 73% support in the university setting).

faiths, are able to find places of belonging, understanding, and safety with those who have similar worldviews and experiences.

If universities want to truly value diversity, they must include religious diversity in that goal. Our public IHEs should be teaching students that navigating fundamental differences is worth doing; that empathy and kindness are important values, and are helpful in pursuit of diversity. Students need to learn that differences are unavoidable and an important part of living in society. In fact, sometimes differences are irreconcilable, but should not be glossed over. Students should be invited into relationship with people who see things differently, while also having spaces where they can feel understood, known and safe.

People need to be able to tell their stories and find connections with others over different stories. Religious groups can help create a culture that holds to such values, and they can be part of learning to communicate across differences. In addition, religious student groups are often great contributors to community service.

Connections with peers and a strong sense of belonging are widely understood as key for student well-being. Professor Rebecca A. Glazier notes that “Decades of research has shown that the best way to ensure that students are successful in college is to help them build relationships—with professors, with mentors, and with peers.”<sup>6</sup> Many universities agree that getting involved in community is a key component for student mental health and improves well-being and a successful college experience. Research also indicates that “Involvement in clubs and organizations has been shown to correlate positively with several areas of psychosocial development.”<sup>7</sup> The U.S. Department of Health and Human Services recognizes this as well, noting the connection on its resource website focused on mental health.<sup>8</sup> It states that “Faith and community leaders are often the first point of contact when individuals and families face mental health problems or traumatic events. In fact, in times of crisis, many will turn to trusted leaders in their communities before they turn to mental health professionals. When leaders know how to respond, they become significant assets to the overall health system.”

In conclusion, by removing the language of 34 CFR § 75.500(d) and § 76.500(d), the Department will harm religious student organizations nationwide. The resulting ongoing marginalization of religious groups on college campuses will stifle the much-needed benefits that religious student organizations provide. We therefore ask the Department of Education to change its proposed course, and instead send the message to public IHEs that it is crucial in our pluralistic society to value all religious and worldview identities.

Respectfully,

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<sup>6</sup> Glazier, Rebecca A., “How to Solve the Student-Disengagement Crisis,” *The Chronicle of Higher Education*, May 27, 2022.

<sup>7</sup> Foubert, John D.; Grainger, Lauren U., “Effects of Involvement in Clubs and Organizations on the Psychosocial Development of First Year and Senior College Students,” *NASPA Journal*, 2006, Vol. 43, no.1.

<sup>8</sup> See <https://www.mentalhealth.gov/talk/faith-community-leaders>

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