

March 20, 2023

The Honorable Miguel Cardona  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202  
Via <https://www.federalregister.gov>

Docket ID ED-2022-OPE-0157

Dear Secretary Cardona:

This letter presents comments on the Notice of Proposed Rulemaking “Direct Grant Programs, State-Administered Formula Grant Programs” (regarding 34 CFR Parts 75 and 76) published by your department in the *Federal Register* on February 22, 2023. The Education Department is presuming that the First Amendment rights of religious student groups on college campuses are robust and protected today, ignoring examples that demonstrate that Institutions of Higher Education (IHEs) regularly and repeatedly deprive postsecondary students of their protections afforded by the U.S. Constitution. Cases have arisen in which religious student groups were not allowed to choose their own organizational leadership, but instead have been required to abide by institutional requirements that the organizations include consideration of individuals for leadership positions who disagree with and may even be hostile to the organization’s mission and beliefs. At public IHEs, such requirements deny equal rights to religious student organizations and are unconstitutional.

The current regulations state that each public IHE grantee of the Education Department “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.”<sup>1</sup> Such provisions are part of an essential bulwark protecting religious students against unjust discrimination on the part of IHEs. As the examples provided below will demonstrate, the department is incorrect in stating that the existing regulations are “not necessary to protect the First Amendment right to free speech and free exercise of religion.” Rather, these provisions clarify IHE administrators’ responsibilities, promote diversity on college campuses, and provides protection for students’ religious freedoms.

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<sup>1</sup> Federal Register Vol. 85, No. 185, September 23, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-09-23/pdf/2020-20152.pdf>.

Removing the current protections for college students seeking to assemble and speak and be recognized by IHEs according to their religious beliefs would leave students vulnerable to abusive and unconstitutional IHE administrative regulations. Furthermore, the current rules promote diversity on campus—both religious and ethnic—by allowing students to organize publicly according to their beliefs and traditions. Religious organizations would not be afforded more privileges on campus than other organizations, but rather would have access to the same opportunities that other student groups are allowed.

Students' rights to practice religious beliefs have been threatened, even in just the last decade:

- At Bowdoin College, college officials “demanded” that a Christian student group consider any student for organizational leadership, even if that student’s beliefs contradicted the group’s mission and values.<sup>2</sup> The group was forced to move off campus and find resources to continue meeting.<sup>3</sup>
- At Vanderbilt University, religious student groups lost their official status due to university officials’ requirement that groups to change their operational policies and consider students for leadership positions who did not share the groups’ commitments and beliefs.<sup>4</sup>
- More recently and directly on point, the University of Iowa revoked the official status of Business Leaders in Christ after school officials interfered with the student group’s freedom to select its own leaders according to the organization’s mission and values.<sup>5</sup> An 8<sup>th</sup> Circuit Court of Appeals ruling resulted in the taxpayer-funded university paying the student group more than \$1.3 million in legal costs—resources that could have been used to help low-income students attend college instead of settle litigation.<sup>6</sup>

Notably, the university’s policy resulted in the decertification of a Muslim-based student group, along with a Sikh Awareness Club, and an Indonesian Student Organization, which means Christian students were not the only students affected.<sup>7</sup>

- The student group Ratio Christi filed a lawsuit against the University of Houston-Clear Lake after school officials did not grant the organization official status (the university

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<sup>2</sup> Michael Paulson, “Colleges and Evangelicals Collide on Bias Policy,” The New York Times, June 9, 2014, <https://www.nytimes.com/2014/06/10/us/colleges-and-evangelicals-collide-on-bias-policy.html>.

<sup>3</sup> Meg Robbins, “Christian Fellowship Moves Off-Campus to House on Harpswell Road,” The Bowdoin Orient, October 17, 2014, <https://bowdoinorient.com/bonus/article/9588>.

<sup>4</sup> Carol Swain, “Vanderbilt’s Policies Pull Campus Away from Christianity,” The Tennessean, May 26, 2016, <https://www.tennessean.com/story/opinion/contributors/2016/05/26/vanderbilts-policies-pull-campus-away-christianity/84955614/>.

<sup>5</sup> Cleo Krejci, “University of Iowa to Pay \$1.37 million in Attorney’s Fees in Anti-Discrimination Case,” Iowa City Press Citizen, December 7, 2021, <https://www.press-citizen.com/story/news/education/university-of-iowa/2021/12/07/after-losing-discrimination-case-university-iowa-owes-legal-fees-business-leaders-in-christ/6416615001/>.

<sup>6</sup> Ibid.

<sup>7</sup> Vanessa Miller, “University of Iowa Deregisters Another 38 Groups,” The Gazette, July 20, 2018, <https://www.thegazette.com/education/university-of-iowa-deregisters-another-38-groups/>.

claimed that officials were still “processing the group’s paperwork” at the time of the suit).<sup>8</sup> The group was granted official status after the legal filing. Another chapter of Ratio Christi was the victim of similar discrimination from the University of Colorado at Colorado Springs (here again, the school settled with the student organization and allowed them official status).<sup>9</sup>

Some universities have adopted policies that protect students’ rights to organize and express their beliefs. For example, the University of Florida has adopted a policy that says, “A student organization whose primary purpose is religious will not be denied registration as a Registered Student Organization on the ground that it limits membership or leadership positions to students who share the religious beliefs of the organization.”<sup>10</sup> As the cases provided above demonstrate, though, not all schools have such provisions in student codes of conduct or organizational requirements; the U.S. Constitution has not stopped some public universities from violating the rights of student religious organizations.

Thus, absent such specific provisions in school code, the Education Department’s existing regulations in 34 CFR Parts 75 and 76 are necessary to protect the rights of postsecondary student organizations—as well as avoid the costly litigation demonstrated in the example from the university of Iowa above. Students should spend their college careers completing their degrees, not litigating university rules. Likewise, taxpayer resources should be used to assist low-income students who have demonstrated the ability to succeed in college-level work in attending college, not paying for the settlement of lawsuits.

The existing regulations do not violate the First Amendment’s Establishment Clause. As the U.S. Supreme Court ruled in *Healy v. James*,<sup>11</sup> just because an IHE recognizes a religious or ideological student group does not mean that the institution is endorsing such a group—an opinion the Court reinforced in *Widmar v. Vincent*.<sup>12</sup> Notably, these two cases involved groups with strikingly different mission statements and beliefs (in *Healy*, the student group was associated with an organization known for violence, while in *Widmar*, the student group was a Christian organization focused on “religious worship and religious teaching”<sup>13</sup>).

The Education Department should not rescind the existing regulations, and any sanctions levied on a student organization must be applied because of a compelling institutional interest and use the least restrictive means necessary (the strict-scrutiny approach common in federal case law). Public institutions must demonstrate that they are meeting a compelling interest with a restriction that is narrowly tailored to meet just that interest. No IHE could meet this standard if a religious student group was already kicked off of campus. Such a modest revision to the existing

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<sup>8</sup> Michael Gryboski, “University Grants Christian Group Official Status Amid Lawsuit Alleging Discrimination,” *The Christian Post*, November 1, 2021, <https://www.christianpost.com/news/university-grants-christian-group-official-status-amid-lawsuit.html>.

<sup>9</sup> *Ibid.*

<sup>10</sup> University of Florida, Student Organization Constitutional Requirements, <https://studentinvolvement.ufl.edu/wp-content/uploads/2022/10/22-23-SAI-Constitution-Requirements-GRSOs.doc>.

<sup>11</sup> 408 U.S. 169 (1972).

<sup>12</sup> 454 U.S. 263 (1981).

<sup>13</sup> *Ibid.*

regulations would provide more clarity to IHE administrators and department officials as they consider individual cases involving student organizations.

Sincerely,

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