

March 21, 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>

Dear Secretary Cardona:

This comment is in response to the Department of Education’s (“Department”) proposal to rescind regulations in 34 CFR Parts 75 and 76 related to religious student organizations.

The Department has invited alternative approaches that consider costs and benefits. Adjudicating such cases similar to the way that the Department’s Office for Civil Rights adjudicates other discrimination cases would have similar benefits and costs compared with those other kinds of discrimination cases, saving the regulated parties as well as student organizations considerable litigation costs.

Retaining and better elaborating the regulations also would increase the regulated parties’ ability and incentives to determine religious freedom cases correctly. Rather than rescind the rules over confusion or edge cases, strengthening the regulations would better ensure that public institutions provide equal treatment to religious and non-religious student organizations—neither over-enforcing nor under-enforcing the institutions’ rules. For these and other reasons below, the Department should retain and improve these regulations rather than rescind them.

### **Background**

Under these regulations, a grantee, State, or subgrantee 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. (§§ 75.500(d) and 76.500(d))

Paragraph (b)(1) of § 75.500 and paragraph (b)(1) of § 76.500 provide that “The Department will determine that a public institution has not complied with the First Amendment only if there is a final, non-default judgment by a State or Federal court that the public institution or an employee of the public institution, acting in his or her official capacity, violated the First Amendment,” including the kinds of violations described in the block quotation above.

Paragraph (d) in each case goes further, requiring the Department to hold the regulated parties accountable for certain religious freedom violations prior to, or in the absence of, a court’s non-default judgment, such as in cases where a student organization has not filed a lawsuit.

From 2007–2012, I directed the defense program at the Foundation for Individual Rights in Education (now identified as the Foundation for Individual Rights and Expression, or FIRE). FIRE’s core mission was to promote and defend individual rights, particularly freedom of speech, for students and faculty members at U.S. colleges and universities. I have seen in detail how hundreds of First Amendment controversies and violations have played out on college campuses, including many pertaining to student religious organizations.

I continue to monitor the First Amendment environment on college and university campuses. For the past three years, I have supported FIRE’s annual Free Speech Rankings.<sup>1</sup>

### **Incentives**

The main motivation for a public institution of higher education to act correctly in a First Amendment case (including religious freedom cases), in my experience, is avoidance of the negative press that results from violating a constitutional right. Nevertheless, in religious liberty cases, student-affairs staff, who are typically the adjudicators of campus policies in this area, usually demonstrate strong preferences to prioritize nondiscrimination by student organizations over the organizations’ right to self-determination of membership and leadership (which is a matter of freedom of association in addition to religious freedom). Some student-affairs staff express anti-religious animus.

In contrast to the incentive of avoiding negative press, the prospect of losing religious-freedom litigation, in itself, has extremely little deterrent effect on a public institution. Losing a lawsuit generally involves only nominal damages (near zero), a return to the status quo, and legal fees. While legal fees can be extremely burdensome for a student organization, in addition to the time and trouble spent on litigation instead of students’ campus experience, their colleges can easily absorb legal costs. Plaintiffs tend not to litigate close calls to the appellate level because of the costs and lower likelihood of succeeding. Besides, the students often graduate before an appellate court issues a final opinion (which can moot a case when the student organization itself is not a plaintiff).

Accordingly, the relative burdens on student plaintiffs vs. campus defendants are very unequal. Putting student organizations and public institutions on a more level field through the Department’s rule, with potential loss of federal grants or other fines or penalties, advances fairness and right-sizes institutions’ incentives to act correctly.

Notably, the Department has not inquired about section (a) of either of these regulations, which could help the Department inform Congress about the impact of nondiscrimination laws at colleges and universities. Yet, the positive and negative incentives involved are much the same.

When a grantee violates section (a) of these regulations, which require nondiscrimination on the basis of race, sex, and other categories, the Department’s Office for Civil Rights (OCR) investigates and makes a determination. Ultimately, all colleges comply with applicable nondiscrimination laws in order not to lose Education Department grants. Not losing federal funding is a powerful incentive. The same incentive applies in the First Amendment context, including religious liberty.

Furthermore, colleges know, just as in the paragraph (a) context, that all colleges eventually comply and none of them—I believe the number is indeed zero—lose federal funding over a discrimination

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<sup>1</sup> <https://rankings.thefire.org/>

complaint. Colleges know that the Department of Education will eventually bring them around to compliance (rarely, the Department of Justice may need to become involved) and they will not in fact lose federal funding. In practice, complaints in the paragraph (d) context will almost always be resolved cooperatively between the Department of Education and the campus parties. As with the paragraph (a) incentives, the paragraph (d) compliance incentives accomplish the regulation's goal without causing the loss of federal funds in practice. Religious liberty advocacy groups have reported that simply citing the regulation has efficiently resolved campus controversies.

The prospect of facing Department action also provides public institutions with incentive to get legal advice before acting in religious liberty cases. In my experience, administrators most often err on First Amendment issues when they act without the benefit of legal training or advice. Such errors cause embarrassing public attention that leads to the involvement of higher-level administrators and legal counsel, who then correct the error. The current regulation incentivizes public institutions to train responsible staff correctly so as to make fewer mistakes—thereby avoiding Department action as well as possible judicial action and negative press.

When a college acts proactively to align its policies and procedures with First Amendment obligations and guarantees, it preserves religious liberty and other rights immediately across its entire relevant population. Such a decision has wide-ranging, immediate benefits. Paragraph (d) in the existing regulations encourage this proactive action. In contrast, a college that begrudgingly changes its policy or practices after a loss in court—following years of litigation—has meanwhile denied religious liberty across its entire relevant population for just as long (absent an earlier court injunction).

Engaging with the Department would involve obligation of expensive campus resources, including legal and administrative time and expense. Yet the regulations, while they may cause such resources to be engaged, simultaneously incentivize public institutions to avoid making mistakes that would give rise to complaints—saving litigation costs as well as saving the costs of engaging with the Department.

It may well be that the lack of paragraph (d) complaints seen at the Department is a function of these incentives working.

### **Strengthening and Clarifying the Regulations**

Rather than rescind paragraph (d), the Department of Education has an opportunity to model religious liberty protection on the civil rights processes of paragraph (a) and OCR's processes in civil rights matters. The clarity provided by strengthened and better specified regulations would facilitate more accurate and efficient resolutions at the level of the regulated parties (before needing to involve the Department). As a result, enhanced regulations would serve justice and reduce errors and the costs of those errors.

Rescinding the regulations without having considered this alternative is arbitrary and capricious. Key features of this alternative are provided below.

1. *Resolution Agreements through the Office of the General Counsel.* When OCR makes a determination of discrimination, OCR frequently requires the institution to enter a resolution agreement in which the institution agrees to heightened reporting requirements—the institution agrees not to discriminate in the future and to demonstrate compliance. In the paragraph (d) context, I propose that the Department of Education's Office of the General Counsel (OGC) be specifically charged to handle cases similarly.

OCR has never had religious liberty within its mission, although in recent years OCR has recognized a nexus between certain forms of ethnic (Title VI) and religious discrimination. Since OCR has thousands of open cases, OGC can more efficiently develop the expertise needed to handle the small number of religious liberty cases that will come before the Department.

The incentives described above would be stronger if the Department shows that it will use resolution agreements to enforce paragraph (d) of each regulation. Colleges do not want to have such agreements on the public record, they do not want the additional compliance requirements, and they may have to disclose investigations and resolutions agreements when applying for other federal grants.

2. *Standard of Evidence*. Since the Obama administration, OCR has dictated acceptable standards of evidence in the Title IX context. The Department’s regulations should follow federal case law in requiring public institutions to take a strict-scrutiny approach, that is, not to abridge the religious freedom of student organizations in the absence of a compelling interest, and then only using the least restrictive means narrowly tailored to that interest, considering other ways of achieving that interest, and ensuring that any restrictions are facially neutral.

The Department’s notice of public rulemaking (NPRM) suggests that the Department holds the incorrect view that it “would be permissible” for a public institution to simply declare that it has a “neutral, generally applicable” rule and then use that rule to give unequal treatment to a religious student organization due to its violation of that rule. Outside of the rare “all-comers” context of *Christian Legal Society v. Martinez*, 561 US 661 (2010), however, religious student organizations have robust First Amendment rights.

Generally applicable nondiscrimination laws, for instance, do not banish religious organizations from the public square, nor do they require religious organizations to change their beliefs or practices (*see, e.g., Fulton v. City of Philadelphia*, 593 US \_ (2021)). Likewise, a public college’s nondiscrimination policies do not permit unequal treatment of religious student organizations, much less any denial or restriction on “official recognition of the student organization” as in the current regulations. Such rules are not facially neutral. And a “regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion,” the Supreme Court wrote in *Wisconsin v. Yoder* (406 US 205, 220 (1972)).

Even *Employment Division v. Smith* (1990) would normally call for the strict-scrutiny standard in religious student organization cases, which most commonly involve organizations being denied recognition and the campus resources that go with recognition. Attorneys Thomas Jipping and Sarah Perry write:

The strict-scrutiny standard, the Court said, would ... apply only when government action is “specifically directed at” religious practice or in cases that involve “the Free Exercise Clause in conjunction with other constitutional provisions, such as freedom of speech and of the press.”<sup>2</sup>

Regularly gathering in rooms large enough to hold all members of the religious organization at the same time, for example, is commonly a core religious practice and value of the organization (*see Capitol Hill*

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<sup>2</sup> Thomas Jipping and Sarah Perry, “The Religious Freedom Restoration Act: History, Status, and Threats,” The Heritage Foundation, May 4, 2021, <https://www.heritage.org/civil-rights/report/the-religious-freedom-restoration-act-history-status-and-threats> (accessed March 17, 2023) (footnotes omitted).

*Baptist Church v. Bowser* (2022)),<sup>3</sup> and campus recognition is generally required for a student religious organization to reserve rooms on a regular basis. A generally applicable campus rule that prevented recognition would impact not only free exercise but also freedom of expressive association. And when such a rule would force an organization to choose between its faith and admitting to leadership someone who does not share the organization’s views, the rule would be subject to strict scrutiny also for that reason.

Other commenters surely are providing many examples where colleges have erred in enforcing their policies and have had to reverse course. A strict-scrutiny requirement would cause regulated parties to make fewer such errors.

It bears repeating that in the likely practical adjudication of complaints by the Department, the Department would work cooperatively with the regulated party to bring it into compliance with its First Amendment and regulatory obligations, rather than employing a “gotcha” approach. As with OCR civil rights cases, an agreement between the regulated party and the Department would not preclude a lawsuit from the student organization if the student organization were to disagree with the agreement, yet a strict-scrutiny requirement would dramatically reduce the number of errors by colleges that would lead to lawsuits.

3. *Subregulatory Guidance*. The NPRM claims that regulated parties have complained of confusion about compliance with the regulations. Rather than rescind the regulations, in addition to specifying an appropriate standard for action by a regulated party, the Department should issue subregulatory guidance that keeps up with federal case law and includes common examples drawn from past situations. The Department already issues FAQs, for example, to aid with civil rights compliance.

Thank you for the opportunity to comment. I would be delighted to answer any questions about my response.

Sincerely,

/s/

Adam Kissel  
Visiting Fellow  
Center for Education Policy  
The Heritage Foundation

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<sup>3</sup> *Capitol Hill Baptist Church v. Bowser*, The Becket Fund for Religious Liberty, <https://www.becketlaw.org/case/capitol-hill-baptist-church-v-bowser> (accessed March 17, 2023).