



February 18, 2020

**VIA REGULATIONS.GOV**

Mr. Jean-Didier Gaina  
U.S. Department of Education  
400 Maryland Avenue, SW  
Mail Stop 294-20  
Washington, D.C. 20202

**Re: 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—RIN 1840-AD45; Docket ID ED-2019-OPE-0080**

Dear Mr. Gaina:

Alliance Defending Freedom (ADF) submits the following comment on the Notice of Proposed Rulemaking (NPRM) regarding federal regulations (1) governing the eligibility of faith-based entities to participate in certain federal programs; and (2) implementing Executive Order 13864 (Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities). ADF enthusiastically supports the Department's efforts to eliminate special burdens on religious educational institutions and to foster compliance by public universities with the First Amendment.

By way of background, ADF is the world's largest legal organization committed to protecting religious freedom, free speech, and the sanctity of life. We have played various roles in 54 Supreme Court victories. Since 2011, ADF has represented parties in nine victories at the Supreme Court.<sup>1</sup> In 2018, Empirical SCOTUS ranked ADF first among "the top performing firms" litigating First Amendment cases.<sup>2</sup>

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<sup>1</sup> See *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Masterpiece Cakeshop v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017); *Geneva Coll. v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam); *So. Nazarene Univ. v. Burwell*, 136 S. Ct. 1557 (2016); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

<sup>2</sup> Adam Feldman, Empirical SCOTUS: Supreme Court all-stars 2013-2017, SCOTUSBlog.com, Sept. 13, 2018, <https://www.scotusblog.com/2018/09/empirical-scotus-supreme-court-all-stars-2013-2017/>.

ADF's Center for Religious Schools defends and advances the religious freedom of faith-based educational institutions and their students. It routinely advises and represents religious schools facing unduly burdensome and discriminatory federal, state, and local regulations. It has also assisted scores of colleges and universities pursuing affirmation of their possession of Title IX's religious exemption.

ADF's Center for Academic Freedom is committed to protecting freedom of speech and association for students and faculty so that everyone can freely participate in the marketplace of ideas without fear of censorship. Since 2006, the Center for Academic Freedom has represented clients in over 385 victories for First Amendment matters on university campuses.<sup>3</sup>

The importance of a robust enforcement of First Amendment protections on our nation's campuses is difficult to overstate. The United States Supreme Court has called public universities "peculiarly the marketplace of ideas."<sup>4</sup> Without this marketplace of ideas, the Court said, "our civilization will stagnate and die."<sup>5</sup> As custodians of the marketplace, public universities should be places where young adults learn to exercise the First Amendment rights necessary to participate in our system of government and to tolerate others' exercise of those same rights even when their views differ. Indeed, teaching students about our constitutional system and the critical role they play in it as citizens is a necessary part of education. Students learn as much or more from universities' policies and practices of protecting or restricting expression and association as they do from the classroom.

ADF appreciates the Department's efforts to eliminate discrimination against religious educational institutions and to faithfully implement Executive Order 13864. We offer a small number of suggestions regarding selected proposed regulations.

A. 2 C.F.R. Part 3474 (Uniform Administrative Requirements)

1. *2 C.F.R. § 3474.15*

Subparagraph (e)(2)(iv) of this proposed regulation permits a faith-based organization that contracts with a grantee or subgrantee to "[s]elect its board members on the basis of their acceptance of or adherence to the religious tenets of the organization."

ADF recommends the addition of the phrase "and employees" following "board members." Such a change would emphasize a faith-based organization's constitutional and statutory right to draw its workforce from among those who share and follow its religious beliefs. It would also be consistent with the revision the Department proposes to 34 C.F.R. § 75.52(d)(2)(iv)(regarding Direct Grant Programs) and 34 C.F.R. § 76.52(d)(2)(iv)(regarding State-Administered Formula Grant Programs).

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<sup>3</sup> ADF Center for Academic Freedom, [www.CenterforAcademicFreedom.org](http://www.CenterforAcademicFreedom.org) (last visited February 14, 2020).

<sup>4</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>5</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion of Warren, C.J.).

Proposed 34 C.F.R. § 3474.15(a) states that “[g]rantees and subgrantees must ensure compliance by their *subgrantees* with the provisions of this section and any implementing regulations or guidance.” We wonder whether the italicized appearance of the word “subgrantees” should be “contractors.”

B. 34 C.F.R. Part 76 (State-Administered Formula Grant Programs)

1. *34 C.F.R. § 76.500*

Despite clearly established law, public universities continue to violate the First Amendment rights of students and professors—often targeting minority viewpoints for discriminatory treatment.<sup>6</sup> Proposed Section 76.500(b) creates incentives for public universities receiving federal grants to proactively review and revise their policies to conform to the requirements of the First Amendment in order to avoid the loss of grant funding, but only if their policies are judged to violate the First Amendment by a state or federal court. The Department is correct to recognize the need for this incentive and to create a simple, non-bureaucratic enforcement mechanism.

Recognizing that private institutions are not subject to the First Amendment and indeed retain their own First Amendment rights, proposed Section 76.500(c) appropriately incentivizes grant recipients to clearly articulate their institutional policies regarding free speech and academic freedom. This approach allows private institutions—including religious ones—to retain their unique identities and missions while encouraging clarity regarding free speech and academic freedom policies for those institutions that receive federal grants.

Proposed Section 76.500(d) appropriately recognizes the need for protecting the free association rights of religious student organizations. All too often, such organizations are discriminated against by universities who prohibit students from forming around shared ideas.<sup>7</sup> But, because personnel is policy, any organization dedicated to advancing a particular cause must ensure that those who lead it are actually committed to that cause.

Thus, organizations dedicated to advancing a particular cause, whether the College Democrats, the College Republicans, the Christian Medical Association, Chabad on Campus, or any other group formed around a common cause or belief should be permitted to maintain membership and leadership standards that ensure the common cause is furthered. The College Democrats should not be required to elect a MAGA-hat wearing leader, the College Republicans

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<sup>6</sup> See, e.g., *Apodaca v. White*, 401 F. Supp. 3d 1040, 1059 (S.D. Cal. 2019) (California State University violated clearly established First Amendment principles and individual defendants were not entitled to qualified immunity); *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960, 994 (S.D. Iowa 2019) (university officials violated plaintiffs’ “clearly established right to free speech. They are not entitled to qualified immunity . . . .”); *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 566 (4th Cir. 2011) (University violated professor’s Free Speech rights).

<sup>7</sup> See, e.g., *Bus. Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885, 909 (S.D. Iowa 2019); *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960, 994 (S.D. Iowa 2019).

should not be required to elect a NeverTrumper, and Chabad on Campus should not be required to elect a Boycott-Divestment-Sanction supporter.

While at least fifteen states have attempted to address this issue so far,<sup>8</sup> the Department is right to create a uniform standard applicable to all grant-recipient public institutions but should consider expanding the protections provided in this proposal to more than just religious organizations. This could be accomplished by the following minor revision to proposed 34 C.F.R. § 76.500(d):

(d) A public institution shall not deny to a religious, political, or ideologically-based student organization at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including full access to the facilities of the public institution and official recognition of the organization by the public institution) because of the beliefs, practices, policies, speech, membership standards, or leadership standards of the student organization.

While the proposed regulation appropriately protects the right of association for religious student organizations, a moderate tweak in language as suggested above is appropriate to extend those protections to all religious, political, or ideologically-based student groups.

We commend the Department for its thoughtful attention to this important matter.

C. 34 C.F.R. Part 106 (Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance)

1. 34 C.F.R. § 106.12

Title IX itself (20 U.S.C. § 1681) does not set forth any procedure through which a religious educational institution confirms its possession of an exemption from applications of the statute that are inconsistent with the school's religious tenets. The procedure set forth in 34 C.F.R. § 106.12(b) is a regulatory creation. The Department has correctly declared that “[a]n institution's exempt status is not dependent upon its submission of a written statement to OCR.”<sup>9</sup>

ADF applauds the Department for proposing a non-exhaustive list of various means by which an institution may establish its eligibility for Title IX's religious exemption. To our knowledge, the Office for Civil Rights has never deemed an institution ineligible on the ground that it is not “controlled by a religious organization.” It bears noting, however, that the previous administration significantly delayed its responses to communications from independent colleges

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<sup>8</sup> See, e.g., Ariz. Rev. Stat. §15-1863 (protecting “religious and political” student groups’ freedom of association; Ky. Rev. Stat. Ann. § 164.348 (2)(h) (same); LSA-R.S. 17:3399.33 (protecting freedom of association for “belief-based” student groups); ); N.C.G.S.A. §116-40.12 (same); Va. Code. Ann. §23-9.2:12 (same).

<sup>9</sup> <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html> (last visited Feb. 18, 2020).

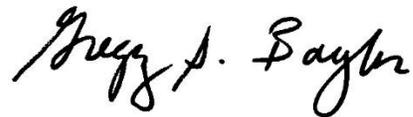
and universities, many of which ADF represented. OCR was apparently considering whether to deem these schools ineligible for the exemption, despite their thoroughly religious character.

The proposed regulation rightly acknowledges the various ways an institution may establish its eligibility for the exemption. It also precludes the Department from engaging in unconstitutional differentiation among religious institutions based on their connection (or lack thereof) with an outside entity, such as a denomination or religious order.

D. Conclusion

ADF is grateful for the opportunity to comment on the proposed regulations and applauds the Department for the many salutary changes it has proposed.

Respectfully submitted,

A handwritten signature in black ink that reads "Gregory S. Baylor". The signature is written in a cursive style with a large, sweeping initial "G".

Gregory S. Baylor  
Director, Center for Religious Schools

A handwritten signature in blue ink that reads "Tyson Langhofer". The signature is written in a cursive style with a large, sweeping initial "T".

Tyson Langhofer  
Director, Center for Academic Freedom