

September 23, 2021

The Honorable Miguel A. Cardona  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, S.W.  
Washington, D.C. 20202

Dear Secretary Cardona:

We write in response to the Department’s blogpost of August 19, 2021, “*Update on the Free Inquiry Rule*,” stating that the Department “anticipate[s] publishing a notice of proposed rulemaking in the Federal Register to propose rescinding parts of the Free Inquiry Rule.” Because the Free Inquiry Rule includes many different regulations, we write simply to express our trust that the Department is not intending to propose rulemaking that will change in any way two regulations, 34 C.F.R. §§ 75.500(d) and 76.500(d), which protect religious student organizations from discrimination on public college and university campuses.

In our letter of June 1, 2021, we asked that the Department preserve these regulations because they provide commonsense protection for faith-based student organizations that have faced discrimination on too many public college campuses for nearly four decades. By protecting students of all faiths, including student organizations represented by many of the undersigned organizations, these regulations ensure that religious students feel welcome on public college campuses and thereby enhance authentic religious diversity on those campuses.

Revision of these regulations would send a message to religious student groups that they are not welcome on public campuses. We trust that is not the message that the Department intends to send.

Especially after the past academic year during which students struggled to keep their organizations intact because many could not meet in person due to the COVID-19 pandemic, these regulations are particularly critical to religious student organizations’ efforts to rebuild. Thriving religious student organizations benefit not just those who choose to participate in their activities but their campus communities as a whole. Religious student organizations offer spiritual nourishment, emotional encouragement, and friendship to all at a time when students are suffering from the physical, emotional, and spiritual toll that the pandemic has taken.

Three recent federal court decisions demonstrate that these regulations are a win-win for *both* religious students *and* college administrators. In March and again in July, the Eighth Circuit Court of Appeals ruled that University of Iowa officials had forfeited qualified immunity and, therefore, were personally liable for damages as a consequence of their derecognition of two religious student organizations because they required their leaders to agree with the groups’ religious beliefs. *InterVarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4<sup>th</sup> 855 (8th Cir. 2021); *Business Leaders in Christ v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021). University officials had indicated to the district court that other religious groups—including Muslim, Jewish, Sikh, Latter-Day Saints, Evangelical, and Catholic student groups—were potential targets for derecognition because they too required their leaders to agree with their

religious beliefs. Similarly, in April, a Michigan federal district court found that Wayne State University officials had lost their qualified immunity by threatening a religious student group with derecognition because it required its leaders to agree with its religious beliefs. *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, --- F. Supp.3d ---, 2021 WL 1387787 (E.D. Mich. 2021).

These regulations codify several Supreme Court decisions, including *Healy v. James*, 408 U.S. 169 (1972), *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and completely align with the Court’s ruling in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). 85 Fed. Reg. 75,310, 75,311 (Nov. 25, 2020) (“As explained in the preamble to the Final Rule, an ‘all-comers’ policy as described in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), does not violate the Final Rule’s requirement regarding equal treatment of religious student organizations at public institutions in 34 CFR 75.500(d) and 34 CFR 76.500(d).”). Of course, actual all-comers policies are extremely rare because, if adopted, an all-comers policy would compel all student organizations to accept any student as a member or leader, which would eliminate, or radically change the nature of, any organization which selects members based on gender (*e.g.*, sororities, fraternities, or any single-gender support group), able-bodied status (*e.g.*, athletic ability), veteran status, or political belief (*e.g.*, Democratic or Republican student organizations).

We respectfully repeat our request that the Department preserve the important legal protections provided in 34 C.F.R. §§ 75.500(d) and 76.500(d) for individual students and religious student organizations so that students of all faiths will feel welcome on their public college campuses.

Respectfully submitted,

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