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February 18, 2020

Secretary Betsy DeVos
c/o Jean-Didier Gaina
United States Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202

Re: Docket ID ED-2019-OPE-0080 Notice of Proposed Rulemaking on 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

Dear Secretary DeVos:

I write on behalf of the University of California (UC) system with regard to the Notice of Proposed Rulemaking (NPRM) on 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 published on January 17, 2020. We wish to provide comments on the proposed amendments to sections 75.500 and 76.500 of Title 34 of the Code of Federal Regulations, and the related discussion in "Part 2 – (Free Inquiry)" of the preamble. With permission from the American Council on Education (ACE), UC supports, endorses, and expands on the views expressed in the comment letter submitted by ACE regarding the Proposed Rule's impacts on public institutions.

The UC system is comprised of ten campuses, six medical schools, and three affiliated U.S. Department of Energy national laboratories. As a system, UC maintains a total enrollment of more than 280,000 students and receives approximately $6 billion annually of extramural awards to support research, training and public service conducted throughout all UC locations.

UC firmly believes that it is essential to the mission of higher education to ensure that persons of any background or viewpoint can freely and safely engage in open discourse and expression. We are proud to have a rich legacy of fighting for and protecting free speech, from our role as the hub of the free speech movement in the 1960s to the current efforts of our National Center for Free Speech and Civic Engagement to promote discourse concerning free speech within and beyond the educational setting. Our campuses have served as hosts to numerous speakers from across the political and religious spectrum.

With that perspective in mind, UC wishes to express concern regarding the rules proposed by the Department of Education (the Department) with respect to conditioning certain federal funding for public institutions on terms relating to, first, litigation outcomes in cases involving First Amendment claims and, second, their recognition of religious student organizations. While we fully support fostering an environment of open discourse, we believe, for the reasons described below, that these elements of the Proposed Rule are problematic and likely to hinder, rather than advance, the goals of "promot[ing]" and "encouraging" free speech described in Executive Order 13864. UC also has significant concerns that the negative consequences of this Proposed Rule would increase significantly should other agencies subject to E.O. 13684 follow the Department's lead in adopting regulatory frameworks similar to the Proposed Rule.

THREAT OF LOSING DEPARTMENT FUNDING BASED ON CERTAIN COURT JUDGMENTS IN FIRST AMENDMENT CASES

The Proposed Rule would require public institutions to comply with the "First Amendment, including protections for freedom of speech, association, press, religious, assembly, petition, and academic freedom," as a "material condition" of receiving a grant from the Department. The Department would find a public institution out of compliance if there is a "final, non-default judgment" by a state or federal court that the institution or any of its employees, acting in their official capacity, violated the First Amendment of the federal constitution.

We believe this approach is ill-advised for a number of reasons.

1. This condition may unfairly harm innocent bystanders.

All public institutions within the United States are already subject to the requirements of the First Amendment. Exposing institutions to additional sanctions beyond court penalties, *particularly* when the Department has itself acknowledged in the Proposed Rule[1] that First Amendment issues have never been known to impact any institution's ability to fulfill the terms of Department grants, is a measure we do not believe is necessary or appropriate.

While it may be within the reasonable rights of the Department to impose sanctions up to and including termination of a grant if a university is found to have violated a federal law or any term in its use of that particular grant, it is deeply concerning that students, researchers, and society as a whole would suffer adverse consequences if research and campus programs are ended because of First Amendment litigation unrelated to that program. For example, a final judgment in a close First Amendment case arising from an unrelated area could lead to the termination of a TRIO grant designed to help first-generation students graduate from college.

In the event that other agencies follow the Department's lead and adopt similar regulations in implementing Executive Order 13864, we would see the negative effects of the rule compound as the amount of federal funding at stake grows significantly. Important research grants from the Department of Defense, National Institutes of Health, and other agencies could all be threatened by unrelated First Amendment litigation, including those of a minor or frivolous nature.

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[1] Discussion of Costs, Benefits and Transfers, 34 CFR 75.500

2. **Universities may incur greater legal costs due to additional litigation, and the incentive to settle frivolous claims or to pursue appeals as far as necessary to obtain a favorable ruling.**

UC is concerned about the burden universities will face due to increased litigation and legal costs in order to avoid non-default court rulings. In fact, the NPRM itself acknowledges universities may be required to "shift their litigation strategies to avoid non-default, summary judgments against them."

We agree with the concerns of others, including FIRE, that incentivizing universities to either (1) settle every claim brought before them or (2) litigate each case as far as possible would not tangibly benefit individuals' rights to free speech.

Further, the costs involved in responding to the predictable increase in the number and duration of speech-related litigation will only serve to escalate college and university costs at a time that affordability is a critical issue for many American families. Groups challenging institutional polices will also see increased litigation costs and delay as institutions are pressured to appeal any adverse judgment.

3. **Institutions may be disincentivized to pursue earlier, more effective means of resolving First Amendment claims and improving their free speech policies and practices.**

The pressure to settle or appeal all judgments may leave institutions little room for earlier, or more effective, thoughtful, and long term solutions to free-speech related issues on their campuses.

For example, universities often choose not to appeal a judgment following a trial or a hearing, preferring instead to reach a post-trial/pre-appeal resolution with the plaintiff or to modify their policies or practices in a manner consistent with the trial court ruling. Such sensible options could become untenable under the proposed rule, as the most recent ruling would become "final" and weighted in the Department's decision whether to refuse or rescind funding to the institution. For these reasons, we believe the Department's stated objectives are ill-served by discouraging responsive and immediate resolution with the plaintiff.

4. **Institutions could be penalized for violations already remedied.**

Currently an institution may elect not to appeal an adverse judgment, particularly in cases where the underlying concern had already been rectified or when modifying a policy to come into compliance with an anticipated ruling is feasible. The Proposed Rule, however, would deem institutions in violation of a material condition of their Department grant even if the institution had cured the deficiency prior to the court's ruling. The Department's stated criteria for appropriate remedies for an institution's non-compliance do not appear to include consideration of whether the university had taken steps to voluntarily cure the underlying violation.

5. **The Proposed Rule authorizes the Department to penalize institutions for judgments against individual employees.**

The Proposed Rule covers not only final non-default court judgments against an institution, but also judgments against "any of its employees acting in their official capacity." By including employees, the proposed rule would threaten institutional funding based on the intentional or unintentional actions of a single employee in contravention of otherwise effective institutional policies – and even when the institution had terminated or otherwise disciplined the employee, or instituted other corrective measures.

6. The Proposed Rule may lead to the Department applying inconsistent sanctions for the same conduct due to differences in courts' interpretations of the First Amendment.

State and federal courts in different jurisdictions may take varying approaches to First Amendment claims, which result in divergent outcomes depending on which court hears a particular case. UC believes this will result in the Department being unable to effectuate the Proposed Rule, or to apply attendant sanctions, in any uniform manner. In the event that other federal agencies follow this model, it is likely that different agencies might further apply different sanctions to the same conduct.

7. Unique considerations in the freedom of speech context call for greater clarity in defining when the Department may terminate federal grant funding.

Citing existing regulations, the preamble lists factors that the Department may consider in determining potential penalties, including: the "actual or potential harm or impact that results or may result from the wrongdoing," the "frequency of incidents and/or duration of the wrongdoing," "whether there is a pattern or prior history of wrongdoing," "whether the wrongdoing was pervasive within [the institution of higher education]" and whether the institution's "principals tolerated the offense."

The Department, itself, recognizes in the preamble the importance of "withdrawing certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." Just as the Proposed Rule wisely removes determination about whether there is a speech violation from the Department's purview, we believe it is similarly important to precisely define the amount of discretion afforded Department officials in determining sanctions, in order to limit the potential for politicized inquiries and judgments—regardless of the political party in charge of the Department—to invade the process.

8. The proposed rule confuses the concepts of freedom of speech and academic freedom.

The Proposed Rule adds the words "academic freedom" into proposed regulatory text, even though the Executive Order neither mentions these words nor references this concept. The Department further references Section 112 of the Higher Education Act (20 U.S.C. 1011a) as justification for its proposal, even though this "Sense of Congress" provision makes no mention of the term "academic freedom." The Proposed Rule further suggests that freedom of speech and academic freedom are coextensive and fails to recognize the distinctions between institutional and individual academic freedom. However, the ways in which academic freedom and freedom of speech intertwine and relate, and are distinguished and separate from one another, are highly complex and have been the subject of significant study and analysis among legal scholars and experts. As such, we do not believe the concept of "academic

freedom" is well-suited to a federal rulemaking process, nor should the Department include it as a potential basis for withdrawing federal grant funds.

THREAT OF LOSING FEDERAL FUNDING BASED ON TREATMENT OF RELIGIOUS STUDENT ORGANIZATIONS

Sections 75.500(d) and 76.500(d) of the Proposed Rule further state that public institutions shall not deny religious student organizations any "right, benefit, or privilege (including full access to the facilities of the public institution and official recognition of the organization" afforded to other student organizations" because of the religious student organization's "beliefs, practices, policies, speech, membership standards, or leadership standards…" The NPRM further states, "This right to expressive association includes the right of a student organization to limit its leadership to individuals who share its religious beliefs without interference from the institution or students who do not share the organization's beliefs…Student organizations at public educational institutions should be able to restrict membership and leadership in their student organization on the basis of acceptance or adherence to the religious beliefs and tenets of the organization."

This Proposed Rule appears to specifically prohibit public universities, as recipients of Department grant funding, from establishing "all comers" policies whereby membership and leadership positions in faith-based student organizations must be open to all individuals regardless of their religious beliefs or status as a member of any other legally protected class.

We believe this to be problematic on several levels.

1. **The Proposed Rule conflicts with Supreme Court precedent that "all comers" policies are consistent with the First Amendment.**

Sections 75.500(d) and 76.500(d) of the Proposed Rule are in clear conflict with the United States Supreme Court's ruling in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). In *Martinez*, the United States Supreme Court specifically upheld the right of the University of California-Hastings College of the Law to decide that only student organizations with "all-comers" policies would be officially recognized by the school. The Proposed Rule purports to implement the Executive Order's directive to take appropriate steps to promote free speech "in a manner consistent with applicable law" and to ensure that institutions receiving federal grants "comply with the First Amendment." Adoption of the proposed regulations would place institutions in an untenable position: institutions taking action allowed by a Supreme Court decision would place their federal funding at risk because of a government regulation based on an Executive Order. The Supreme Court held that "all comers" policies, if evenly applied, are "*reasonable, viewpoint-neutral [conditions]* on access to the student-organization forum" (emphasis added).

UC objects to the penalization of institutions for implementing policies that the Supreme Court has specifically ruled to be consistent with the First Amendment.

2. **Prohibiting "all comers" policies for recognition of religious student organizations only is inconsistent with requiring them to treat them the same as secular organizations.**

The NPRM emphasizes "our obligation to be neutral in matters of religion" and that the proposed rules are intended to ensure institutions neither "provide special benefits to faith-based organizations" nor "treat faith-based organizations and religious individuals differently than other organizations or individuals."

We do not believe the proposed rule will accomplish the stated objectives, as the proposed rule applies *only* to faith-based organizations and not to other organizations intended to bring together individuals of similar beliefs or viewpoints. The proposed rule would thus require institutions to permit faith-based organizations to exclude participants on the basis of viewpoint or religious belief, even if other types of student organizations may not. As the Supreme Court held in *Martinez*, excepting religious organizations from an institution's all-comers policy would constitute "not parity with other organizations, but a preferential exemption from [the institution's] policy."

3. Allowing recognized student organizations to exclude students based on religious belief would conflict with the University's and California state law's nondiscrimination goals.

Requiring institutions to revise existing "all comers" student organization policies to allow faith-based student organizations to deny membership to students who do not espouse the same religious beliefs is likely to create conflicts with those institutions' commitments under state and local non-discrimination laws that prohibit discrimination on the basis of religion, or on the basis of other legally protected statuses that may be implicated in religious beliefs, such as sex, sexual orientation, or gender identity. The Proposed Rule's requirement regarding religious student organizations would conflict with UC's commitment to nondiscrimination, and its support of state anti-discrimination law, such as California's Ed. Code s 66270. [2]

The risk of conflict with nondiscrimination goals and state and local laws is compounded by the Proposed Rule's broad wording, to prohibit public institutions from denying recognition to religious student organizations not only on the basis of "beliefs" but also "practices, policies, speech, membership standards, or leadership standards," independent of religious beliefs.

4. Requiring universities to adopt policies to allow faith-based organizations to limit membership and/or leadership based on religious beliefs would require a difficult review of an organization's motives and may encourage secular organizations to claim religious status in order to receive the same benefits.

As the Supreme Court specifically pointed out in *Martinez*, "all comers" policies would allow a university to "police the written terms of its Nondiscrimination Policy without inquiring into [a Recognized Student Organization]'s motivation for membership restrictions," and noted the difficulty

[2] "No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any characteristic listed or defined in Section 11135 of the Government Code or any other characteristic that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.5 of the Penal Code, including immigration status, in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid."

of otherwise doing so: “How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb? If a hypothetical Male-Superiority Club barred a female student from running for its presidency, for example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental policy?” UC is concerned about the challenges of making such distinctions.

Relatedly, UC is also concerned about the potential for student organizations who would not otherwise claim to be faith-based to frame their membership policies as being based on religious beliefs in order to benefit from this proposed rule. Any abuse of this criterion would cheapen the intended effects of the proposed rule while, as discussed above, exposing institutions to increased legal liability in the process.

The University of California thanks you for the opportunity to provide our input. We would be happy to further engage with you in finding workable solutions. We join other organizations in requesting that the Department extend the comment period for this Proposed Rule to allow for further input from educational institutions; if the Department agrees to extend the comment period, we may wish to augment these comments.

Sincerely,

Lourdes G. DeMattos
Associate Director
Research Policy Analysis & Coordination