



February 18, 2020

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

Submitted electronically via www.regulations.gov

Re: Written Comment re the Department of Education's proposed rulemaking of January 17, 2020 at 85 FR 3190. Docket ID: ED-2019-OPE-0080-0001. RIN 1840-AD45.

We are writing today to offer Cru's perspective as a nonprofit organization with affiliated Chapters on college and university campuses all over the country.

We strongly support the proposed language for 34 CFR § 76.500(d) and § 75.500(d):

A public institution shall not deny to a religious 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 religious student organization.

Thank you for taking action to protect religious student organizations.

Cru started its campus ministry in 1951 at UCLA. It has been seeking to provide a safe space for students to explore Christianity and grow in their faith since that time. We presently have student chapters on 1,439 campuses, with more than 106,000 students involved across the country in our various ministries. On many of those campuses, the Cru chapters have been active for decades, meeting the spiritual needs of students and providing meaningful community during that pivotal time in their lives.

Our Cru chapters have always welcomed any student to get involved and we have never had membership restrictions. We have sought to give leadership to students and develop them as caring and compassionate people and leaders. Because the role of leadership involves teaching religious beliefs and what it means to live out the Christian life, however, we believe that our student leaders are best equipped to lead if they have made the decision to follow Jesus and see

their faith as an important part of their life journey. What unites our chapters around the country is a shared faith and a shared mission and purpose.

The proposed language is helpful because it acknowledges the importance of allowing religious student organizations to have authentic expressions of religious faith. It allows religious student organizations to preserve the integrity of their beliefs by ensuring that people who are leading and speaking for the group agree with and care deeply about its mission and purpose which, in this case, is religious.

In this comment, we will make the following observations:

- There is a clear legal basis for the proposed language for 34 CFR § 76.500(d) and § 75.500(d).
- There is a clear logical basis for the proposed language.
- The proposed language is important and will remedy real problems.

There is a clear legal basis for the proposed language:

There is strong Supreme Court precedent for the principle of not singling out religious groups for different treatment. It violates a religious group's speech and association rights to be treated differently than other groups because it is religious. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830-31 (1995). Student groups and organizations may engage in expressive activity without it being considered the university's speech. On public universities, this is based upon the principle of limited open forums, where a university opens space for private speech. *See Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000).

It is unreasonable to force religious groups to choose between preserving their religious missions and messages or being recognized student organizations. This choice puts religious student groups in an unreasonable position, hindering their association rights. It is a significant burden to be unregistered. *See Healy v. James*, 408 U.S. 169, 181-82 (1972). In addition, the principle that religious groups should not be singled out and refused benefits because of their religious status was made even more clear in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

There is also no Establishment Clause problem. A public university is not favoring religion when it allows private religious speech in the context of a limited open forum. *See Rosenberger*, 515 U.S. at 834. In fact, it creates more entanglement when a university dictates how a religious group may or may not function, such as by dictating what they are or are not allowed to consider in selecting the leaders who will represent the group and its religious beliefs.

The language in 34 CFR § 76.500(d) and § 75.500(d) can also be read consistently with *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). *Martinez* addressed an uncommon policy that it called an "all comers policy," and said that it was permissible, but neither required nor expected for a university to implement such a policy. A true all comers policy (not allowing

any group to have requirements based on any beliefs or statuses) is extremely uncommon; the vast majority of schools that claim they have them do not. Any exceptions at all disqualify a policy from being a true all comers policy, including the choice to allow single-gender fraternities or sororities, or club sports. *See Martinez*, 561 U.S. at 704 (J. Kennedy, concurring) (stating that “Here, the policy applies equally to all groups and views”). In fact, the Martinez court singled out fraternities and sororities as an example of groups that might function without official recognition. *Id.* at 691. In light of this narrow definition, we have not seen true all-comers policies on any large university campuses.

Instead, policies that schools claim to be implementing equally frequently include exceptions for fraternities and sororities and often result in uniquely disadvantaging religious student groups. Often religious groups are the only student organizations asked to change their standards. When a school’s policy specifically affects religious groups because those groups have detailed standards (a logical result of the fact that religious beliefs are specific and detailed differently than other generalized beliefs), then that school is treating those groups differently “because of” their religious beliefs and leadership standards, etc. 34 CFR § 76.500(d) and § 75.500(d) would remedy that. In addition, religious beliefs are uniquely tied to religious identity in a way that is distinct from the other statuses frequently listed in nondiscrimination statements. For example, a womens’ rights group may require its leaders to hold certain beliefs about gender equality, but that belief qualification is independent of whether someone identifies as a certain gender. If someone holds a set of religious beliefs, however, they, by definition, have the corresponding religious status; if they do not hold those beliefs, they do not have that religious status. Therefore, to allow religious groups to have the same associational rights and ability to preserve their messages requires that they be allowed to expect agreement with their beliefs in the same way other groups are able to expect agreement, even though it ends up resulting in a distinction based on “religion.”

Religious groups, in fact, merit particular protection. The Supreme Court has acknowledged that, supported by the presence of the religion clauses in the First Amendment, religious organizations have a particularly strong interest in ensuring that those teaching and representing their beliefs also subscribe to them. *Hosanna- Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (holding religious organizations have an affirmative right under the Religion Clauses of the First Amendment to select leaders consistent with their faith and finding that a neutral and generally applicable federal nondiscrimination law could not override that right). In fact, the Court noted that government interference in dictating selection for religious leadership positions constitutes interference with internal decisions that “affect[] the faith and mission” of the church or organization itself. *Id.* at 707.

There is a clear logical basis for the proposed language:

Our religious student organization chapters want to be treated fairly. The way this issue has often been discussed turns religious discrimination on its head. Opponents often claim that to allow religious groups to use religious criteria in selecting leaders means the government is permitting discrimination based on religion. In fact, the government is committing religious discrimination

against such groups when it prevents them from preserving their beliefs and maintaining their religious identities, while allowing other groups to preserve their non-religious identities.

All groups want leaders who embody a combination of knowledge, skill, values and beliefs that match up with those of the group or organization that they represent. Religious beliefs, in particular, involve more than a set of statements or even intellectual assent; they are communicated and expressed in word and deed. In order to authentically and effectively pursue a religious mission and speak on behalf of a religious community, one must believe in its mission and be motivated by authentic personal faith. In addition, religious groups are often unique in wanting to write down the specific tenets of the beliefs they hold in order to distinguish themselves from other religious perspectives. It dilutes religious diversity if groups are not able to define themselves clearly based upon their particular missions and beliefs.

In addition, equal treatment is only possible if religious organizations can become officially recognized student organizations. There are significant benefits to being registered. These benefits are many and varied, ranging from room reservations to advertising to funding requests. Some of the benefits that directly involve aspects of expression by the groups include tabling, handing out fliers, advertising and promoting activities and events, having access to websites that students at that campus regularly access, and being able to apply for funding that enables the group to hold events that engage the broader campus community.

Accordingly, there is tremendous loss when a religious student group is refused registered status. It becomes essentially a second-class group, becomes more isolated, and loses credibility with students. It also often experiences considerable (and often prohibitive) financial costs, required to pay for the use of campus facilities that are made available to registered organizations at no cost. The campus community is harmed as well, because diversity is most rich when authentic belief-based expression by both individuals and groups is allowed to flourish.

The proposed language is important and will remedy real problems:

Cru chapters around the country have faced numerous challenges over the years. We always seek to resolve concerns respectfully, engaging with each campus individually to address policies that seem to single out religious student organizations. Our involved student leaders tend to be non-political and want to maintain good relationships with administrators, so they prefer dialogue to confrontation. Nevertheless, it takes a lot of time and energy away from their ability to serve their fellow students and campus communities when the status of their groups is threatened.

For example, some of the challenges we have faced include:

- A policy change in the California State University system in 2014 that resulted in many religious student organizations being without official status for a full year, many experiencing loss of members and high financial costs in trying to continue meeting on campus during that time.
- A proposed policy change that would have prevented religious qualifications for leaders that took eight months of dialogue with administrators to resolve at Indiana University in 2015.

- A student government deciding to refuse religious groups the ability to consider religion in selecting their leaders at Southeast Missouri State University in 2016.
- A refusal to approve a Cru chapter for over a year at Northern Colorado University in 2018 because its constitution said student leaders must meet an “alignment requirement.”
- Religious groups being singled out and evaluated as possibly violating school policies in ways non-religious groups were not at University of Iowa in 2018-19.
- And many more challenges, some of which never get resolved. Our students often choose to function in non-ideal situations in order to avoid tension, just hoping that they can preserve their group’s identity despite the problematic policies.

Thank you for considering our comment. For the reasons stated above, we believe that the language proposed for 34 CFR § 76.500(d) and § 75.500(d) is legally appropriate, practical, and necessary to ensure that religious student organizations of all types will be able to continue to add to the rich diversity that is so essential to college life in this country.

Respectfully submitted,

DocuSigned by:



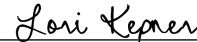
E9943314F2C044C...

Mark Gauthier

Vice President and Executive Director, US Campus Ministry
Cru

mark.gauthier@cru.org

DocuSigned by:



74957851D3434A5...

Lori D. Kepner

Staff Attorney

Cru—General Counsel’s Office

Lori.kepner@cru.org

100 Lake Hart Drive – 3500

Orlando, FL 32832

407-826-2355