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Proposed DOE Rule Targets Free Speech on Campus and Equal Treatment of Faith-Based Institutions

SUMMARY

On January 16, 2020, the Department of Education (the "Department") issued a notice of proposed rulemaking ("NPRM") with the stated aim of implementing at colleges and universities certain Trump administration initiatives related to (1) fostering open academic debate and (2) "ensur[ing] nondiscrimination against faith-based organizations, and strengthen[ing] religious freedom protections."

Most significant for all colleges and universities – public and private, religious and secular – the proposed regulatory changes explicitly condition certain federal grants on institutions' compliance with First Amendment obligations (for public institutions and their employees) or stated institutional free speech or academic freedom policies (for private institutions), as they apply to what the Department calls academic "freedom of inquiry." Notably, though, a violation under the proposed rule would be found (and funding jeopardized) only if there is a "final, non-default judgment by a state or federal court."

While the intention of this proposed change may be to enhance "freedom of inquiry," those in the field may wonder whether the risk of losing funding will affect how colleges and universities choose to set their policies in the future and how they handle speech-related litigation.

The proposed rule would also amend other regulations that directly relate to religious organizations or activities on campus. The revisions would eliminate existing requirements imposed on religious organizations – but not on secular organizations – broadening their ability to receive certain Department grants. In addition, the changes seek to narrow the definition of prohibited religious activity tied to certain programs, as well as to clarify the means by which a school may demonstrate that it is "controlled by a religious organization" for purposes of obtaining Title IX exemptions.

The Department will accept comments to the proposed rule through February 18. Comments may be submitted through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery.

Free Speech and Federal Grant Money

The proposed rule provides that, as a "material condition" of a Direct Grant or subgrant from a State-Administered Formula Grant program of the Department (notably, however, not Title IV federal student aid), public institutions must comply with the First Amendment, and private institutions must comply with their "stated institutional policies regarding freedom of speech, including academic freedom." In addition, as a "material condition" of any such grant, public institutions must ensure that faith-based student organizations are treated the same as non-religious organizations in terms of the rights, benefits or privileges afforded to them by the institution. This proposed change appears to be an effort by the Department to import the Religious Freedom Restoration Act ("RFRA"), which prohibits the government from "substantially burdening" a person's free exercise of religion and has traditionally been applied to protect employers/contractors, to the higher education world.

The NPRM states that these First Amendment/free speech conditions are a way to promulgate Executive Order 13864, "Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities," signed by President Trump on March 21, 2019, which directed federal agencies, such as the Department, to "take appropriate steps, in a manner

consistent with applicable law, including the First Amendment, to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies." The NPRM explicitly states that its conditional, carrot-stick approach is in response to Executive Order 13864, explaining that "[b]y materially conditioning Federal research and education grants on institutional respect for free inquiry, the Department's proposed regulations would help preserve freedoms, as promised under the First Amendment and institutional policies."

What is unclear from the NPRM, however, is the type of conduct the Department believes would be in violation. The Department cites several cases where courts have found that universities (all public) have suppressed speech, such as the denial of a promotion to a professor because of newspaper columns he had authored that a school found offensive; viewpoint discrimination when a university refused to allocate grants from a mandatory student fee to a pro-life student organization; and the recent settlement of a suit by the University of California Berkeley because it had, in the words of the NPRM, "deployed its vague policies to prevent conservative groups from bringing to campus speakers harboring ideas the university administration just did not like."

Speech violations as proposed by this NPRM would not be determined by the Department, but instead by the courts. The Department explains in the NPRM that it would be almost impossible to police such infractions on its own, and, as a result, it ties compliance determinations to a final, non-default judgment by a state or federal court that the First Amendment (for public institutions or their employees) or an institutional policy (for private institutions) was violated. Under the proposed rule, institutions will be required to submit a copy of any such judgment to the Department, which would then consider available remedies on a case-by-case basis. The Department may then pursue existing remedies under federal statutes and regulations, including by imposing special conditions, temporarily withholding cash payments pending correction of the deficiency, suspension or termination of a federal award, and potentially debarment. With respect to direct grants, the Department has authority to initiate suspension or debarment only if it first determines that non-compliance cannot be remedied by imposing additional conditions. Factors that the Department must consider prior to debarment include:

- 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;
- The kind of positions held by the individuals involved in the wrongdoing;
- Whether the institution's principals tolerated the offense; and
- Other factors that are appropriate in the circumstances of a particular case.

Under the proposed rule, an institution will have an opportunity to object and provide information and documentation to challenge any remedy for non-compliance that the Department attempts to impose.

The incentives created by the proposed rule and its practical effects are uncertain. Will private institutions seek to amend student or faculty handbooks' free speech or academic freedom policies? Will institutions be more vulnerable to lawsuits, and, ultimately, surrender leverage in settling claims to avoid submitting to the final adjudication of a court and risk their grant funding?

In the case of student organizations at public institutions, the implications of conditional grant funding may be more straightforward: public institutions that receive a Direct Grant or subgrant from the Department may 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 institution." To support this change, the NPRM cites the First Amendment's right to expressive association, which includes the right of a student organization to restrict membership and leadership

"on the basis of acceptance or adherence to the religious beliefs and tenets of the organization." The implication is that public institutions may have to support faith-based organizations, even if they restrict membership based on belief or nonadherence to religious beliefs about conduct considered by many to be inconsistent with civil rights. How enforcement of this provision may square with the Department's regulations pertaining to discrimination on the basis of sex, race, and other protected characteristics remains unclear.

Protection of Religious Organizations and Activities

The proposed rule also sets forth three other areas for revisions to Department regulations. *First,* in direct response to the U.S. Attorney General's Memorandum on Federal Law Protections for Religious Liberty (October 6, 2017), and Executive Order 13831, "Establishment of a White House Faith and Opportunity Initiative" (May 3, 2018), the Department seeks to ensure that religious and non-religious organizations are treated equally under the law. The amended regulations seek to clarify that "faith-based organizations are eligible to participate in the Department's grant program on the same basis as any other private organization," and "seek to address and prevent any confusion about the ability of faith-based organizations to qualify for grants," consistent with the First Amendment and RFRA. To achieve this goal, the proposed rules remove Obama-era mandates that required religious organizations to provide referrals to secular organizations for individuals who objected to the organization's religious status.

Second, the Department will more narrowly define the list of religious activities that are prohibited for recipients of certain federal development grants, such as using development grants for activities or services that constitute religious instruction, religious worship, or proselytization. Under current regulations, recipients of these development grants may not use this money for activities or services that relate to "sectarian instruction" or "religious worship." The Department found these definitions too broad. Current regulations also prohibit an institution from using a development grant for activities provided by a "school of divinity," and the proposed changes seek to address the Department's concern that the definition of "school of divinity" is so vague as to apply to, say, departments with Ph.D. programs in religious studies that "approach theology through an academic lens." The Department proposes to clarify that development grants may not be used for activities that are "solely to prepare students to become ministers of religion or enter some other religious vocation."

Finally, the rule addresses how an educational institution may demonstrate that it is "controlled by" a religious organization for purposes of exemption from Title IX regulations, by adding seven non-exhaustive criteria to be considered, five of which codify existing Office of Civil Rights guidance. However, the Department also added (1) that an institution can itself be a religious organization that controls its own operations and (2) a safe harbor provision, which recognizes that the proposed criteria "do not in any way limit the methods and means that an educational institution may use" to demonstrate that it is "controlled by" a religious organization. Thus, while this proposed change seeks to provide clarification and close the door on what it means to be "controlled by" a religious organization, in the same stroke, the safe harbor provision allows institutions to prove their control by any methods and means.

Saul Ewing Arnstein & Lehr attorneys regularly advise colleges and universities on legal and compliance issues, including with respect to policies and responses related to free speech issues. If you have any questions regarding the NPRM or any issue related to the handling of free speech issues, please contact the authors or the attorney at the firm with whom you are regularly in contact.

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