

Freedom of Expression and Federal Grants – New Proposed Rule

On January 16, 2020, in a move that highlights two First Amendment issues, the U.S. Department of Education (Department) issued a [Notice of Proposed Rulemaking](#) (NPRM) that proposed revisions to current regulations to (1) encourage institutions of higher education to foster environments that promote open and diverse debate and (2) avoid discrimination against faith-based entities in the awarding and administration of Department research and education grants.

This post will briefly summarize the key provisions of the proposed regulations, followed by discussions of the implications for public, private and faith-based institutions of higher education.

Free Speech-Related Proposed Regulations

The free speech-related proposed regulations provide that public institutions of higher education receiving Federal research or education grants must “comply with the First Amendment, as a material condition of the grant.” (Please note that these grants do not include Title IV financial aid funds.) Specifically, public institutions would be required to inform the Department of any final non-default court judgment finding that they violated the First Amendment, and the Department would treat this as a violation of a material condition of the grant and could “pursue existing remedies for noncompliance, including imposing special conditions, temporarily withholding cash payments pending correction of the deficiency, suspension or termination of a Federal award, and potentially debarment.” The proposed regulations include factors to be considered by the Department, including “actual or potential harm or impact that results or may result from the wrongdoing”, “frequency of incidents and/or duration of the wrongdoing” and “the kinds of positions held by the individuals involved in the wrongdoing,” among others. An institution would have an opportunity to object and provide information and documentation challenging an action before a remedy is imposed. A final judgment is a judgment that (1) the public institution or an employee of the institution, acting in his or her official capacity, violated the First Amendment that (2) the institution chooses not to appeal or that is not subject to further appeal.

As the First Amendment does not apply to non-public institutions, private institutions receiving Federal research or education grants would be required to comply with their own “stated institutional policies regarding freedom of speech, including academic freedom,” and would be required to inform the Department of any final non-default court judgment finding that they violated those policies. Such a judgment would be similarly treated by the Department as a violation of a material condition of the grant subject to the same remedies, factors, and process as public institutions. The Department would not “require a private institution to adopt any particular policy on freedom of speech or academic freedom”.

Free Exercise-Related Proposed Regulations

The free exercise-related proposed regulations would do several things:

1. Change Department research or education (non-Title IV) grant eligibility requirements to provide that faith-based institutions of higher education and other organizations are eligible to receive such grants, including subgrants, on the same basis as any other private organization, including ending requirements to provide written notice to prospective beneficiaries of the boundaries of religious activity permitted under such grants, and identify alternative secular providers for individuals who object to a religious provider;

2. Make it easier for faith-based institutions of higher education to demonstrate that they are eligible to claim an exemption from Title IX;
3. Require that public institutions receiving such grants not deny to a faith-based student organization any of the rights, benefits or privileges that are otherwise afforded to non-faith-based student organizations, as a material condition of the grant. This would require public institutions receiving such grants to allow student organizations “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.”

Implications for Public Institutions

If these regulations take effect as written, public institutions would be required to notify the Department of any final non-default court judgment finding that the institution violated the First Amendment, which would by definition be a violation of a material term of its grant(s). Depending on the circumstances, the institution could incur significant penalties up to and including debarment and would be required to demonstrate to the Department’s satisfaction that the issue had been addressed and steps taken to prevent recurrence. This could encourage lawsuits from students, employees or outsiders, and could pressure institutions to settle even non-meritorious cases to avoid possible negative verdicts.

Additionally, public institutions would be required to allow student religious organizations to exclude as members or leaders those who did not accept or adhere to the organization’s religious tenets, for example, LGBTQ or pro-choice individuals, among others. Even having a uniform “accept-all-comers” policy providing that all recognized groups must accept any student who wishes to join, as was upheld by the U.S. Supreme Court in *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of the Law v. Martinez*, 561 U.S. 661 (2010), would not prevent the Department from imposing penalties. The American Council on Education (ACE) has expressed concern that the draft rule could conflict with state non-discrimination laws. ACE and the Association of Public and Land-grant Universities (APLU) have indicated that they plan to submit comments on the proposed regulations. See [here](#).

Implications for Private Institutions

If these regulations take effect as written, private institutions would be required to notify the Department of any final non-default court judgment finding that the institution violated its institutional policies on free expression, including academic freedom, which would be a violation of a material term of its grant(s). Depending on the circumstances, the institution could incur significant penalties up to and including debarment and would be required to demonstrate to the Department’s satisfaction that the issue had been addressed and steps taken to prevent recurrence. This could encourage lawsuits from students, employees or outsiders, and could pressure institutions to settle even non-meritorious cases to avoid possible negative verdicts. The Department “will hold a private institution to its stated institutional policy on freedom of speech, including academic freedom, and will not require a private institution to adopt any particular policy on freedom of speech or academic freedom.” The NPRM does not explicitly state that a private institution is required to have such a policy but appears to assume that institutions will do so. In any case, having such a policy including appropriate procedures is a best practice for institutions.

The NPRM is clear that its provisions regarding student religious organizations apply only to public institutions.

Implications for Faith-Based Institutions

If these regulations take effect as written, faith-based institutions that have a sincerely held religious belief that they cannot register with the IRS for non-profit status may qualify for such status under the proposed regulations if they otherwise would meet the newly delineated criteria for demonstrating that they are “controlled by a religious organization” and as such entitled to such an exemption from the Department.

Faith-based institutions that do not have exemptions from Title IX should also be aware that under a different Notice of Proposed Rule-making, 83 FR 61462, issued by the Department on November 29, 2018, they would no longer need to submit a letter to the Assistant Secretary of the Department for such an exemption.

Implications for All Institutions

This NPRM advances and implements the President's Executive Order on Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities issued on March 21, 2019. The Executive Order calls upon other agencies, including major grant funders such as the Departments of Defense, Health and Human Services, Transportation and Energy as well as the National Science Foundation and NASA to similarly take steps to effectuate the Order. We can expect that those steps would mirror in many if not all respects the final regulations of the Department of Education.

Given this scope, virtually all public and private (non-faith-based) institutions would be affected by the possibility of debarment from Department grants, and/or significant required steps to address the findings resulting from a final court judgment that an institution violated the First Amendment or institutional policies. Institutions may wish to consider reviewing their policies, procedures and training relating to free expression, including academic freedom to ensure that they comport with the First Amendment (for publics), and with the values of free expression, including academic freedom (for all institutions), and that they are clear, up-to-date and reflect the institution's circumstances and values.

The proposed changes in research and education grant regulations relating to faith-based institutions and organizations would require careful attention to and training about procedures, processes, documents and forms in Department grant and sub-grant applications, awards and agreements, both as grantors and grantees.

Institutions wishing to comment on the proposed rules should note that comments must be received by the Department by or before **February 18, 2020**, through the Federal e-Rulemaking Portal or via postal mail, commercial delivery or hand delivery (not fax or email). See the NPRM for detailed requirements for submitting comments

Please contact [Jane M. Sovern](#), any [attorney](#) in the [Higher Education Practice Group](#), or your primary contact at Bond if you have questions about this Notice of Proposed Rulemaking or your policies or procedures relating to freedom of expression.

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