AMERICANS FOR PROSPERITY FOUNDATION

February 18, 2020

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

RE: Notice of Proposed Rulemaking in response to the President's E.O. 13864, ED-2019-OPE-0080

Dear Mr. Gaina:

I write on behalf of Americans for Prosperity Foundation ("AFPF"), a grassroots educational organization that advocates for the principles of a free and open society. AFPF submits these comments in response to the Department of Education's notice of proposed rulemaking implementing Executive Order 13864 (Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities).

Protecting fundamental freedoms of expression and association is necessary for maintaining a dynamic society open to new and challenging ideas. And nowhere is this more important than on our college campuses, where the next generation should be empowered to express their views, have their arguments challenged, and understand the mutual benefit of constructive debate with those they disagree with. It is through this exchange of ideas that we can arrive at solutions for our country's biggest problems.

AFPF appreciates the Department's effort to implement the Executive Order and ensure greater protections for free expression and association on college campuses while respecting institutional autonomy and academic freedom.[1] We offer these comments to identify specific areas of concern where the Department's rule may have unintended consequences that hamper, rather than promote, free expression and association on campus.

[1] AFPF believes that the most effective way of protecting free expression and association is at the local level, with students, faculty and administrators working collaboratively to reform policies that may restrict protected expression and to use those freedoms to promote constructive dialogue. Additionally, several states have enacted limited state laws that ensure the protection of First Amendment freedoms on public university campuses while working to respect the institutional autonomy of state universities.

Specifically, AFPF asks that the Department consider the following revisions to its proposed rule:

(1) Create a safe harbor within which a university could remedy any First Amendment violation without jeopardizing participation in grant programs;

(2) Establish a graduated penalty structure;

(3) Protect freedom of association for all religious, political, and ideological student organizations; and

(4) Eliminate the obligations on private colleges.

I. The Executive Order and The Proposed Rule:

In March 2019, President Trump signed Executive Order 13684, Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities. The order states, in relevant part, "[i]t is the policy of the Federal Government to: (a) encourage institutions to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions."[2]

The order explains that to advance this policy: "the heads of [12 different federal agencies with covered grants to universities] shall, in coordination with the Director of the Office of Management and Budget, 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."[3]

In response to that Executive Order and others, Secretary DeVos released on January 16, 2020 a Notice of Proposed Rulemaking in response to the President's E.O. 13864, ED-2019-OPE-0080. In relevant part the DOE rule requires public institutions that receive a Direct Grant or subgrant from a State-Administered Formula grant program of the Department to comply with the First Amendment, as a material condition of the grant.[4] Specifically, the rule provides that where a court determines by a final, non-default judgment that a public university violated the First Amendment, "the Department [of Education] will consider the grantee to be in violation of a material condition of the grant and may pursue available remedies for noncompliance, which

[2] Exec. Order No. 13864 § 2(a), 84 Fed. Reg. 11401 (Mar. 21, 2019).
[3] *Id*. § 3(a).
[4] 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, 85 Fed. Reg. 3190-01 (proposed Jan. 17, 2020) (to be codified at 2 C.F.R. pts. 3474, 34 C.F.R. pts. 75, 76, 106, 606, 607, 608, and 609).

include suspension or termination of a Federal award and potentially debarment."[5] A university must notify the Department of any such judgment against it within 30 days.

Public institutions' compliance with the First Amendment includes ensuring that faith-based student organizations are treated the same as secular student organizations by prohibiting the denial of any right, benefit, or privilege to a religious student organization that is otherwise afforded to other student organizations. This includes protecting the freedom of faith-based student groups to choose leaders who share the group's religious views in the same way that other student groups may commonly choose leaders who share their views.

The proposed rules do not require private colleges and universities to comply with the First Amendment, a welcome distinction as this would itself have violated the First Amendment rights of private colleges and universities.

However, the rule does require private institutions that receive a direct grant or subgrant from a State-Administered Formula Grant program of the Department to comply with their stated institutional policies on freedom of speech, including academic freedom, as a material condition of the grant.[6] Similar to the rules governing public institutions, the rule provides that where a final, non-default judgment is entered against a private university, "the Department [of Education] will consider the grantee to be in violation of a material condition of the grant and may pursue available remedies for noncompliance, which include suspension or termination of a Federal award and potentially debarment."[7] Private universities also have a 30-day window to notify the Department of a final judgment.

II. AFPF's Comments:

A. The Department rightly leaves First Amendment disputes to the courts.

The proposed rules do not require the Department to review and adjudicate disputes about the constitutionality of policies or practices on campus alleged to violate the First Amendment, with any agency action to enforce the rules coming only in response to a determination by a court. AFPF supports this aspect of the proposed rules.

The judicial branch is best positioned to adjudicate the large number of First Amendment claims that could be required under an alternative rule. To the extent other commenters encourage the Department to independently assess the constitutionality of campus speech policies or actions, we encourage the Department to reject those requests.

Federal and state courts are equipped with the resources, staff, and expertise to adjudicate these issues and to evaluate the sometimes competing versions of the facts. With at least 600 colleges and universities affected by the proposed rule, each with numerous policies applying to various

[5] *Id*. at 3196.
[6] *Id*. at 3198.
[7] *Id*. at 3196.

speech forums, departments, types of media, much less the First Amendment challenges that can arise just from interactions between speakers and any employee, the Department would be ill-equipped to independently adjudicate all such complaints. Developing the staff necessary to review thousands of policies and interactions would entail considerable expansion of the Department or diversion of staff's attention from other Department priorities.

Additionally, leaving these determinations within the purview of the courts permits the development of case law that will place all parties on notice of their rights and obligations. First Amendment doctrine, as it applies to campus speech contexts, is still developing. The courts are the best venue for this continuing doctrinal development. Moreover, First Amendment decisions arising from disputes on campus also implicate the First Amendment freedoms of speakers in other contexts. As First Amendment doctrine on the reasonableness of certain types of time, place, and manner restrictions or the application of forum doctrine develops off-campus, the lessons of those decisions will apply to disputes arising on campus and *vice versa*. Removing a subset of First Amendment issues arising on university campuses from the ongoing development of First Amendment law could distort the law both on and off campus. AFPF supports this important aspect of the proposed rule.

B. Creation of a remedial safe harbor and graduated penalties

Under the proposed rule, the Department would potentially terminate any or all covered grants—in some cases totaling millions of dollars[8]—whenever a court determines that a university violated the First Amendment rights of students or faculty regardless of severity or ameliorative action. This rule could discourage the protection of the very First Amendment rights the rule is intended to safeguard.

The imposition of an automatic penalty would discourage students with legitimate First Amendment claims from seeking redress from a court. Students litigating such cases typically have little to no compensatory damages at stake. They simply ask the court to determine whether their rights have been violated and ask the court to prevent further infringements of their rights or those of other students.

With little to no personal financial damages at stake in most campus free speech cases, the impacts of the litigation on others may be particularly important for would be student litigants. If successful litigation of a First Amendment claim would potentially result in millions of dollars in immediate penalties against their own college, affecting third parties unrelated to the First Amendment violations at issue, many students and student organizations would be disinclined to pursue litigation. The Department should not place students whose free speech rights may have been violated in the position of threatening significant negative effects on third parties in order to defend their own rights in court.

[8] The impact could be more pronounced if other agencies follow the model of this proposed rule with respect to grants that they oversee, including significant grants funding medical research.

Judicial management of First Amendment cases also may become far-more complex under the proposed rule as the consequences of a decision would reach significantly beyond the parties to the case. Otherwise routine First Amendment disputes between university administrators and students might then invite the participation of grantees, subgrantees and beneficiaries of grants who would suddenly have a direct stake in the outcome of the litigation. The automatic application of substantial penalties to universities would also pressure courts to press the parties to settle disputes rather than simply determining the application of the First Amendment to the parties. This would hardly advance the long-term protection of the First Amendment rights the proposed rule is ostensibly designed to secure.

AFPF instead urges the Department to create a safe harbor period within which the Department would take no action with respect to a university's programs if the university remedied any constitutional infirmities. That period should be at least 60 days to permit universities adjudicated to have violated the First Amendment to obtain required trustee or other required approvals to change university policy. This safe harbor would not interfere with the protection of the rights of the students involved whose rights would already necessarily be remedied by the court's decision.

By establishing such a rule, the Department would accomplish the protective aims of the proposed rule while not discouraging students from challenging unconstitutional policies or courts from adjudicating them. By leaving the decision in the hands of the university to comply with its commitments to uphold the First Amendment rights of students or sacrifice the relevant funds, both litigants and courts could proceed without having to take on the burden that any burden on third parties was attributable to them.

Additionally, or alternatively, AFPF encourages the Department to establish a graduated penalty structure that ensures a single court decision that a university violated the First Amendment would not jeopardize a university's entire participation in a federal grant program. Such a graduated penalty structure might take into consideration the number of past violations by the university and other relevant circumstances, but ruling out complete rescission of a federal grant based on a single first violation. Such a graduated penalty structure would not impair the rights of any student or group directly affected because their rights would already be protected by the court's decision. Thus, while the amended rule would continue to provide a strong incentive to universities to ensure compliance with the First Amendment, it would avoid discouraging students from seeking redress or courts from issuing opinions protecting students' First Amendment rights.

C. AFPF supports expanding protection for freedom of association.

The proposed rule rightly affirms the protection of both free expression and the corollary right of free association.[9] These rights are intertwined, such that free expression cannot be fully protected without ensuring protection for the right of individuals to join together around shared views. As the Supreme Court has explained, "implicit in the right to engage in activities protected by the First Amendment is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'"[10] The right to associate with

[9] *Id*. at 3211.
[10] *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984).

others to express certain views necessarily includes the right to choose leaders who share and will advocate for those views.[11] Thus, the proposed rule rightly affirms that religious student groups must be afforded this right just as other political, philosophical, or ideological groups may associate around shared beliefs and ideas and choose leaders who will champion those views.

But while disputes more often arise in the context of religious student groups, and the need for protecting the rights of those groups is thus more acute, the First Amendment protects the freedom of association of all student organizations. Whether a student group is political, religious, philosophical, ideological, or academic in nature, it should have the freedom to operate and select leaders and members based on the organization's beliefs or principles. For example, an environmental group should be able to require that members and leaders affirm their commitment to protecting the environment.

Thus, AFPF encourages the Department to broaden the rule to expressly ensure that all religious, political, and ideological student organizations are protected. As the proposed rule explains, "[u]nder Supreme Court jurisprudence it is [constitutionally] immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters."[12] Broadening the scope of the rule in this way would therefore more fully serve the rule's stated purpose. This expansion of the proposed rule would also track the language of the Equal Access Act, which protects "religious, political and ideological" student groups on secondary school campuses.[13] Moreover, several state laws already reflect similar language protecting the freedom of association of religious, political and ideological student organizations on college campuses.[14]

D. Eliminating Disincentives to Free Expression at Private Universities

The Department's proposed rule rightly avoids imposing First Amendment standards on private institutions. The First Amendment restrains government, including public universities and colleges; it does not restrain private universities and colleges. Some private institutions may choose to extend full free speech protections to their students and faculty. But they are not obligated to do so. Indeed, the imposition of First Amendment obligations on private colleges would raise potential First Amendment violations of the private colleges' *own* First Amendment rights. To the extent other commenters ask the Department to blur the important lines between public universities with First Amendment *obligations* and private universities with First Amendment *rights*, AFPF encourages the Department to continue to resist those demands.

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[11] *Id.* at 623.
[12] *Id*. at 3212 (quotation marks omitted).
[13] 20 U.S.C. § 4071(a).
[14] At least 15 states currently protect freedom of association for religious student groups in state law. Among these, several states affirmatively protect political and other student groups as well. *See, e.g.,* Ariz. Rev. Stat. §15-1863 (protecting "religious and political" student groups' freedom of association; Ky. Rev. Stat. Ann. § 164.348 (2)(h) (same); LSA-R.S. 17:3399.33 (protecting freedom of association for "belief-based" student groups);); N.C.G.S.A. §116-40.12 (same); Va. Code. Ann. §23-9.2:12 (same). Alabama, Arkansas, Iowa and South Dakota have also protected freedom of association for religious and other student groups. Idaho, Ohio, Oklahoma, Kansas and Tennessee ensure freedom of association specifically for religious student groups.

AFPF also encourages the Department to eliminate the requirement that private colleges comply with their own stated free speech policies and notify the Department (and face automatic rescission of their grants) if a court has determined that they failed to follow their policies. AFPF is concerned that this aspect of the proposed rule may expose private universities and colleges to substantial liability and discourage, rather than protect, free expression. Instead of supporting and expanding protections for free expression for students and professors in private universities, the proposed rule is likely to disincentivize many private universities from providing explicit free speech guarantees in the first place.

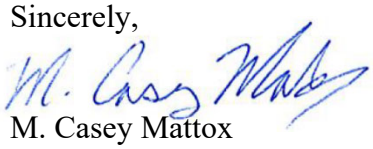
The proposed rule makes a private college's compliance with its own policies on free expression a "material condition of the grant."[15] This exposes private colleges that voluntarily extend free speech protections to their students, but then fail to live up to their promise in a given circumstance, to the risk of False Claims Act liability.[16] Even if private colleges avoid would-be False Claims Act relators alleging breaches of their voluntary choice to affirm free speech protections in their policies, these colleges could still face potential contract or other claims that would imperil the college's participation in federal grant programs.

Thus, the safest path for a private university would be to simply eliminate any express promises that the school protects students' rights of free expression. Private colleges would be incentivized to water down their promises of free speech protections. This result would diminish rather than enhance protection for student expression on private university campuses. Thus, AFPF strongly urges the Department not to finalize the portion of the proposed rule that would impose obligations on private universities as it is likely to disincentivize free speech protections on these campuses.

III. Conclusion

AFPF appreciates the Department's effort to implement the Executive Order in a way that would ensure greater protections for free expression and association on college campuses while respecting academic freedom and institutional autonomy. We encourage the Department to finalize the proposed rule with the modifications outlined above.

Sincerely,



M. Casey Mattox
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Americans for Prosperity Foundation

[15] 85 Fed. Reg. at 3191.
[16] *See Universal Health Servs., Inc. v. United States ex. rel. Escobar*, 136 S. Ct. 1989 (2016) (finding False Claims Act liability hinges on the "materiality" of the violation to the government's payment decision).