

February 18, 2020

Honorable Betsy DeVos
Secretary of Education
c/o Jean-Didier Gaina
U. S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Docket ID ED-2019-OPE-0080

Dear Secretary DeVos:

On behalf of its more than 1,000 members, including 970 private nonprofit colleges and universities, the National Association of Independent Colleges and Universities (NAICU) and the undersigned associations submit these comments in response to the Department of Education's January 17, 2020 notice of proposed rulemaking. Our comments focus on the aspects of the proposed regulations that would affect private nonprofit institutions, specifically 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.

We appreciate that the proposed regulations would recognize and respect the right of private institutions to determine their own policies and practices, consistent with their distinctive institutional missions and cultures. Private institutions are deeply committed to fostering open, intellectually engaging and diverse debate, as the executive order seeks to encourage. However, NAICU shares concerns articulated in the comments submitted by the American Council on Education (ACE) and the Association of American Universities (AAU) about the possible impact of the proposed regulations on private nonprofit colleges and universities.

Specifically, we are concerned that the proposed regulations, which would require institutions to abide by their stated institutional policies regarding freedom of speech and academic freedom as a material condition of receiving a grant from the Department, could lead to a variety of unintended consequences, including, but not limited to, the following:

- The proposed rules could encourage excessive and frivolous litigation, due to both the regulations themselves and to the potential for liability under the False Claims Act, and could undermine the goal of maintaining broad protections for campus speech.
- Depending on the jurisdiction, courts could reach different conclusions about whether an institution has violated its stated policies—and even whether an institutional policy violation gives rise to legal remedies, as not all jurisdictions agree about whether institutional policies are legally binding contracts. Inconsistency in legal standards across jurisdictions could result in a loss of federal grants for some but not others, even when the same or similar conduct is at issue.



- Unique considerations in the freedom of speech context call for greater clarity in defining when the Department may terminate federal grant funding.
- The proposed rules confuse the concepts of freedom of speech and academic freedom.

While we appreciate the ways in which the proposed rule recognizes that private nonprofit institutions are not subject to the First Amendment, we agree with ACE and AAU that the proposed rule could undermine the very thing it purports to promote, namely environments that promote open, intellectually engaging and diverse debate. NAICU therefore endorses the recommendations of ACE and AAU as they relate to private nonprofit institutions of higher education.

Thank you for the opportunity to comment on the proposed regulations.

Sincerely,

A handwritten signature in cursive script that reads "Barbara K. Mistick".

Barbara Mistick
President

On behalf of:

Association of Catholic Colleges and Universities
Association of Jesuit Colleges and Universities
Council of Independent Colleges