



**Office of the President**

1700 Van Hise Hall  
1220 Linden Drive  
Madison, Wisconsin 53706-1559  
608-262-2321  
[rcross@uwsa.edu](mailto:rcross@uwsa.edu)  
[www.wisconsin.edu](http://www.wisconsin.edu)

February 17, 2020

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

**RE: Docket ID ED-2019-OPE-0080**

Dear Mr. Gaina,

I write on behalf of University of Wisconsin System (UW System) leadership to provide feedback on the U.S. Department of Education's (ED's) proposed rule relating to "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."

The proposed rule emphasizes the importance of compliance with the First Amendment of the U.S. Constitution. The UW System is committed to promoting open, intellectually engaging, and diverse debate on all our campuses and welcomes discussion on this issue. The proposed rule also emphasizes that public institutions must treat religious and nonreligious student organizations the same. The UW System embraces our students' right to expressive association and shares ED's commitment to prohibiting discrimination against individuals or groups on the basis of religion and any other legally protected characteristics.

However, as described in more detail below, parts of the proposed rule cause concern and others need clarification to more effectively accomplish our shared goal of promoting free inquiry and association.

**Introduction**

The UW System is one of the largest systems of public higher education in the country, serving more than 170,000 students each year and employing approximately 39,000 faculty and staff statewide. The UW System has a longstanding tradition of support for freedom of expression, dating back to 1894. As stated by our Board of Regents on September 18, 1894:

Whatever may be the limitations which trammel inquiry elsewhere, we believe the great state University of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone the truth can be found.

The Board of Regents have since reaffirmed its commitment to freedom of expression and academic freedom on multiple occasions, in 1922, 1949, 1962, 1964, 1985, 1994, 2011, 2015, and most recently in 2017. The UW System works on an ongoing basis to improve our policies and procedures with respect to free inquiry, including our recent adoption of a Regent Policy Document entitled "Commitment to Academic Freedom and Freedom of Expression."

The UW System also explicitly recognizes freedom of association rights. Specifically, our Regent Policy Document on “Recognition of Student Organizations” provides as follows:

Student organizations that select their members or officers on the basis of commitment to a set of beliefs (e.g., religious or political beliefs) may limit membership, officer positions, or participation in the organization to students who affirm that they support the organization’s goals and agree with its beliefs, so long as no student is excluded from membership, officer positions, or participation on the basis of his or her race, color, creed other than commitment to the beliefs of the organization, religion, national origin, disability, ancestry, age, sexual orientation, pregnancy, marital status or parental status, or, unless exempt under Title IX, sex.

With this background, please consider the UW System’s comments pertaining to ED’s proposed rule, which highlight: (1) areas of support, (2) areas of concern, and (3) areas in need of clarification. In each section, the UW System offers recommendations to help improve the draft rule.

### **Areas of Support**

The UW System strongly supports the idea that recipients of federal grant funds must comply with the law, including the First Amendment, as a condition of receiving grant money. Including the First Amendment in the existing list of statutes at 34 CFR 75.500 and at 34 CFR 76.500 will emphasize the importance of compliance with the First Amendment to institutions of higher education (IHEs). Specifically, ED’s proposed rule clarifies that compliance with the First Amendment is on par with compliance with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act.

### **Areas of Concern**

**ED’s existing remedial structure has the potential to be unnecessarily punitive. This is particularly concerning in the context of First Amendment compliance and will not advance compliance.** ED’s ability to withhold funding for a violation of a material condition of a grant is not currently tied to whether the violation is related to the program being funded. As a result, there is the potential that researchers could suffer adverse consequences for violations completely unrelated to their research. This is particularly concerning in light of the proposed rule, given that First Amendment jurisprudence is complicated and ensuring compliance with it at all times and in every instance can be challenging. If an adverse judgment in a First Amendment case could lead to the termination of a grant in a program that had nothing to do with the free speech controversy, it is questionable whether such a consequence is the best mechanism to ensure future compliance, as the actors are entirely different. Further, individual research would be hampered by such a funding loss, and those funding losses would slow not only the research itself, but also the career of the researcher(s) whose advancement is often tied to research funding, discoveries, and publications. The funding loss accordingly could result in outcomes that are not in the public interest and could involve negative consequences that considerably outweigh those involved in the underlying First Amendment dispute.

**Recommendation:** The UW System believes there should be meaningful consequences for violations of the First Amendment, but researchers who are not responsible for the First Amendment issues at hand should not have to forfeit their funding if someone else at the institution makes an error in a difficult case. In light of this, for First Amendment cases, any loss of funding should be tied to whether the violation is related to the program being funded.

**ED’s proposed rule imposes unnecessary reporting obligations.** The proposed regulation requires IHEs to affirmatively submit a copy of the final, non-default judgment to ED when a court has determined that the IHE violated the First Amendment. There is no similar affirmative reporting requirement for violations of the other statutes listed at 34 CFR 75.500 and at 34 CFR 76.500. Using different reporting procedures for First Amendment violations as opposed to other types of violations, such as discrimination based on race or other protected characteristics, creates unnecessary complication. Using the same procedures for all compliance violations is less administratively burdensome, and it creates clear expectations for IHEs.

**Recommendation:** The UW System recommends that IHEs not be required to affirmatively submit court judgments in First Amendment-related cases.

**ED’s proposed rule creates unequal standards for student organizations.** As described above, the UW System already allows student organizations to restrict membership and leadership in their organization on the basis of adherence to beliefs and tenants of the organization. This allowance, however, is not tied specifically to religious belief. ED’s proposed rule, on the other hand, applies only to faith-based organizations and not to other groups with specific beliefs or viewpoints such as political groups or affinity groups. The implication is that faith-based student organizations are entitled to additional rights, which suggests a preference for faith-based student organizations.

**Recommendation:** The UW System recommends that ED broaden the allowance as UW System has done in the aforementioned Regent Policy Document on “Recognition of Student Organizations.”

### **Areas in Need of Clarification**

#### **Clarify the definition of “final” non-default judgment or expand the 30-day reporting deadline.**

Typically, once a judgment is entered, an IHE has a period of time to decide whether to appeal, which is often 30 days. The reporting period should not start to run until after this appeal time has expired.

**Recommendation:** To the extent that ED keeps the affirmative reporting requirements discussed above, the UW System respectfully requests ED consider adding a definition of “final” to the proposed rule to provide guidance beyond that currently contained in the proposed rule, given the importance of this term when determining an institution’s obligations under the proposed rule. Alternatively, ED could expand the reporting deadline to 60 or 90 days.

**Effective date and application of the proposed rule.** Because IHEs may be required to revise their policies, the UW System proposes the final rule not be effective immediately. Rather, the consideration should be given to setting the effective date sufficiently far in the future to permit institutions to bring their policies into compliance.

**Recommendation:** The UW System recommends at least eight months from the time of the posted final rule, which is consistent with the Higher Education Act’s Master Calendar.

### **Conclusion**

As stated above, the UW System believes the proposed rule will emphasize the importance of the First Amendment, which we fully support. However, the proposed rule could be improved as described above. Such improvements are important given that ED is the first of twelve federal agencies to propose regulations in response to Executive Order 13864, and the eleven other federal agencies may use ED’s model.

Thank you for the opportunity to comment on this proposed rule, and please let us know if we can provide you with any additional information or clarification.

Sincerely,

A handwritten signature in black ink that reads "Ray Cross". The signature is written in a cursive style with a large, prominent "R" and "C".

Ray Cross  
President  
University of Wisconsin System