



DEPARTMENT OF EDUCATION

Notice of Reporting Process

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education publishes information on how institutions of higher education may submit to the Secretary of Education a copy of certain final, non-default judgments as required under newly promulgated regulations in the Department's Religious Liberty and Free Inquiry Final Rule, ("Religious Liberty and Free Inquiry Final Rule" or "Final Rule"). The Department also publishes information about how a person may report a violation of newly promulgated regulations in the Final Rule that ensure equal treatment of religious student organizations at public institutions of higher education.

FOR FURTHER INFORMATION CONTACT: Gregory Martin, U.S. Department of Education, 400 Maryland Avenue, SW, room 281-15, Washington, DC 20202. Telephone: (202) 453-7535. Email: Gregory.Martin@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service, toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: The Department publishes this notice to inform public institutions of higher education

how to submit to the Secretary a copy of a final, non-default judgment by a State or Federal court that the public institution or an employee of the public institution, acting in his or her official capacity, violated the First Amendment to the U.S. Constitution, as required under 34 CFR 75.500(b) and 34 CFR 76.500(b) of the Final Rule, 85 FR 59,916 (Sept. 23, 2020). The Department also publishes this notice to inform private institutions of higher education how to submit to the Secretary a copy of a final, non-default judgment by a State or Federal court to the effect that the private institution or an employee of the private institution, acting on behalf of the private institution, violated its stated institutional policy regarding freedom of speech or academic freedom, as required under 34 CFR 75.500(c) and 34 CFR 76.500(c) of the Final Rule. Finally, the Department publishes this notice to inform the public how a person may report a violation of newly promulgated regulations in the Final Rule, 34 CFR 75.500(d) and 34 CFR 76.500(d), that ensure equal treatment of religious student organizations at public institutions of higher education.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the person listed under FOR FURTHER INFORMATION CONTACT.

Electronic Access to This Document: The official version of this document is the document published in the *Federal Register*. You may access the official edition of the *Federal Register* and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the *Federal Register*, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the *Federal Register* by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: November 20, 2020.

Robert L. King,
Assistant Secretary for
Postsecondary Education.

Submission of a Final, Non-Default Judgment to the
Secretary Pursuant to 34 CFR 75.500(b)-(c) and 34 CFR
76.500(b)-(c)

Under 34 CFR 75.500(b) and 34 CFR 76.500(b) of the Final Rule, which becomes effective on November 23, 2020, a public institution of higher education must submit to the Secretary a copy of a final, non-default judgment by a State or Federal court that the public institution or an employee of the public institution, acting in his or her official capacity, violated the First Amendment no later than 45 calendar days after such final, non-default judgment is entered. Under 34 CFR 75.500(c) and 34 CFR 76.500(c) of the Final Rule, a private institution of higher education must submit to the Secretary a copy of a final, non-default judgment by a State or Federal court to the effect that the private institution or an employee of the private institution, acting on behalf of the private institution, violated its stated institutional policy regarding freedom of speech or academic freedom no later than 45 calendar days after such final, non-default judgment is entered. A final judgment is a judgment that the institution chooses not to appeal or that is not subject to further appeal.¹ Public and private institutions of higher education should submit to the Secretary a copy

¹ 34 CFR 75.500(b)(1), (c)(1); 34 CFR 76.500(b)(1), (c)(1).

of any such final, non-default judgment by a State or Federal court by e-mail to freespeechjudgment@ed.gov no later than 45 calendar days after such final, non-default judgment is entered.

As previously noted, the Final Rule becomes effective November 23, 2020, and the Department will not enforce the Final Rule retroactively.² Accordingly, under 34 CFR 75.500(b) and 34 CFR 76.500(b) of the Final Rule, a public institution does not need to submit a copy of a final, non-default judgment by a State or Federal court concerning conduct that violated the First Amendment if such conduct occurred before November 23, 2020. Similarly, under 34 CFR 75.500(c) and 34 CFR 76.500(c) of the Final Rule, a private institution does not need to submit a copy of a final, non-default judgment by a State or Federal court concerning conduct that violated a stated institutional policy regarding freedom of speech or academic freedom if such conduct occurred before November 23, 2020. A public institution must submit to the Secretary a copy of a final, non-default judgment by a State or Federal court concerning

² Federal agencies authorized by statute to promulgate rules may only create rules with retroactive effect where the authorizing statute has expressly granted such authority. See 5 U.S.C. 551 (referring to a "rule" as agency action with "future effects" in the Administrative Procedure Act); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

conduct that violated the First Amendment if such conduct occurred on or after November 23, 2020. Similarly, a private institution must submit to the Secretary a copy of a final, non-default judgment by a State or Federal court concerning conduct that violated a stated institutional policy regarding freedom of speech or academic freedom if such conduct occurred on or after November 23, 2020.

Reporting Alleged Violations of 34 CFR 75.500(d) and 34 CFR 76.500(d) - Equal Treatment of Religious Student

Organizations at Public Institutions of Higher Education

Under 34 CFR 75.500(d) and 34 CFR 76.500(d) of the Final Rule, a public institution as a material condition of the Department's grant "shall not deny to any student organization whose stated mission is religious in nature and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs." Anyone may report an alleged violation of 34 CFR 75.500(d) and 34 CFR

76.500(d) to the Department by e-mail at religiousliberty@ed.gov.

As explained in the preamble to the Final Rule, an “all-comers” policy as described in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), does not violate the Final Rule’s requirement regarding equal treatment of religious student organizations at public institutions in 34 CFR 75.500(d) and 34 CFR 76.500(d). A true all-comers policy “mandate[s] acceptance of all comers” meaning that “[s]chool-approved groups must ‘allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [the student’s] status or beliefs,’” and without any exceptions.³ A non-discrimination policy with enumerated protected classes is not an all-comers policy and, therefore, cannot be applied to prohibit religious student organizations from having faith-based membership or leadership criteria.⁴ Under the stipulated facts of *Martinez*, the all-comers policy applied to all 60 groups on campus, including “political groups (e.g., the . . . Democratic Caucus and the . . . Republicans), religious groups (e.g., the . . . Jewish Law Students Association and the . . . Association of Muslim Law Students), groups that promote[d] social causes (e.g., both pro-choice and pro-life groups), groups organized

³ *Id.* at 671 (citations omitted).

⁴ *Id.* at 678 n.10.

around racial or ethnic identity (e.g., the Black Law Students Association, the Korean American Law Society, La Raza Law Students Association, and the Middle Eastern Law Students Association), and groups that focus[ed] on gender or sexuality (e.g., the Clara Foltz Feminist Association and Students Raising Consciousness at Hastings).”⁵ The implications of such an all-comers policy were that “the . . . Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization.”⁶ With respect to a true all-comers policy, pro-choice groups could not bar membership or leadership positions from pro-life individuals; Muslim groups could not bar membership or leadership positions from non-Muslims; the feminist group could not bar membership or leadership positions from misogynists; sororities could not bar membership or leadership positions from males; fraternities could not bar membership or leadership positions from females; and so on. Such an all-comers policy is constitutional under *Martinez* and permissible under the Final Rule, but is not required by the U.S. Constitution, the holding in *Martinez*, or the Final Rule. Indeed, many public institutions of higher education elect not to implement a true all-comers policy due to these obvious practical difficulties. Absent a true

⁵ *Id.* at 709.

⁶ *Id.* at 675.

all-comers policy that is uniformly applied, §§ 75.500(d) and 76.500(d) of the Final Rule prevent public institutions from failing to recognize religious student organizations because of their faith-based membership or leadership criteria. Whether a policy is a true “all-comers” policy may be challenged if the policy or the application of the policy results in a violation of 34 CFR 75.500(d) or 34 CFR 76.500(d). Other policies also may be challenged if the policy or the application of the policy results in a violation of 34 CFR 75.500(d) and 34 CFR 76.500(d).

[FR Doc. 2020-26108 Filed: 11/24/2020 8:45 am; Publication Date: 11/25/2020]