



September 20, 2017

VIA EMAIL and FEDERAL eRULEMAKING PORTAL
Hilary.Malawer@ed.gov

Hilary Malawer, Assistant General Counsel
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue SW, Room 6E231
Washington, DC 20202

Re: Request for Written Comments on Possible Repeal, Replacement, or Modification of Regulations and Guidance Issued by the Department of Education

Dear Ms. Malawer:

On behalf of Brigham Young University (BYU), I appreciate the opportunity to submit this response to the request from the Department of Education (DOE) for written comments about DOE regulations and guidance related to postsecondary education programs that have an impact on policy. We welcome DOE's efforts to seek comment on possible changes to the heavy regulatory burden that institutions of higher education face—a burden that has fundamentally altered the higher education landscape and the opportunities available to our students.

Our comments focus on four key needs with respect to current DOE regulations and guidance: (1) recognizing and preserving the rule of law in the establishment and enforcement of public policy in higher education; (2) allowing postsecondary educational institutions the freedom to establish and enforce their own policies as necessary to fulfill their own unique missions; (3) alleviating the burden of the regulatory and sub-regulatory tsunami that has swept across higher education; and (4) eliminating overly burdensome, duplicative, inconsistent, and/or ambiguous regulations and guidance. We also provide examples of regulations, guidance, and practices that need these types of changes.

1. Recognizing and Preserving the Rule of Law

Belief in the rule of law is a value shared by all institutions of higher education. This fundamental value espouses the principle that we are governed by and accountable to laws, and not the arbitrary decisions of government officials. One of our core religious tenets at BYU is that “we believe . . . in honoring, obeying, and sustaining the law.”¹ As Dallin H. Oaks, one of our past

¹ The Church of Jesus Christ of Latter-day Saints, 12th Article of Faith.

presidents and a current leader in the LDS Church, stated at the founding of our law school, “[d]evotion to the rule of law means that our preeminent political allegiance is to the law and the offices of government and not to the persons who occupy those offices.”²

A troubling trend in higher education has been the creation and imposition of federal mandates, not through the statutorily required process of public notice and comment, but through declarations, letters, and other publications, often referred to as “sub-regulatory guidance.” This trend has left institutions of higher education guessing about whether and how to comply with specific statutes and regulations, especially when their interpretation has less to do with what they say than it does with the agenda of the party tasked with enforcing them.

Even more troubling has been the apparent arbitrary enforcement of statutes and regulations against institutions that have genuinely sought to comply with the law as written. Despite institutions’ best efforts to protect their students and to fulfill legal mandates in a manner that is fair, consistent, and reasonable, some institutions have been confused by inconsistent enforcement and subjective interpretations of the law by government agencies and bureaucrats.

Accordingly, we support efforts to establish clear, concise, fair, and publicized regulations for higher education through the lawful rulemaking process, and not through executive fiat. These standards must be applied and administered in a manner that is consistent and open.

2. Allowing Institutions the Freedom to Fulfill Their Unique Missions

A central focus of every postsecondary educational institution is the ultimate success and happiness of our students. In the pluralistic world of higher education, each institution aims to fulfill this central focus in its own unique way through its own unique mission. This institutional diversity is critical to providing students with a tailored educational experience of their choice, which allows them not only to discover who they are but also to develop their own distinct talents and abilities.

As a private, non-profit, religious institution, BYU’s unique mission “is to assist individuals in their quest for perfection and eternal life.” We strive to fulfill this mission by “provid[ing] a period of intensive learning in a stimulating setting where a commitment to excellence is expected and the full realization of human potential is pursued.”

Other private institutions, particularly religious institutions, also approach higher education from a perspective unique to their individual missions. We believe that public good is best served when private institutions are free to pursue their own missions and values, even when these differ from popular opinion or the values promoted by public institutions.

Rather than acknowledging the important role of private institutions in higher education, DOE has imposed burdensome standards that typically would apply only to state actors. For example, instead of recognizing institutions’ efforts to protect students and promote fundamental fairness, DOE in effect has imposed on private institutions a constitutional standard of “due process,” and has required institutions to establish pseudo-court systems applying evidentiary standards (e.g., “preponderance of the evidence”) in an effort to adjudicate issues involving student conduct.

In the past, DOE at times has acted with particular hostility toward religious institutions and their beliefs. For example, DOE created what has been referred to as the “shame list” of

² Dallin H. Oaks, Remarks at Opening Ceremony of the J. Reuben Clark Law School, Aug. 27, 1973.

institutions seeking to preserve their religious freedom by applying for exemptions from certain interpretations of Title IX requirements that conflict with core religious beliefs.

Our friends at public institutions also have their own missions to provide the benefits of public education to their students and to better society as a whole.

Despite the distinctive missions of public and private institutions, federal regulation has eroded important differences between public and private institutions by imposing a one-size-fits-all regulatory regime across all colleges and universities. Yet, in higher education, there is no one size that fits all schools, and especially not all students. Therefore, federal regulation generally should not require institutions to adopt identical, detailed policies.

Postsecondary educational institutions differ widely in their objectives, student bodies, personnel, locations, resources, and capabilities. Students themselves also differ widely in their backgrounds, identities, characters, and goals. Yet, regulation of higher education has evolved to assume the false notion that each institution and each student should be subject to a detailed set of rules and regulations, regardless of their circumstances and regardless of whether such rules are in their best interests. The reality is that institutions and students can accomplish more through self-discovery and self-governance than from complex, sweeping policy mandates.

For this reason, we welcome efforts to repeal, replace, or modify regulations and guidance, which, in their current form, undermine the ability of institutions—both public and private—to fulfill their unique missions. We recognize and support a level of baseline uniformity that is necessary to protect the fundamental rights of individuals and to preserve certain core values of our society (e.g., fairness, justice); however, institutions of higher education must be free to establish and maintain their own policies and procedures that help their students succeed and be safe.

3. Alleviating the Heavy Burden of Regulation

Finally, perhaps the greatest burden that colleges and universities face today is the tsunami of federal regulations and guidance that have overwhelmed higher education in recent years. The exponential growth in the number of federal rules and interpretations of those rules has made it virtually impossible for institutions to comply fully with what the law requires.

According to the Regulatory Studies Center at George Washington University, the number of pages annually published in the federal register was more than 97,000 in 2016, and the most recent edition of the Code of Federal Regulations now consists of more than 180,000 pages.³ These figures are unprecedented in our nation's history.

Jonathan Alger, now president of James Madison University, provided this accurate description of the regulatory burden faced by institutions of higher education: “While some people still cling to the notion of higher education as the isolated ivory tower that somehow is set apart from the rest of society, the reality is that higher education is one of the most highly regulated sectors of the American economy.”⁴

³ Regulatory Studies Center, George Washington University, *Reg Stats*, <https://regulatorystudies.columbian.gwu.edu/reg-stats>, last visited Sep. 18, 2017.

⁴ Jonathan Alger, *Higher Education Law and Policy 2.1—The Rise of the Compliance University*, 33rd Annual Conference on Law and Higher Education (Feb. 20, 2012).

Instead of committing personnel and funding to the education and development of their students, colleges and universities have been forced to divert already scarce resources to complying with a constantly evolving regulatory regime. The real costs of this massive regulatory burden include (1) a substantial increase in administrative costs and tuition costs; (2) a decrease in funding available to meaningfully serve students and fulfill the institutional missions of teaching and research; and (3) interference with the institutional autonomy, including academic and administrative decision making, which is foundational to our nation's system of higher education.⁵

We recognize that some regulation is necessary to enforce and implement statutory mandates. Nonetheless, higher education cannot succeed in fulfilling its objectives if the historic trend of rapidly increasing government regulation continues. Therefore, to the extent that DOE regulations are duplicative, overly detailed, inconsistent with other regulations, or even oppressive, we, along with all other institutions of higher education, welcome their amendment or repeal.

4. Examples of DOE Regulations Needing Change

The following are recommendations regarding a handful of DOE regulations, guidance, and practices that might be modified or reconsidered, based on the above-outlined principles:

- a. Further clarifying and harmonizing the requirements imposed by the Clery Act (as amended by the Violence Against Women Act of 2013) on the one hand, and Title IX, on the other hand—both of which have been interpreted to address sexual assault.
- b. Streamlining and ensuring consistency between multiple sets of agency regulations that implement the same statute. For example, the Age Discrimination Act has published regulations from not only the Department of Education (34 C.F.R. pt. 110) but also the Department of Labor (29 C.F.R. pt. 35), the Department of Health and Human Services (45 C.F.R. pt. 90), and the National Science Foundation (45 C.F.R. pt. 617). Likewise, Title IX regulations are published in more than a dozen different places, besides 34 C.F.R. pt. 106.
- c. Avoiding unfair and arbitrary guidance or enforcement of laws, such as Section 504 of the Rehabilitation Act or the Gramm-Leach Bliley Act, by reference to standards that are not mandated by statute or regulation (e.g., WCAG 2.0, NIST).
- d. Providing greater leeway to institutions in how they provide required notices and disclosures to students and employees under various federal statutes (e.g., the Clery Act, FERPA, the Higher Education Act, the Drug Free Schools Act).
- e. In an investigation by the Office for Civil Rights, eliminating the practices of
 - (i) refusing to provide information about a complainant or their specific allegations, and
 - (ii) accepting complaints from those who have no affiliation with the institution.
- f. Allowing institutions, particularly religious institutions, more freedom to adopt tailored policies (e.g., student discipline policies) that best serve the needs of their students while preserving students' rights and the unique mission of the institution.

Through the current effort to repeal, replace, or modify existing federal regulations and guidance related to postsecondary education, DOE has a rare opportunity to protect the rule of law, to allow institutions to fulfill their unique missions, and to alleviate the heavy regulatory burden on

⁵ Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Middle of the Room*, 36 J. COLL. & UNIV. L. 749, 761 (2010).

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colleges and universities. In doing so, we urge DOE to consider the specific challenges faced by institutions of higher education as they strive to protect and to serve their students and implement effective compliance programs. By understanding these challenges, DOE and institutions of higher education can work cooperatively to identify those regulatory provisions most in need of change.

We thank you for the opportunity to submit these comments and welcome the ongoing dialogue on these important issues of public policy.

Sincerely,

A handwritten signature in blue ink that reads "Michael R. Orme". The signature is written in a cursive, slightly stylized font.

Michael R. Orme
General Counsel, Brigham Young University