STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 31, 2014

Opinion No. 14-41

Recognition of Student Religious Groups by Post-secondary Educational Institutions

QUESTION

Does Senate Bill 2294/House Bill 2032 of the 108th General Assembly (2014) (hereinafter "SB2294") violate the United States or Tennessee Constitutions?

OPINION

SB2294 is constitutionally suspect under the First Amendment to the United States Constitution as applied to private institutions of higher education.

ANALYSIS

SB2294 would amend the Tennessee Human Rights Act by adding a new § 4-21-1101, which would prohibit any post-secondary educational institution[1] from denying recognition or access to programs, funding, facilities, or scheduling of activities to a student organization on the basis of the religious content of the organization's speech or the exercise of the organization's rights with respect to choosing its leaders. SB2294, § 1 (new § 4-21-1101(a), (b)). Violation of this provision would be a discriminatory practice subject to the remedies available under Tenn. Code Ann. § 4-21-301 to -312. SB2294, § 1 (new § 4-21-1101(c)).

SB2294 is substantially similar to the bills considered in Tenn. Att'y Gen. Op. 13-05 (Jan. 11, 2013) and Tenn. Att'y Gen. Op. 13-20 (Mar. 13, 2013). In Op. 13-05, this Office addressed the constitutionality of a bill[2] that would have worked to prohibit any private institution of higher education receiving substantial state funding from discriminating against a student organization on the basis of religion. Specifically, the bill prohibited such institutions from denying recognition or otherwise available access to programs, funding, or facilities to a student organization on the basis of the religious content of the organization's speech or the exercise of the

[1] The bill defines "post-secondary educational institution" as in Tenn. Code Ann. § 49-7-2003, i.e., generally stated, a school, college, or university offering educational credentials, instruction, or services to persons who have completed secondary education.

[2] Op. 13-05 involved House Bill 3576/Senate Bill 3597 of the 107th General Assembly (2012).

organization's rights with respect to choosing its members or leaders. In effect, the bill precluded an educational institution from adopting or enforcing an all-comers policy—a policy that requires supported student organizations to accept all students who wish to join. *See id.* at 3 n.2.

This Office concluded that application of the bill to private institutions was constitutionally suspect because it utilized state funds to impose an arguably unconstitutional condition on the receipt of such funds.

> If [the bill] had directly required a private educational institution to so structure its supported student associations, such legislative action would be constitutionally suspect as an impermissible legislative intrusion upon a private institution's implicit right under the First Amendment to the United States Constitution to freely associate with others in "a wide variety of political, social, economic, education, religious and cultural ends."

Op. 13-05, at 7 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000)). *See also* Tenn. Att'y Gen. Op. 13-20 (Mar. 13, 2013) (likewise finding constitutionally suspect a bill that would make a private educational institution's compliance with the same student-organization requirements a condition of its exercise of police powers).[3]

SB2294 does directly what the bills addressed in Op. 13-05 and Op. 13-20 did only indirectly: require a private higher-education institution that has instituted an all-comers policy to recognize and support student organizations that do not adhere to that policy. Accordingly, for the reasons expressed in those prior opinions, SB2294, too, is constitutionally suspect. "It is probable that . . . a state legislative action attempting to control how a private institution regulates its student associations would run afoul of the institution's First Amendment protection." Op. 13-05, at 8.

SB2294 differs from the two prior bills in one respect. The earlier legislation provided that a religious student organization would be free to determine that only persons professing, and comporting themselves in conformity with, the faith of the group qualify to serve as either *members* or *leaders*. *See* Op. 13-20, at 2; Op. 13-05, at 2. SB2294 provides that a religious organization may make such a determination, but only with respect to persons who qualify to serve as *leaders*. SB2294, § 1 (new § 4-21-1101(b)).

But even with this change, the bill remains constitutionally suspect. In *Hsu v. Roslyn Union Free School Dist.*, 85 F.3d 839 (2d Cir. 1996), the Second Circuit focused

[3] Op. 13-20 involved House Bill 1150/Senate Bill 1241 of the 108th General Assembly (2013). Both Op. 13-20 and Op. 13-05 concluded that the legislation was facially constitutional as applied to public institutions of higher education.

on a student organization's decision to allow only Christians to be its *officers* in holding that a local school district could be constitutionally required to recognize the student organization. 85 F.3d at 858-59. The court determined that this decision of the organization was calculated to and would affect the religious content of the speech at its meetings. *Id.* But *Hsu* involved a public, not a private, school. And the associational interest of a private educational institution in making clear that all students will have the chance to participate equally no doubt extends to both membership *and* leadership opportunities in school-supported student groups. *See Christian Legal Soc'y Chapter of the Univ. of Calif., Hastings Coll. of the Law v. Martinez*, 130 S.Ct. 2971, 2979 & n.2 (2010) (noting school's view of its all-comers policy as requiring school-approved groups to "allow any student to participate, become a member, or *seek leadership positions* in the organization") (emphasis added).

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