

# United States Senate

WASHINGTON, DC 20510

March 24, 2023

The Honorable Miguel A. Cardona  
Secretary  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, D.C. 20202

RE: Comments on Proposed Rule: Direct Grant Programs, State-Administered Formula Grant Programs, 88 FR 10857 (February 22, 2023), (RIN): 1840-AD72

Dear Secretary Cardona,

We write in strong opposition to the Proposed Rule *Direct Grant Programs, State-Administered Formula Grant Programs*, 88 FR 10857, which would rescind two provisions of what has been referred to as the “Religious Liberty and Free Inquiry Rule.”<sup>1</sup> The Religious Liberty and Free Inquiry Rule ensures the equal treatment of religious student organizations across the country who are subjected to discrimination. The Rule also affirms the First Amendment rights of members of religious student organizations at public institutions of higher education. The Proposed Rule should be withdrawn, and the provisions of the Religious Liberty and Free Inquiry Rule should be maintained to ensure that no student or religious student organization is subjected to unconstitutional discrimination.

The First Amendment protects the rights to free speech, assembly and religious exercise, and serves as the cornerstone for our laws and society. Few entities are more integral to the promotion and protection of such vital constitutional rights than institutions of higher education, where the free expression of ideas and beliefs informs and educates the next generation. Unfortunately, limitations on religious exercise, specifically the rights of members of religious student organizations to elect and maintain leaders who share the organization’s fundamental principles, have been threatened in recent years, as academic institutions engage in religious discrimination in the name of inclusion.

The Religious Liberty and Free Inquiry Rule ensures that, as a condition of participating in direct grant programs and state administered grant programs, public institutions of higher education comply with the First Amendment. This requirement ensures that religious student organizations have access to the same benefits, rights, and privileges as other student organizations.

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<sup>1</sup> *Direct Grant Programs, State-Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program*, 85 FR 59916.

Specifically, the Rule requires that grantees “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.”<sup>2</sup>

In addition to clarifying and affirming protections for religious student organizations, the Religious Liberty and Free Inquiry Rule also clarified the standard by which religious education institutions are exempt from Title IX.<sup>3</sup>

Despite this Rule providing clarity and useful protections for numerous religious student organizations around the country, under your leadership, ahead of formal rulemaking, a former official of the Department of Education (the Department) publicly announced in a 2021 blog on the Department’s website that you planned to remove these regulatory protections for religious student organizations.<sup>4</sup> At that time, Members of Congress expressed concern with the intent of the Department to remove those important regulatory clarifications.<sup>5</sup> We remain concerned with the impact the recession of these provisions will have on equal access for religious student organizations on campus.

The Department premised its reasoning for removing these regulatory protections in the Proposed Rule on three unwarranted claims. First, the Department asserts the Rule is currently causing confusion within institutions. However, Department staff could not provide *any* examples of formal complaints of confusion from a college or university during a bicameral, bipartisan briefing on this Proposed Rule with Congressional education committee staff. Following this briefing, the Department has failed to produce any formal complaints. Further, we have not heard from institutions or their associations about any confusion, though we have heard from numerous stakeholders, including religious student organizations, who have benefitted from the clarifications afforded by the Rule. Rather than cause confusion, the Religious Liberty and Free Inquiry Rule provides assurances and clarity to institutions and religious student organizations, who are able to rely on the explicit text of the regulation to prevent and respond to any instances of discrimination.

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<sup>2</sup> *Id.* at 59979-59980

<sup>3</sup> While the Proposed Rule does not make any changes to the Rule’s codification of factors that a faith-based institution may rely upon to demonstrate that it is “controlled by a religious organization” for purposes of Title IX, we urge the Department to similarly retain those provisions if it issues a Final Rule. The clarification of the “controlled by” standard gives fair notice to stakeholders and the public of when a religious exemption under Title IX applies, and balances the Department’s interest in safeguarding religious freedom for educational institutions with its interest in ensuring enforcement of Title IX. It would be arbitrary and capricious for the Department to alter such provisions in a Final Rule when it did not propose to do so.

<sup>4</sup> <https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/>

<sup>5</sup> <https://www.lankford.senate.gov/news/press-releases/lankford-blunt-scott-urge-biden-administration-to-protect-religious-freedom-at-public-universities-colleges->

Second, the Proposed Rule claims it is unduly burdensome for the Department to investigate allegations regarding religious student organizations. It is an alarming admission that the Department would rather allow discrimination against religious student organizations than ensure compliance with First Amendment protections as a condition of receiving grants. The Department is already tasked with monitoring and investigating numerous other civil rights violations including claims of discrimination based on sex under Title IX of the Education Amendments of 1972 and claims of discrimination based on race, color and national origin under Title VI of the Civil Rights Act of 1964 that it has not claimed to be burdensome. Recently, the Department even issued guidance regarding oversight of all contractors that an institution employs to assist with its responsibilities under Title IV of the Higher Education Act of 1965.<sup>6</sup> Institutions informed us that this would require the Department to oversee up to 1,000 contractors for a single college. In abdicating its responsibility to protect the constitutional rights of religious student organizations, the Department is abandoning religious student organizations to address these discrimination claims in costly, time consuming litigation.

Meanwhile, the Department is committed to investigating and enforcing other nondiscrimination protections. The Department's reasoning for ending protections for religious student organizations based on burden to the agency rings hollow.

Finally, the Department claims that proactively affirming the First Amendment's right to the free exercise of religion is not necessary on public college campuses. The Department claims that "institutions generally make a good-faith effort to abide by the First Amendment irrespective of the implementation of the 2020 final rule."<sup>7</sup> However, the sheer volume of instances of confusion and discriminatory actions by institutions demonstrate that regulatory clarifications are warranted.

Before the current Rule was implemented, institutions provided many religious student organizations with less access or no access to resources, such as the use of meeting spaces on campus. For instance, according to stakeholders, religious student organizations were denied either official recognition or funds from the student organizations budgets because of their religious character, affiliation or beliefs in 37 States.<sup>8</sup> For example, in 2019, one university planned to remove access to campus resources from 32 religious student groups including the Chabad Jewish Student Association, Sikh Awareness Club, Muslim Students Association, and the Latter-day Saint Student Association.<sup>9</sup> If finalized, the Proposed Rule would make it harder for religious student organizations to exist on public college campuses.

First Amendment rights apply to all individuals and organizations on a public college campus regardless of whether their beliefs are favored by the government.

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<sup>6</sup> <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-02-15/requirements-and-responsibilities-third-party-servicers-and-institutions-updated-feb-28-2023>

<sup>7</sup> 88 Fed. Reg at 10863

<sup>8</sup> [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/Center%20Legislation/2023-03%20List%20of%20Situations%20Final\\_0.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Legislation/2023-03%20List%20of%20Situations%20Final_0.pdf)

<sup>9</sup> *Business Leaders in Christ v. University of Iowa.*, Joint Appendix Vol. IV at JA 0797-JA0799 <https://becketnewsite.s3.amazonaws.com/8th-Cir-Appendix-vol-04.pdf>

In 2017, the Supreme Court upheld the First Amendment right of religious organizations to participate in generally available public benefits in *Trinity Lutheran Church of Columbia, Inc. v. Comer*. Chief Justice Roberts concluded, “[The] exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.”<sup>10</sup> The Supreme Court has subsequently affirmed protections for religious and faith-based organizations to ensure they are not discriminated against based on their religious status or use.<sup>11</sup>

Student organizations, including religious ones, play an important role on campus and in the lives of college students. Unfortunately, the Proposed Rule threatens students’ ability to grow and learn while practicing and observing their respective faiths. These religious student organizations serve many different purposes on college campuses from teaching about their faith to hosting and participating in philanthropic events. Students desire organized fellowship on college campuses to learn and practice their faith with like-minded students. They should be afforded the same rights as any other student organization on campus, not discriminated against merely because of their sincerely held religious beliefs. The Department has an obligation to ensure equal participation for these organizations, particularly at institutions receiving federal taxpayer dollars.

In conclusion, we implore you to withdraw the Proposed Rule and maintain all the provisions in the Religious Liberty and Free Inquiry Rule. The Constitution dictates that students of faith are guaranteed freedom of speech and exercise of religion, just like every other student organization on campus.

Sincerely,



James Lankford  
United States Senator



Tim Scott  
United States Senator



Roger Marshall, M.D.  
United States Senator



Rick Scott  
United States Senator



Lindsey O. Graham  
United States Senator




Cindy Hyde-Smith  
United States Senator


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<sup>10</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U. S. 449 (2017)

<sup>11</sup> *Carson v. Makin*, 596 U. S. \_\_\_\_ (2022)



Joni K. Ernst  
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James E. Risch  
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Mike Crapo  
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Steve Daines  
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Josh Hawley  
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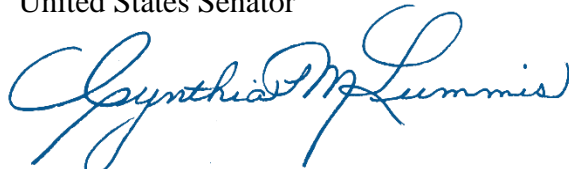
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