



March 24, 2023

U.S. Department of Education
Re: Docket ID ED-2022-OPE-0157
400 Maryland Avenue SW
Room 2C185
Washington, DC 20202

[SUBMITTED ELECTRONICALLY]

To Whom It May Concern:

We write to you today regarding the Education Department's Office of Postsecondary Education Notice of Proposed Rulemaking entitled, "Direct Grant Programs, State-Administered Formula Grant Programs," (RIN: 1840-AD72, Docket ID ED-2022-OPE-0157, the "Proposed Rule") and ask that Regulations 34 CFR § 75.500(d) and § 76.500(d) not be rescinded as the Proposed Rule suggests. Family Policy Alliance is a network of hundreds of thousands of families, including college students, from across the country as well as a network of organizations that seek to preserve family's and individual's First Amendment freedoms.

We are very concerned that this Proposed Rule will strip First Amendment rights from religious student organizations at Institutions of Higher Education (IHE) across the United States. By revoking those two provisions, the Education Department is leaving these religious organizations at risk of being compelled to speak or operate under a standard outside of their core beliefs, not being treated equally to other campus organizations, or being completely removed from their campus entirely.

We would also like to bring to your attention a concern with the thirty-day comment period. The Proposed Rule was released on February 22, 2023, and all comments must be made by March 24, 2023. While we appreciate any opportunity to weigh in on such important issues, rules often have a sixty-day comment period, making it possible for more Americans to weigh in on major, pressing issues of the day. We would prefer and strongly advocate for the Department to issue rules that have at least a sixty-day comment period.

History and Support for the 2020 Rule

When the prior Administration issued a proposed rule on January 17, 2020 ("2020 Rule"),¹ this 2020 Religious Liberty and Free Inquiry Rule was well-received and seen as necessary by faith-based student organizations as seen in the comments submitted in the

¹ 85 FR 3190 (2020).



Final Rule.² The 2020 Final Rule was issued in November of 2020, leaving little time for the implementation to take full effect during the prior Administration and communicating the specifics of the rule to students who might be at risk of their First Amendment rights being undermined. However, even in this window, individual student groups have reaped countless benefits from its ongoing effectiveness. Examples of negative impacts felt by student groups on campuses prior to the finalization of the Free Inquiry Rule were submitted in comments to the 2020 Rule.

The 2020 Rule was intended to promote free inquiry according to Executive Order 13864.³ The 2020 Rule states that both the Executive Order and the Rule were intended “to promote the First Amendment’s guarantees of free expression and academic freedom, as the courts have construed them; to align with Federal statutes to protect free expression in schools; and to protect free speech on campuses nationwide.”⁴ Free Inquiry is described in Executive Order 13864 as “an essential feature of our Nation’s democracy, and it promotes learning, scientific discovery, and economic prosperity.”⁵

We recommend finding ways to further promote students’ abilities to know their rights according to the 2020 Rule’s free inquiry rule, rather than completely revoke provisions that students rely on.

Concern on the Authority Provided for the Rule

In the opening statement of the Proposed Rule, there is mention of Executive Order 13563 and 12866, which 13563 was meant to supplement, as the authority and reasoning behind rescinding the two regulations in question.⁶ These executive orders were submitted in 1993 and 2011, respectively, prior to when the 2020 Rule came about and is intended to reduce regulatory burdens. However, we are gravely concerned with the Administration’s actions that seemingly go out of the way to limit protections for faith-based student organizations on public institutions rather than bolster the First Amendment rights of students at a time when individuals and groups are being silenced regularly.

With the plethora of regulations and rules that the Education Department oversees, it seems that these executive orders would have lent the Department to review duplicative regulations and not these specific regulations that are regularly relied upon by the students themselves, specifically religious students of all faiths in this instance.

² 85 FR 59916 (2020).

³ Exec. Order No. 13864 (2019).

⁴ 85 FR 3190 (2020).

⁵ Exec. Order No. 13864 (2019).

⁶ Exec. Order No. 13563 (2011).

The Risks of Overturning the 2020 Rule Provisions

We appreciate the Department’s commitment that it “deeply values religious liberty and free expression” and that “public IHEs are rightly required to comply with First Amendment guarantees, including the free exercise of religion.”⁷ However, by revoking § 75.500(d) and § 76.500(d), its actions seem to provide a different story. Those two sections have provided great support and reassurance to religious organizations on campuses across the country who are at risk of being punished by their school for their faith-based nature.

The plain text of the 34 C.F.R. § 75.500 (d)⁸ states the intention to protect all student organizations’ rights and benefits just as other student organizations are afforded on campus:

“(d) As a material condition of the Department’s grant, each grantee that is a public institution 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.”

Provision 34 C.F.R. 76.500(d) is similar text as above yet is specific to States and subgrantees.⁹ Both provisions, however, are important to the continuation of recognition and protection for our nation’s students. Recognition is key to a student organization’s ability to operate, book meeting rooms, and participate in campus activities as an organization.

We are also concerned that all faith organizations, including minority faiths, are in jeopardy of having their right to operate their organization according to the core tenants

⁷ 85 FR 10857 (2023).

⁸ 34 § C.F.R. 75.500(d) (2020).

⁹ 34 § 34 C.F.R. 76.500(d) (2020). Text here for clarity: “As a material condition of the Department’s grant, each State or subgrantee that is a public institution 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.”

of their belief taken away. In the past, groups that have been threatened to be kicked off of campus include but are not limited to: Chabad Jewish Student Association; Chi Alpha Christian Fellowship; Christian Pharmacy Fellowship; Cru; Latter-day Saint Student Association; Lutheran Campus Ministry; Muslim Students Association. Without the ability to set their own policies, choose their leadership, establish membership standards and more, the Department is essentially forcing groups to choose between their strongly held beliefs or forfeit them in order to be recognized by the university. It is absolutely unthinkable that an organization would have to forego their core beliefs in choosing the leadership of their group. This completely undermines the organization's ability to recruit and retain members who are a part of the group because of what it stands for.

Additionally, the Supreme Court has repeatedly ruled in favor of religious groups participating alongside secular organizations in cases such as 2017's *Trinity Lutheran Church v. Comer*.¹⁰ Cases like these established that to treat a religious organization differently would undermine the fabric of our Constitutional rights.

As you can see, these regulations have served to promote religious diversity on campus and support the Department's statement that the importance of religious freedom adds to the "the vibrancy, diversity, and strength of our nation."¹¹

Changes to Guidance and Enforcement

The Department of Education serves as an important arbitrator in ensuring that IHEs do not trample on the rights of students to freely express their beliefs and assemble. The 2020 Rule rightfully gave the Department the ability to punish IHEs when hostility was expressed toward religious student groups by threatening the removal of federal funding for consistently harming religious student groups.

As the Department noted in the Proposed Rule, the 2020 Rule from the past Administration was designed to prohibit "public IHEs from denying to a religious student organization at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations." The Department should do more to ensure First Amendment rights are not undermined and to provide ample opportunities for protecting faith-based organizations that have had their rights trampled on.

Providing a phone number and email address for complaints is just a start. Awareness campaigns on student organizations rights and guidance for IHEs would be recommended places to continue in order to better fulfill the obligations under the 2020 Rule. Part of the reasoning behind revoking these two provisions was to limit confusion at IHEs about the rule. This is an opportunity for the Education Department to provide valuable feedback to clarify the 2020 Rule, not to completely revoke free inquiry and the

¹⁰ *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. (2017).

¹¹ 85 FR 10857 (2023).

protections for these students by the Education Department. By doing so, the Department would limit costs of litigation for all parties, even though the Department appears to be encouraging litigation in the Proposed Rule rather than communicating these basic freedoms to public institutions of education that are supposedly “confused.” By working to avoid litigation, the Department would instead be saving taxpayers funds in costly lawsuits when cases are brought against public universities.

Conclusion

The 2020 Rule fostered fairness and accountability for religious student organizations. There is ample evidence in prior comments made to the Administration that these regulations have been incredibly helpful in staving off hostile attacks to religious organizations. Schools should be held accountable for needlessly removing the recognition of faith-based student groups they disagree with. This Proposed Rule puts these student organizations at risk of being treated unequally with little recourse for any injustice done to them.

We appreciate your time in reviewing this comment and your vocal commitment to protect a student’s ability to express themselves on campus. Please stand with our students and maintain crucial safety guardrails for their organizations in their attempts to assemble, provide leadership on campus, and guidance for students.

Respectfully,
Ruth Ward
Director, Government Affairs
Family Policy Alliance