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March 24, 2023

Docket # ED-2022-OPE-0157

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

Dear Secretary Cardona:

We write to comment on the Department of Education’s (“ED”) Notice of Proposed Rulemaking (“NPRM”), which would rescind free speech and free exercise of religion protections provided to religious student organizations at public institutions of higher education (“IHEs”).¹ As Members of the U.S. House of Representatives’ Committee on Education and the Workforce, we strongly oppose the ill-advised proposed rule. ED’s 2020 Religious Liberty and Free Inquiry (“Free Inquiry”) rule ensured that, as a material condition of receiving ED grants, a public institution of higher education shall not deny any religious student organization “any right, benefit, or privilege, that is otherwise afforded to other student organizations at 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.”² The proposed rollback of these protections lacks any compelling rationale, and sends a dangerous message to students and university administrators that religious liberty is not a priority.

Conflicting Reasons for Rescinding

The NPRM gives conflicting reasons why the current religious student organization protections within the Free Inquiry rule should be rescinded. On the one hand, the NPRM argues that IHEs are already required to protect the free exercise of religion and thus that “rescinding these regulations would not affect those requirements.”³ On the other hand, the NPRM describes the Free Inquiry rule as “burdensome” and “confusing,” with the risk of reducing “institutions’

¹ 88 Fed. Reg. 10857 (Feb. 22, 2023); <https://www.govinfo.gov/content/pkg/FR-2023-02-22/pdf/2023-03670.pdf>.

² 85 Fed. Reg. 59916, 59979-59980 (Sept. 23, 2020).

³ 88 Fed. Reg. at 10860.

ability to set individualized policies that protect First Amendment freedoms and reflect the diversity of institutional contexts and missions.”⁴

Since the Free Inquiry rule’s protections are grounded in the First Amendment, the additional protections in the current rule should not be confusing to institutions as the NPRM claims. In fact, the NPRM contains no specific examples to support its claims of confusion or burden. As the NPRM states, there is no “measurable burden estimate”⁵ of how the rule has affected IHEs. Further, no examples have been presented of an institution losing the ability to “tailor . . . [its] policies”⁶ as a result of the existing Free Inquiry rule, nor has any documentation been presented of specific conflicting state or federal laws. Unsupported allegations of confusion are no reason for rescinding the assurance that religious student organizations be treated even-handedly with secular student organizations.

Religious Liberty Threatened

In ED’s August 2021 blog on the Free Inquiry rule, ED wrote, “Public colleges and universities take a variety of steps to support student activities on campus and generally may not deny student organizations access to school-sponsored forums because of the groups’ religious or non-religious viewpoints.”⁷ Unfortunately, many public colleges and universities have indeed denied student organizations’ access to school-sponsored forums because of their religious viewpoints. The Christian Legal Society cites examples and lawsuits on over 90 campuses in more than 35 states.⁸

Though the so-called “confusion” from the Free Inquiry rule is speculative, the challenges religious student organizations face are real. IHEs pay lip service to neutrality; yet, at the same time, religious student organizations face burdensome restrictions, and in some cases, specific demands for groups to fundamentally change the nature of their beliefs and student leadership to receive recognition by a college or university.⁹

Student groups seek “recognition” from universities to receive a portion of student activity fees, have the option to reserve meeting space on campus at no expense, and to advertise the organization to other students. There are many examples of unfair impediments to the recognition of religious student groups, often based on leadership requirements and on objections to religious content. Indeed, one such lawsuit against the University of Nebraska-Lincoln was

⁴ 88 Fed. Reg. at 10857, 10861.

⁵ 88 Fed. Reg. at 10863.

⁶ 88 Fed. Reg. at 10859.

⁷ <https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/>.

⁸ https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Legislation/2023-03%20List%20of%20Situations%20Final_0.pdf.

⁹ *Intervarsity Christian Fellowship v. University of Iowa*, <https://www.becketlaw.org/case/intervarsity-christian-fellowship-v-university-iowa/>.

Ratio Christi at the University of Colorado Springs, Colorado v. Sharkey, <https://adflegal.org/case/ratio-christi-university-colorado-colorado-springs-v-sharkey>.

settled in January after the university cited “political and ideological” concerns as the reason for denying student funding to a religious student club to host a Christian philosopher.¹⁰

Recognition of a student group has also been rescinded, even after decades of approval. Wayne State University suddenly declared a student chapter of InterVarsity Christian Fellowship to be “discriminatory” despite the chapter having held the same beliefs and had university recognition for 75 years.¹¹

Effect of the Rule

Religious freedom is a fundamental pillar of American society, and as such, the express regulatory text of the Free Inquiry rule helps protect this right. ED contends it has “not observed” that the existing Free Inquiry rule has “meaningfully increased protections of First Amendment rights for religious student organizations.”¹² This is inaccurate. As ED has acknowledged, stakeholders from faith-based organizations have said that “the regulations fairly state current law, provide needed protections for students of all faiths, and ensure religious students feel welcome on public college campuses.”¹³ For example, a religious student group at the University of Wisconsin-Madison specifically cited the Free Inquiry rule in response to an unwarranted campus denial of re-recognition.¹⁴

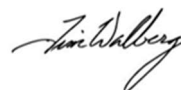
Conclusion

The NPRM undermines the current even-handed treatment that the Free Inquiry rule ensures for religious student organizations. Students of all faiths should know that their rights to free speech and free exercise of religion are protected. Rescinding this portion of the Free Inquiry rule due to hypothetical instances of “burden” or “confusion” is wholly unwarranted, unsupported by the evidence, and will be detrimental to religious liberty on campuses nationwide. We strongly urge you to withdraw this proposed rule.

Sincerely,



Virginia Foxx
Chairwoman



Tim Walberg
Member of Congress

¹⁰ See <https://adflegal.org/article/university-nebraska-settles-after-adf-lawsuit>. The university did not apply the “political and ideological” requirement to non-religious groups.

¹¹ *InterVarsity Christian Fellowship v. Wayne State University*, <https://www.becketlaw.org/case/intervarsity-christian-fellowship-v-wayne-state-university/>.

¹² 88 Fed. Reg. at 10861.

¹³ 88 Fed. Reg. at 10859.

¹⁴ https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Letters/Letter%20to%20General%20Counsel%20Williams%20with%20attachments%202022-09-09%20Sent%20REDACTED.pdf.

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