



March 24, 2023

Submitted electronically

Ashley Clark
U.S. Department of Education
400 Maryland Avenue, SW
Room 2C185
Washington, DC 20202

Re: Public comment regarding the notice of proposed rulemaking entitled “Direct Grant Programs, State-Administered Formula Grant Programs”¹

RIN: 1840-AD72

Dear Sir or Madame,

Family Research Council (FRC) respectfully submits the following comment regarding the notice of proposed rulemaking (NPRM) issued by the U.S. Department of Education (“the Department”) entitled “Direct Grant Programs, State-Administered Formula Grant Programs.” This proposed rulemaking would rescind provisions 34 C.F.R. §§ 75.500(d) and 76.500(d), parts of the “Free Inquiry Rule” that was published on September 23, 2020, and became effective on November 23, 2020.²

We request that the NPRM be withdrawn, thereby preserving the “Free Inquiry Rule” *in toto* as set forth by the 2020 Final Rule. The Department should also issue a statement apologizing to the nation for this petty, mean-spirited attack on religious believers who currently attend or will attend institutions of higher education in the future.³

The NPRM seeks to eliminate two provisions of the Federal Code, 34 C.F.R. §§ 75.500(d) and 76.500(d). These two provisions provide the same protections but in different grant-making circumstances. Section 75.500(d) applies to direct grant programs, and section 76.500(d) applies to state-administered formula grant programs. These provisions state that a “material condition of the Department’s grant” is that each grantee (§ 75.500(d)) or each state or subgrantee (§ 76.500(d)) 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.⁴

Essentially, the provisions were enacted to ensure that religious student organizations are treated in the same manner as any other campus organization. Despite this laudable objective, the Biden administration seeks to rescind these Constitution-mirroring protections. What reasons does the Department of Education provide in the NPRM?

Department Reasons for the Proposed Rule Section Recissions

In the NPRM, the Biden administration claims that these two rule sections, 34 C.F.R. §§ 75.500(d) and 76.500(d), are:

- too burdensome for the Department to investigate allegations regarding mistreatment of religious student organizations by institutions of higher education (IHEs),⁵
- too confusing for college administrators and “stakeholders” to enforce,⁶
- too inconsequential to produce evidence that the rules are providing additional First Amendment protections,⁷
- too costly for the Department to provide such protections when federal and state courts are available.⁸

Reasons for Family Research Council’s Disagreement with the Department

34 C.F.R. §§ 75.500(d) and 76.500(d) Are Not Too Burdensome

The Department is an enormous organization with tremendous resources. The Department’s Office of Civil Rights has a budget of roughly \$130-140 million and 600 full-time staff members nationwide.⁹ It receives thousands of complaints each year and has instituted complex systems to assess them. Religious student group claims would not be burdensome for the Department. We note that the Department cannot claim excessive burdens from enforcement while also claiming that it “has not received any complaints regarding alleged violations of” these regulations promulgated to protect religious student groups.¹⁰

34 C.F.R. §§ 75.500(d) and 76.500(d) Are Not Too Confusing for IHE Compliance

These relatively simple, straightforward regulations should not confuse IHEs as to what is required of them administratively. These regulations merely represent the application of a widely applied non-discrimination principle to the treatment of religious student organizations at public IHEs. Religious-based groups are entitled to the same benefits, grants, and funding as other groups. Religious student groups are often harassed or disparaged by university officials who are hostile to religious practice or are overly concerned about causing offense to students or faculty whose beliefs may conflict with the group’s religious beliefs. We believe it should be easy to discern when targeted religious groups are being deprived of benefits.

We also note that the Department seems fond of complexity and confusion when it wants to be. Under President Joe Biden and Secretary Miguel Cardona, the Department issued a nearly 700-page rulemaking for Title IX that is causing tremendous confusion and contention. That rulemaking is

attempting to transform numerous American institutions with little thought given to the wrecking ball its regulations would send through our colleges and universities on a massive scale.

34 C.F.R. §§ 75.500(d) and 76.500(d) Do Provide Additional First Amendment Protection

In the Free Inquiry Rule's notice and comment period, various groups presented that religious student groups did face discrimination. In particular, the Christian Legal Society presented such evidence in an appendix to its comment in that proceeding.¹¹ Such discrimination by IHEs is not imagined. The Department takes it as dispositive proof that because no claims have been made yet under these regulations, the regulations are not needed. Rather, it is more likely that the regulations are deterring discriminatory actions and policies by IHEs.

34 C.F.R. §§ 75.500(d) and 76.500(d) Is a Superior Option than the Court System

The Department takes the position that the rights of religious student organizations will be better vindicated in federal and state courts. FRC disagrees. Litigation is extremely costly, and the students who populate campus groups are only temporarily affiliated with the IHEs in question. As noted above, the number of cases involving these provisions is clearly not overwhelming; in fact, it appears to be underwhelming. Therefore, the Department can adopt policies and procedures to screen such claims in a manner similar to the other discrimination claims it reviews that are not based on First Amendment law.

Conclusion

For the reasons stated above, Family Research Council believes that the NPRM, which proposes rescinding provisions 34 C.F.R. §§ 75.500(d) and 76.500(d), should be rejected by the Department and that these provisions, promulgated by the "Free Inquiry Rule," should be allowed to continue affording legal protection to religious student groups at America's institutions of higher learning.

Respectfully submitted,

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¹ U.S. Department of Education, Notice of Proposed Rulemaking, “Direct Grant Programs, State-Administered Formula Grant Programs,” *Federal Register* 88, no. 35 (February 22, 2023): 10857-864, <https://www.govinfo.gov/content/pkg/FR-2023-02-22/pdf/2023-03670.pdf>.

² U.S. Department of Education, Final Rule, “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,” *Federal Register* 85, no. 185 (September 23, 2020): 59916-982, <https://www.govinfo.gov/content/pkg/FR-2020-09-23/pdf/2020-20152.pdf>.

³ Indicative of this administration’s lack of sensitivity to the lives of religious believers was the NPRM’s release to the public on Ash Wednesday; see Mary Fairchild, “What is Ash Wednesday?,” Learn Religions, January 12, 2019, <https://www.learnreligions.com/what-is-ash-wednesday-700771>.

⁴ 34 C.F.R. §§ 75.500(d) & 76.500(d).

⁵ 88 Fed. Reg. 10861.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ 88 Fed. Reg. 10861, 10863.

⁹ U.S. Department of Education, Office for Civil Rights, “Fiscal Year 2022 Budget Request,” accessed March 23, 2023, <https://www2.ed.gov/about/overview/budget/budget22/justifications/bb-ocr.pdf>. Regarding the budget amount of approximately \$140 million, see BB-2, BB-9; regarding the number of OCR employees (FTEs), see BB-8, BB-9, BB-10, BB-11. However, one might agree or disagree about the precise numbers; ED-OCR is a large organization.

¹⁰ 88 Fed. Reg. 10863.

¹¹ Kimberlee Wood Colby, Comment on Department of Education’s Notice of Proposed Rulemaking, 85 Fed. Reg. 3190 (Jan. 17, 2020), Christian Legal Society, February 18, 2020, [https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Legislation/Christian%20Legal%20Society%20Comments%20Proposed%20Regulations%2075.500\(d\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Legislation/Christian%20Legal%20Society%20Comments%20Proposed%20Regulations%2075.500(d).pdf).