



March 24, 2023

ED-2022-OPE-0157  
U.S. Department of Education  
400 Maryland Ave. SW,  
Room 2C185  
Washington, DC 20202

**Submitted Electronically**

**Re: Direct Grant Programs, State-Administered Formula Grant Programs  
Proposed Rule—Docket ID ED-2022-OPE-0157**

Dear Secretary Cardona:

First Liberty Institute submits this comment regarding the proposed rulemaking, “Direct Grant Programs, State-Administered Formula Grant Programs Proposed Rule,” promulgated by the U.S. Department of Education’s Office of Postsecondary Education. 88 Fed. Reg. 10,857 (Feb. 22, 2023).

First Liberty is a nonprofit, public interest law firm whose mission is to defend religious liberty for all Americans through pro bono legal representation of individuals and institutions of diverse faiths—Catholic, Protestant, Islamic, Jewish, Buddhist, the Falun Gong, Native American religious practitioners, and others. For over thirty years, First Liberty attorneys have worked to defend religious freedom before the courts, including the U.S. Supreme Court, as well as by testifying before Congress, and by advising federal, state, and local officials about constitutional and statutory protections for religious liberty.

First Liberty represents religious students and student groups who, because of their religious beliefs, have faced discriminatory treatment at institutions of higher education (“IHEs” or “institutions”). Currently, we represent the Free Exercise Coalition, a religious student group at University of New Hampshire Franklin Pierce School of Law (“UNH Law”) that was denied official recognition in December 2022, and faced difficulties obtaining equal access to institution facilities. Attached to this comment is a complaint we filed with the Department regarding the University of New Hampshire’s First Amendment violations.

First Liberty opposes the Department’s proposed rescission of certain portions of the 2020 final rule entitled, “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 Fed. Reg. 59,916 (Sept. 23, 2020) (“Free Inquiry Rule” and “the 2020 rule”).

None of the Department’s concerns about the 2020 Free Inquiry Rule justify rescinding the protections for religious student groups contained in §§ 75.500(d) and 76.500(d). Those protections for religious student groups provide clarity for students’ rights on campus and enforce only what the First Amendment already prohibits: denying to religious student groups any benefit that a university affords to other student organizations. In addition, the Department’s claims that the 2020 rule imposes significant burdens on the Department are demonstrably false, and the Department’s insistence that universities are already making good faith efforts to comply with the First Amendment is contradicted by evidence of universities doing the *opposite* of what the First Amendment requires. For all of these reasons, the Department should decline to rescind §§ 75.500(d) and 76.500(d).

## Background

On September 23, 2020, the Department published the Free Inquiry Rule, requiring, among other things, public IHEs to provide religious student organizations the same rights, benefits, or privileges that they provide other student organizations, and private IHEs to follow their own speech policies. 85 Fed. Reg. 59,916. Protections for religious student groups are codified at 34 CFR §§ 75.500(d) and 76.500(d), and plainly state Institutions’ legal duties towards religious student groups under the First Amendment. As justification for its rule, the Department explained that public officials may not discriminate against students and instructors based on their viewpoints, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995), and may not force students to choose between exercising their religion or participating in a publicly available government benefit program, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). *See* 85 Fed. Reg. at 59916-17. The 2020 rule went into effect on November 23, 2020.

In late July 2021, the Department shut down the free speech hotline established only months earlier as a place for university students to file complaints regarding First Amendment violations on college campuses.<sup>1</sup> Shortly after, on August 19, 2021, the Department announced in a blog post that it planned to rescind portions of the Free Inquiry Rule.<sup>2</sup>

On February 22, 2023, the Department published its proposed rule for rescinding the protections for religious students and groups in §§ 75.500(d) and 76.500(d). *See* 88 Fed. Reg. 10,857. The Department explained that §§ 75.500(d) and 76.500(d) caused

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<sup>1</sup> Jeremiah Poff, “Department of Education silently shuttered DeVos-era free speech hotline,” Wash. Exam’r, Aug. 17, 2022, <https://www.washingtonexaminer.com/restoring-america/fairness-justice/departments-education-shuttered-free-speech-hotline> (last visited March 22, 2023).

<sup>2</sup> U.S. Department of Education blog, “Update on the Free Inquiry Rule,” Aug. 19, 2021, <https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/> (last visited March 22, 2023).

confusion for IHEs about the interplay between these regulations and nondiscrimination requirements, imposed novel and substantial burdens on the Department, and were not necessary to ensure that institutions respected students' First Amendment rights. We refute each of the Department's claims below, which ring hollow and ignore the plain meaning of the 2020 regulatory text.

## Argument

### I. The Necessity of the Free Inquiry Rule

#### A. The Free Inquiry Rule requires IHEs to fulfill preexisting, longstanding First Amendment duties.

The Department's first justification for rescinding §§ 75.500(d) and 76.500(d) is that the rule causes confusion for IHEs because it "may" conflict with IHEs' nondiscrimination policies or "could be read" to require IHEs to give religious student groups preferential treatment. 88 Fed. Reg. 10,859, 61. And yet, the Department admits that the Free Inquiry Rule "repeatedly" clarified in its preamble that §§ 75.500(d) and 76.500(d) do not require IHEs to go beyond First Amendment requirements, and further, that public IHEs may apply neutral, generally applicable nondiscrimination policies to religious student groups without risking the loss of Department grants. 88 Fed. Reg. at 10,860.

Despite these clarifications, the Department insists on proposing to rescind the protections for religious student groups because it claims there is nothing in the regulatory text itself that "guarantees" an IHE the ability to impose on religious student groups neutral and generally applicable nondiscrimination policies. *Id.* The Department also claims there is a "disparity" between the 2020 rule's regulatory language and its stated intent. *Id.*

A quick glance at the regulation text, however, settles any potential confusion. Section 75.500(d) and 76.500(d) both state as follows:

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.

34 CFR §§ 75.500(d), 76.500(d) (emphasis added).

The regulation merely prohibits what the First Amendment prohibits: an IHE may not deny to religious student groups any benefit that the IHE affords to other student

organizations. This simple, clear regulatory language merely restates institutions' preexisting legal duties towards religious student groups under the First Amendment. As IHEs must already know, the First Amendment "at a minimum" prohibits public officials from "treating religious exercise worse than comparable secular activities." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (J. Gorsuch, concurring) (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)).

If the Department rescinds the Free Inquiry Rule, public IHEs still must comply with the First Amendment when promulgating nondiscrimination policies. This means that public IHEs must treat religious student groups equally to other groups, and may only enforce neutral, generally applicable policies against religious groups. The government "fails to act neutrally" when it behaves in a manner intolerant of religious beliefs or restricts practices because of their religious nature. *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1730-1732 (2018); *Lukumi*, 508 U.S. at 533. In addition, a policy is not generally applicable if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). By allowing some groups to restrict or limit membership, an IHE is "permitting secular conduct that undermines the government's asserted interests in a similar way," and must permit religious student groups to also set membership or leadership criteria if they wish to do so. *Id.*

Like the religious adoption agency in *Fulton*, IHEs burden the religious exercise of student groups by "putting [them] to the choice of curtailing [their] mission" or obeying nondiscrimination policies that are inconsistent with their beliefs. *Id.* at 1876. So long as IHEs can achieve their interests in a manner that does not burden religion, they "must do so." *Id.*

Therefore, the regulatory text restates public IHEs' preexisting legal duties in a clear way. If public IHEs experience confusion, perhaps their confusion originates from uncertainty about what the First Amendment requires rather than the regulatory text itself. Similarly, some commenters to the 2020 rule expressed concerns about how the Free Inquiry Rule "may conflict with institutional and State nondiscrimination policies," and might hamper an IHE's ability to set "individualized policies" that comply with its diverse "contexts and missions." 88 Fed. Reg. 10,861. And yet, those IHEs must also follow the First Amendment above any institutional or state policies, regardless of the "individualized policies" IHEs wish to implement. *See* U.S. CONST. art. VI, cl. 2. The Department should educate IHEs about their mistaken understating of State nondiscrimination policies vis a vis the supreme requirements of the First Amendment.

## **B. The Free Inquiry Rule does not burden the Department.**

Next, the Department proposes to rescind the protections of the Free Inquiry Rule because, it claims, the review of an alleged violation would impose on the Department extensive burdens. 88 Fed. Reg. 10,861. The Department believes that investigations would be broad in scope and dissimilar to the types of investigations the Department

currently undertakes, because “[t]he First Amendment is a complex area of law with an intricate body of case law” and often entails “[c]losely contested cases.” *Id.*

Whether the First Amendment is a complex area of law, however, is irrelevant to how the Department would conduct investigations. These investigations “do[] not involve the full panoply of First Amendment issues.” 85 Fed. Reg. 59,945. Rather, the Department would look at the “discrete issue” of whether other student organizations received a right, benefit, or privilege that an IHE denied a religious organization. *Id.* No one at the Department needs to have been “historically ... responsible for investigating First Amendment violations” to determine whether a student group either did or did not receive a right, benefit, or privilege that was denied to a religious student group. 88 Fed. Reg. 10,861. In addition, §§ 75.500(d) and 76.500(d) assists Department investigators by listing common examples of how a public institution may treat a religious organization differently from a secular organization, including by failing to provide full access to the public IHE’s facilities, withholding funds, or denying the group official recognition. 85 Fed. Reg. 59,945. Thus, the Department’s justification for proposing rescission rings hollow, as it disputes a strawman rather than engaging with the actual provisions of the 2020 rule.

Relatedly, the Department cites *Intervarsity Christian Fellowship v. University of Iowa*, Case No. 3:18-cv-00080 (S.D. Iowa Nov. 18, 2021), to support its claim that a proper review of alleged violations would require the Department to expend “extensive resources.” *Id.* at 10,861 n.36. In *Intervarsity*, a court awarded attorneys’ fees and expenses for the student group in the amount of \$533,508 to cover an estimated 873 hours. The Department, however, props up and then fights yet another strawman in this instance. An agency investigation looking to determine the sole factual question of whether a nonreligious student group received a right, benefit, or privilege that a religious student group was denied should not be compared to a federal lawsuit alleging 17 causes of action and lasting 1.5 years. The Department would not need to adjudicate the claims raised in such a lawsuit, and so it is not appropriate for the Department to analogize its burden to this lawsuit. Moreover, if the Department properly educated IHEs about protecting students’ First Amendment rights and enforced the Free Inquiry Rule, lawsuits like *Intervarsity*—and the substantial costs they impose on both the Department and private parties—would be unnecessary.

The Department also must provide clarification about its expected burden under the Free Inquiry Rule. The Department asserts that the 2020 rule would be overly burdensome, and yet it claims that it has not yet received a complaint under the rule and expects to receive no more than five such complaints per year. Does the Department expect to receive so few complaints each year? And if so, why does the Department anticipate that the 2020 rule will impose a significant burden despite receiving so few complaints? Similarly, we are seeking clarification as to why the Department concluded that the 2020 rule would prove overly burdensome and yet also admitted that it could not predict how much the rescission would decrease the Department’s burden. If the Department cannot quantify the burden the rule would place on the Department, how did the Department conclude that the burden would be so substantial as to warrant a rescission

rather than a revision of the rule? These questions and inconsistencies must be addressed by the Department.

### **C. Religious student groups need the Free Inquiry Rule.**

The Department concludes that the 2020 rule is “unnecessary” because public IHEs must already comply with the First Amendment, and, thus, they already treated religious student groups equally with nonreligious groups prior to the Department promulgating the Free Inquiry Rule. 88 Fed. Reg. 10,862. The Department opines that institutions already make a good-faith effort to abide by the First Amendment, and it estimates that rescinding §§ 75.500(d) and 76.500(d) would impose no costs on students or campus communities. *Id.* at 10,863. The Department admits the theoretical possibility that some IHEs might discriminate against religious student groups, but “such organizations can and do seek relief in ... [the] courts.” *Id.* at 10,861. Further, because student groups can sue to vindicate their First Amendment rights, the Department does not believe, “at this time,” that conditioning a school’s grants on constitutional compliance is necessary to ensure such compliance by public IHEs.

First, although student groups “can and do” sue to protect their rights, *id.* at 10,861, many students do not. Even for those brave student who do choose to sue their university, the emotional and financial costs are severe. IHEs maintain endowments—often large endowments—and employ teams of attorneys to defend their actions in court, while student groups must locate an attorney and either pay his or her legal fees or convince a nonprofit firm to represent them. And if the student group successfully procures legal representation, they must bear the emotional stress of litigation and public harassment by their peers while their case advances slowly through the court system. Thus, because we know from experience the massive costs of, and barriers to, litigation, the Department’s statement that student groups can easily sue public IHEs to vindicate their First Amendment rights is not accurate.

Second, religious student groups need—now more than ever—the protections offered by the Free Inquiry Rule. First Liberty maintains an online portal for individuals and groups to request legal assistance. The number of people who reported to First Liberty that they suffered harm from alleged religious freedom violations at public and private IHEs has substantially increased in the last several years. News headlines have reported for the past few years that IHEs have become increasingly hostile to free speech and inquiry.<sup>3</sup> And only two weeks ago, students shouted down Fifth Circuit Judge Kyle

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<sup>3</sup> See, e.g., Jeffery J. Salingo, “College students support free speech—unless it offends them,” Washington Post, March 12, 2018, [https://www.washingtonpost.com/local/college-students-support-free-speech--unless-it-offends-them/2018/03/09/79f21c9e-23e4-11e8-94da-ebf9d112159c\\_story.html](https://www.washingtonpost.com/local/college-students-support-free-speech--unless-it-offends-them/2018/03/09/79f21c9e-23e4-11e8-94da-ebf9d112159c_story.html) (last visited March 22, 2023); see also Michael C. Behrent, “A Tale of Two Arguments about Free Speech on Campus,” American Association of University Professors, Winter 2019, <https://www.aaup.org/article/tale-two-arguments-about-free-speech-campus#.ZBtgAuzMKEs> (last visited March 22, 2023) (“The current debate is rooted in controversies surrounding “political correctness” and campus speech codes dating back to the 1980s. In the past five years, however, these culture wars seem to have entered a new phase.”); Adam Weinberg, “Universities Need to Do More to Protect Free Speech. Here’s How We’re Succeeding,”

Duncan when he arrived on campus to speak at Stanford Law School.<sup>4</sup> If anything IHEs and students need the Department to increase its educational and protective efforts to maintain First Amendment rights on campus.

For example, the Free Exercise Coalition, who, until we wrote the university a demand letter, was denied official recognition from the UNH Law in December 2022. And despite our letter, the Free Exercise Coalition is still trying to gain equal access to campus facilities that other groups enjoy. See attached complaint. The Free Exercise Coalition's difficulties demonstrate that the Department should preserve, rather than rescind, protections for religious student groups.

The Department stated that it welcomes evidence regarding whether maintaining a condition specifically for institutions that receive Department grants has provided any additional protections. 88 Fed. Reg. 10,861. The problem with this request, however, is that the 2020 rule had only been in effect for nine months when the Department informed the American public that it should not expect the Department to enforce the Free Inquiry Rule's protections when it announced that it "anticipate[s] publishing a notice of proposed rulemaking ... to propose rescinding parts of the Free Inquiry Rule."<sup>5</sup> The previous month, in late July 2021, the Department disbanded the free speech hotline.<sup>6</sup> Thus, the American public had little opportunity in the narrow window from November 2020 to August 2021 to avail itself of the rule's protections until the Department announced its plans to rescind provisions of the regulation. The Department received no complaints, not because religious student groups are being treated equally, but because the Department already informed the American public that it intended to rescind portions of the 2020 rule and never truly made any real effort to educate students that it would help their groups if needed. If, however, the Department had allowed the Free Inquiry Rule to go into effect and remain in effect until its proposed rule in February 2023, we would have filed a complaint when we began representing the Free Exercise Coalition in December 2022.

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Newsweek, Feb. 23, 2023, <https://www.newsweek.com/universities-need-do-more-protect-free-speech-heres-how-were-succeeding-opinion-1783397> (last visited March 22, 2023).

<sup>4</sup> See, Stuart Kyle Duncan, "My Struggle Session at Stanford Law School," Wall Street J., March 17, 2023, <https://www.wsj.com/articles/struggle-session-at-stanford-law-school-federalist-society-kyle-duncan-circuit-court-judge-steinbach-4f8da19e> (last visited March 22, 2023).

<sup>5</sup> U.S. Department of Education blog, "Update on the Free Inquiry Rule," Aug. 19, 2021, <https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/> (last visited March 22, 2023).

<sup>6</sup> Jeremiah Poff, "Department of Education silently shuttered DeVos-era free speech hotline," Wash. Exam'r, Aug. 17, 2022, <https://www.washingtonexaminer.com/restoring-america/fairness-justice/departament-education-shuttered-free-speech-hotline> (last visited March 22, 2023).

## II. Benefits of Religion on College Campuses

Involvement in campus-based religious organizations has been found to have a positive impact on first year students' adjustment and development through positive relationships, social integration, emotional well-being, friendship networks, and spirituality.<sup>7</sup> Notably, involvement in religious student groups has been associated with students becoming more culturally aware and developing friendships with non-believers. Involvement in student groups has been shown to enhance academic achievement and emotional health.<sup>8</sup> Furthermore, involvement in religious practice and spiritual well-being has been found to benefit overall adjustment.<sup>9</sup>

The positive impacts of faith-based student organizations also extend beyond the members of the faith group to “vulnerable” populations, Native Americans, blacks, persons of color, and otherwise “adversely affected by persistent poverty or inequality” identified in Executive Order 13895.<sup>10</sup> The social connections connected by faith have been shown to be valuable to the member students themselves as well as to society at large. For example, at Missouri State University, the religious student group Chi Alpha is heavily involved in domestic community service and humanitarian work abroad to help the hungry worldwide by partnering with feedOne, assist the widowed and orphans on a New Mexico Navajo reservation, teach students in Kenya, and help the homeless in Milwaukee, Wisconsin.<sup>11</sup> First Liberty has represented ministries affiliated with neighborhood houses of worship, which provide valuable connections to faith

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<sup>7</sup> Alyssa N. Bryant, *The Effects of Involvement in Campus Religious Communities on College Student Adjustment and Development*, *Journal of College & Character*, Vol. VIII, No. 3 (April 2007), <https://www.tandfonline.com/doi/pdf/10.2202/1940-1639.1178>.

<sup>8</sup> L. J. Sax, A. N. Bryant, & S. K. Gilmartin, *A longitudinal investigation of emotional health among male and female first-year college students*, 16 *Journal of the First-Year Experience* 39-65 (2004); A.W. Astin, *What matters in college? Four critical years revisited*, San Francisco: Jossey-Bass (1993).

<sup>9</sup> See, e.g., M. Fiesta, M., C. Strange, & K. Woods, *The ins and outs of spirituality during the college years*, Presented at the meeting of the American College Personnel Association, Long Beach, CA (2002); J. Hammermeister, & M. Peterson, *Does spirituality make a difference? Psychosocial and health-related characteristics of spiritual well-being*, 32 *Am. J. of Health Education* 293-297 (2001).

<sup>10</sup> E.O. 13985 on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Section 2 (Jan. 20, 2021), <https://www.govinfo.gov/content/pkg/DCPD-202100054/pdf/DCPD-202100054.pdf>.

<sup>11</sup> Nii Abrahams, *Proponents of 'Diversity' Tried to Force My Religious Group Off Campus*, *Daily Signal*. Feb. 15, 2017, <https://www.dailysignal.com/2017/02/15/proponents-of-diversity-tried-to-force-my-religious-group-off-campus/>.



communities on and off campus.<sup>12</sup> In total, religious congregations provide an estimated value of \$91.3 billion to education in the United States.<sup>13</sup>

### III. Cases of Burdens on the Beliefs of Diverse Students

Student groups across the country face religious discrimination, including both minority and majority faith groups, groups at both public and private universities, and religious affinity groups who share a racial and national origin.

Religious student groups have reported suffering religious discrimination at numerous public universities, including California State University, Indiana University, Missouri State University Rutgers University (New Jersey), University of California Hastings College of Law, University of California Stanislaus, University of Iowa, University of Michigan, University of New Hampshire Pierce School of Law, University of Wisconsin-Superior, University of Wisconsin Madison, and Wayne State University.<sup>14</sup> Private universities and colleges receiving public funds with religious discrimination cases include Bowdoin (Maine), Georgetown, Rollins (Florida), Tufts, and Vanderbilt.<sup>15</sup>

Religious minorities and persons of color are among the students being excluded from college campuses on the basis of their religion – the people the Biden Administration pledged to protect from discrimination.<sup>16</sup> At the University of Iowa, the Imam Mahdi Muslim organization, Sikh Awareness Club, and Chinese Student Christian Fellowship

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<sup>12</sup>First Liberty, Oklahomans United for Life Case, <https://firstliberty.org/cases/oklahomans-united-for-life>.

<sup>13</sup> Brian J. Grim and Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12:3 *Interdisciplinary Journal of Research on Religion* (2016), <https://www.religjournal.com/pdf/ijrr12003.pdf>.

<sup>14</sup> See First Liberty, *New Hampshire Law School Approves Student Group After Religious Liberty Law Firm Threatens Legal Action* (Jan. 25, 2023), <https://firstliberty.org/media/new-hampshire-law-school-approves-student-group-after-religious-liberty-law-firm-threatens-legal-action/>; *InterVarsity Christian Fellowship v. Wayne State University*, 3:19-cv-10375-RHC-SDD (S.D. Mich. 2021); InterVarsity Christian Fellowship, *Legal Challenges*, <https://intervarsity.org/about-us/press-room/campus-access-issues/legal-challenges>; Becket Fund, *Chi Alpha v. Cal State*, <https://www.becketlaw.org/case/chi-alpha-v-cal-state/>; Nii Abrahams, *Proponents of ‘Diversity’ Tried to Force My Religious Group Off Campus*, *Daily Signal*, Feb. 15, 2017, <https://www.dailysignal.com/2017/02/15/proponents-of-diversity-tried-to-force-my-religious-group-off-campus/>.

<sup>15</sup> InterVarsity Christian Fellowship, *Legal Challenges*, <https://intervarsity.org/about-us/press-room/campus-access-issues/legal-challenges>.

<sup>16</sup> E.O. 13985 on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Section 2 (Jan. 20, 2021), <https://www.govinfo.gov/content/pkg/DCPD-202100054/pdf/DCPD-202100054.pdf>.

were among those faith affinity groups excluded from campus,<sup>17</sup> and other faith affinity groups were put on the watchlist, such as Muslim Students Association, Chabad Jewish Student Association, Hillel, and Multiethnic Undergrad Hawkeye Intersity. Cases of hostility against Jewish speakers and faculty based on religion and national origin have also occurred at University of Minnesota,<sup>18</sup> University of Texas–Austin,<sup>19</sup> San Francisco State University,<sup>20</sup> and the University of California–Irvine.<sup>21</sup>

### Conclusion

For the forgoing reasons, the Department should not abandon important religious liberty protections by rescinding 34 CFR 75.500(d) and 76.500(d).

Sincerely,

Keisha Russell, Senior Counsel  
Christine Pratt, Counsel  
First Liberty Institute

**Attachment:** March 23, 2023 Complaint to Assistant Secretary for Postsecondary Education, Dr. Nasser Paydar.

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<sup>17</sup> *Intersity Christian Fellowship v. University of Iowa*, No. 3:18-cv-00080 (8th Cir.) Appendix <https://s3.amazonaws.com/becketnewsite/Vol-08.pdf>.

<sup>18</sup> Dale Carpenter, *Israeli academic shouted down at University of Minnesota*, Wash. Post, Nov. 4, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/04/israeli-academic-shouted-down-in-lecture-at-university-of-minnesota/>.

<sup>19</sup> David Bernstein, *University of Texas law student and cohorts disrupt Israeli professor's talk*, Wash. Post, Nov. 18, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/18/university-of-texas-law-student-and-cohorts-disrupt-israeli-professors-talk/>.

<sup>20</sup> Michael Barba, *SFSU president: University 'failed' students in handling of Israel-Palestine protest*, San Francisco Exam'r, Sept. 1, 2016, [https://www.sfexaminer.com/news/sfsu-president-university-failed-students-in-handling-of-israel-palestine-protest/article\\_425ab447-cd45-531e-a1bf-ab43acfe0eb9.html](https://www.sfexaminer.com/news/sfsu-president-university-failed-students-in-handling-of-israel-palestine-protest/article_425ab447-cd45-531e-a1bf-ab43acfe0eb9.html).

<sup>21</sup> Roxana Kopetman, *Anti-Israel protestors disrupt Israeli movie screening at UC Irvine*, Orange County Register, May 19, 2016, <https://www.ocregister.com/articles/israeli-716561-israel-uci.html>.



**Attachment to First Liberty Comment re: Direct Grant Programs, State-Administered Formula Grant Programs Proposed Rule—Docket ID ED-2022-OPE-0157**

March 23, 2023

Dr. Nasser Paydar  
Assistant Secretary for Postsecondary Education  
Office of Postsecondary Education  
LBJ Building  
400 Maryland Avenue, SW  
Washington, DC 20202-1100

*Sent via email ([Nasser.Paydr@ed.gov](mailto:Nasser.Paydr@ed.gov))*

**RE: Unconstitutional Denial of Free Exercise Coalition Student Group**

To Assistant Secretary Paydar:

First Liberty Institute is the nation’s largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. We represent the Free Exercise Coalition (“FEC”), a religious student group at the University of New Hampshire Franklin Pierce School of Law (“UNH Law”). We submit this complaint to the U.S. Department of Education (“the Department”) under 34 CFR § 75.500(d) and the First Amendment to the U.S. Constitution. The University of New Hampshire is a recipient of direct grants from the Department.

Since November 2022, the FEC has struggled against hostility and opposition from UNH Law. The school begrudgingly granted the FEC official recognition after the group retained legal counsel, and it altered its flag policy to ensure that the FEC could not display the Christian flag as other student groups had done. At public meetings, UNH Law students maligned FEC’s beliefs, with some referring to the Coalition’s leaders as “hateful bigots,” “oppressors,” and “a problem for the law school,” and reportedly calling their flag “a symbol of hate.” The Free Exercise Coalition merely wishes to live out its mission to serve God and equip religious students in their free exercise of religion both on and off campus. The group seeks the same rights, benefits, and privileges that UNH Law already affords other student groups, in accordance with 34 CFR § 75.500(d) and the First Amendment.

**Background**

The Free Exercise Coalition is a religious student group at UNH Law. Students formed the group to serve God and equip religious students in their free exercise of religion, both on and off campus. The organization is an open member coalition of

religious students and their allies, all with a passion to exercise their religion and see America's foundational religious freedoms restored and respected. Through scholarship, service, and education, coalition members will have the opportunity to exercise their religion and support religious liberty causes on their campus and in their communities.

Rarely, if ever, has a student organization been more aptly named or, as the actions of UNH students and faculty make clear, needed at UNH Law. Despite the FEC meeting all requirements for recognition as an official student organization and completing its application, UNH Law's Student Bar Association ("SBA") refused to grant formal recognition to the group during its first meeting on November 29, 2022. At that meeting, students called the FEC's leaders "hateful bigots," "oppressors," and "a problem for the law school." In response to the hostility and vitriol the school displayed towards the FEC, the FEC's faculty advisor withdrew as advisor following the meeting. As of the date of this letter, the Coalition is still seeking a faculty advisor.

Nonreligious student groups that met the same eligibility requirements and received official recognition by UNH Law includes more than twenty organizations, including, the Civil Engagement Society, the Diversity Coalition, Secular Students Alliance, Outdoors Club, and UNH Law Pond Hockey. None of those groups received the opprobrium of the UNH leadership or community upon their application.

At the next SBA meeting, on January 24, 2023, and despite the SBA's own chartered procedure, the SBA refused to hold a vote on whether to give the student group official recognition. The UNH administration, however, after receiving First Liberty's December 12, 2022 letter, stepped in at that meeting and granted the Free Exercise Coalition recognition as a UNH Law student organization.

Although the Free Exercise Coalition was finally able to obtain recognition, the Coalition was unable to operate like other student groups until just recently, on March 22, 2023, when UNH Law altered its flag policy. On or about March 25, 2022, the LAMBDA club displayed the Pride flag, and on or about February 9, 2023, the Black Law Student Association displayed its flag. On February 15, 2023, the Coalition sought permission to display the Christian flag like other student groups do with their own flags. The Christian Legal Society had similarly requested permission to display the Christian flag three months earlier, on November 18, 2022, but UNH Law never responded to the Christian Legal Society's request. In response to the FEC's request, UNH Law said that the FEC's request provided the school with an opportunity to review its flag policy. Then, on March 6, 2023, while the FEC still awaited the school's decision, UNH Law displayed another student group's flag and endorsed it as its own speech to ensure that it would continue to fly. On March 22, 2023, associate dean Shane Cooper informed the FEC that, rather than permitting the FEC to fly its flag, the school had created a separate "display board" for all groups including the FEC to use. UNH Law continues to fly the other student group's flag in the law school cafeteria, after designating the flag as its own speech. Recently, FEC leadership has heard from students and others who have observed numerous instances of religious hostility at the law school. Many of these observers wish to remain anonymous for fear of reprisals from the law school and its students.

The Free Exercise Coalition merely seeks to be treated like other student groups on campus. Instead, they are held to a different standard and, along with other people of faith in the community, are left feeling ostracized and insulted because of their religious beliefs.

**Current U.S. Department of Education regulations require UNH Law to treat the Free Exercise Coalition like other student organizations.**

Department regulations require public institutions of higher education to afford religious student groups “any right, benefit, or privilege” that the institution affords to other student organizations. 34 CFR § 75.500(d).

UNH is a public institution of higher education<sup>22</sup> and according to public records, is a recipient of several direct grants from the Department.

The Department has stated that it will investigate complaints by religious student groups who are denied equal treatment by institutions of higher education as compared to other student groups. See “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 Fed. Reg. 59,916 (Sept. 23, 2020). In that rule, the Department explained that it would investigate the “discrete issue” as to whether other student organizations indeed received the right, benefit, or privilege that the religious student organization was denied. *Id.* at 59,945.

As detailed above, UNH Law initially denied the Free Exercise Coalition the official recognition it affords other groups, and later, it changed its flag policy to prevent the FEC from displaying its flag.

**The First Amendment requires UNH Law to treat the Free Exercise Coalition like other student organizations.**

It is settled law that “the First Amendment rights of speech and association extend to the campuses of state universities.” *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981); *see also Healy v. James*, 408 U.S. 169, 180 (1972); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Students at America’s universities are entitled to express their beliefs on campus, as well as by associating with students that share those beliefs. It is the responsibility of a state university to ensure that students wishing to so associate receive evenhanded treatment by university leadership.

When university officials question, criticize, or censor student expression and association, the university fails the promise of the First Amendment by promoting viewpoints it favors and regulating speech it disfavors. *See Lamb’s Chapel v. Ctr.*

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<sup>22</sup> <https://www.unh.edu/main/about-unh>

*Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (“The principle that has emerged from our cases ‘is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.’” (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984))).

Rather than provide routine, administrative approval to the Free Exercise Coalition’s application for recognition, SBA took upon itself the role of inquisitor. It viewed with suspicion the student group’s mission, fomented public discussion that labeled the group as bigoted, subversive, oppressive, and a general “problem” for UNH. Further, this shocking, knives-out inquisition of the Free Exercise Coalition’s religious beliefs by the SBA led the Free Exercise Coalition’s faculty advisor to withdraw, which has yet to be remedied. And currently, the Free Exercise Coalition is still unable to access school facilities and display its flag like other student groups.

## **Conclusion**

UNH’s preexisting duties to follow the First Amendment, as enforced by the courts, did not induce UNH to comply with the First Amendment when the Free Exercise Coalition first sought official recognition and equal access to UNH Law’s facilities. We thus appeal to the Department to enforce its regulations by investigating these events at UNH Law.

You may direct your response to us at [krussell@firstliberty.org](mailto:krussell@firstliberty.org) or [cpratt@firstliberty.org](mailto:cpratt@firstliberty.org). Should you have questions related to this matter, you may reach us at 972-941-4444.

Sincerely,

Keisha Russell, Senior Counsel  
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