THE EQUAL PROTECTION PROJECT
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Ashley Clark
U.S. Department of Education
400 Maryland Avenue SW, Room 3C152
Washington, DC 20202

Re: Proposed Rule "Direct Grant Programs, State-Administered Formula Grant Programs," Docket ID No. ED-2022-OPE-0157

Dear Ms. Clark,

The Equal Protection Project of the Legal Insurrection Foundation (LIF) submits this letter comment to the U.S. Department of Education ("Department") in opposition to "Direct Grant Programs, State-Administered Formula Grant Programs," Docket ID No. ED-2022-OPE-0157 (the "Proposed Rule")[1] because it would end a Trump-Pence rule that added extra safeguards for the rights of faith-based campus groups.

[1] Direct Grant Programs, State-Administered Formula Grant Programs, 88 Fed. Reg. 10857 (proposed Feb. 22, 2023).

LIF is a Rhode Island tax-exempt charitable corporation that promotes and educates the public, among other things, on protection of constitutional rights in education. As such, LIF has legal expertise in and an abiding interest in the negative impact the Proposed Rule will have on fundamental constitutional rights of all Americans, but especially campus religious groups who may be subject to discrimination.

The "Free Inquiry Rule," from the Trump-Pence administration, is a necessary and proper means of protecting the free speech and free exercise rights of religious student organizations and their members at public institutions of higher education ("IHEs"). Specifically, 34 C.F.R. §§ 75.500(d) and 76.500(d) require that any IHE receiving federal funding "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." All these sections require is that religious groups be treated the same as secular groups or face the potential loss of federal funding; an important protection for campus religious groups who might otherwise be subject to discrimination. Therefore, the Proposed Rule, which purports to rescind provisions 34 C.F.R. §§ 75.500(d) and 76.500(d), should be rejected.

The Department states that "these provisions' costs outweigh any potential benefits."[2] The Department cites three main reasons for this claim: (1) the provisions "are not necessary to protect the First Amendment right to free speech and free exercise of religion" of religious student organizations at IHEs;[3] (2) the provisions "create[] confusion among institutions;"[4] and (3) the provisions "prescribe an unduly burdensome role for the Department to investigate."[5] However, none of these points justify the contention that the provisions in question's "costs outweigh any potential benefits"[6] and therefore should be rescinded.

The provisions of the "Free Inquiry Rule" are necessary to protect the First Amendment right to free speech and free exercise of religion of faith-based student organizations at IHEs, because religious groups (particularly minority religions) are always at risk of having their First Amendment rights infringed upon. That is why, throughout this country's history, special or added protections have been afforded to religious groups, in all three branches, at both the state and federal levels, so that they can believe, practice, and speak freely. The *Religious Freedom Restoration Act*,[7] the *Respect for Religious Liberty* section of the United States Attorneys' Manual,[8]

[2] *Id.* at 10863.
[3] *Id.* at 10857.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 10863.
[7] 42 U.S.C. §§ 2000bb-2000bb-4.
[8] U.S. Dep't of Just., U.S. Attys' Manual § 1-15.000 (2018).

Marsh v. Alabama (1946),[9] and *An Act to Provide Protections for the Exercise of Religious Freedom* in South Dakota[10] are just a few examples. As Justice Alito stated in *Burwell v. Hobby Lobby Stores, Inc.*, "Congress enacted RFRA in 1993 in order to provide *very broad protection for religious liberty*,"[11] and enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) to ensure that the First Amendment "be construed in favor of a *broad protection of religious exercise, to the maximum extent permitted* by the terms of this chapter and the Constitution."[12]

Indeed, "[s]ince 2011, 14 state legislatures have recognized the need to protect religious student groups' right to meet as recognized student groups on public college campuses and have enacted laws to provide protection. Those states are the following: Arizona (2011), Ohio (2011), Idaho (2013), Tennessee (2013), Oklahoma (2014), North Carolina (2014), Virginia (2016), Kansas (2016), Kentucky (2017), Louisiana (2018), Arkansas (2019), Iowa (2019), South Dakota (2019), and Alabama (2020)."[13]

Further, because of the complexity and cost of bringing First Amendment claims in the courts, a difficulty the Department effectively acknowledges,[14] the relative ease of bringing a complaint before the Department provides significant and meaningful protection for the First Amendment rights of student organizations.

The provisions should not "create[] confusion among institutions" bound by them. The provisions in question state that a "religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs,"[15] may not be used as the basis to,

> 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).[16]

[9] Marsh v. Alabama, 326 U.S. 501 (1946) (holding that governments cannot require permits for evangelizing, in public spaces, even where those spaces are privately owned).
[10] S.D. CODIFIED LAWS § 1-1A-4.
[11] 573 U.S. 682, 693 (2014) (emphasis added).
[12] *Id.* at 696 (emphasis added).
[13] *Uzuegbunam v. Preczewski*, Brief of Christian Legal Society as Amicus Curiae in Support of Petitioners, 2020 WL 5894130, at *13-14 note 3 (U.S. Sept. 29, 2020).
[14] *See supra*, note 1 at 10861.
[15] 34 C.F.R. §§ 75.500(d) & 76.500(d).
[16] *Id.*

Put more concisely, an organization's religious beliefs cannot be used to deny it benefits it would be entitled to, but-for its religious beliefs. The regulation's requirements are straightforward and easy to follow. IHEs must not deny benefits to a student group because of its religious beliefs.

Lastly, the Department claims that the provisions will require it to take an "unduly burdensome"[17] investigative role, despite the Department's own admission that it "has not received any complaints regarding alleged violations of §§ 75.500(d) and 76.500(d) at the time of publishing" this NPRM.[18] Further, the Department attempts to justify its claim of undue burden by pointing to the complexity and fact-intensive nature of First Amendment law.[19] However, the Department need not engage in a comprehensive First Amendment analysis to determine the relevant question under the regulations it seeks to rescind: whether a religious student organization would have received the same benefits as other student organizations but for its religious beliefs. All the Department need do is compare the rights, benefits, or privileges allegedly denied to a religious group that are provided to non-religious groups and decide if the religious group was so denied such rights. Therefore, because the Department can provide no evidence for its claim that investigation would be unduly burdensome and because the justification it does provide exaggerates the burden investigation would impose, the burden of investigation is insufficient to support the claim that the benefits of the existing regulations outweigh their costs.

For the foregoing reasons, the Equal Protection Project of the Legal Insurrection Foundation recommends that the Proposed Rule, which would rescind provisions 34 C.F.R. §§ 75.500(d), and 76.500(d), should be rejected by the Department and the "Free Inquiry Rule" preserved as is.

Respectfully Submitted,

William A. Jacobson

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[17] *Supra*, note 1 at 10857.
[18] *Id.* at 10863.
[19] *Id*. at 10861.