



September 29, 2021

The Honorable Miguel A. Cardona
 Secretary of Education
 U.S. Department of Education
 400 Maryland Avenue, S.W.
 Washington, D.C. 20202

Dear Secretary Cardona:

We are writing in response to the recent blog by the Department on August 19, 2021, titled “Update on the Free Inquiry Rule.” In the post, the Department indicated an intention to issue a proposed rulemaking that will rescind portions of the 2020 rule. We respectfully ask—as you continue to review this rule, especially 34 C.F.R. §§ 75.500(d) and 76.500(d)—that you commit to uphold protections in the Rule that ensure religious student organizations’ ability to have an authentic religious presence on public college and university campuses free from discrimination.

We celebrate the Department’s desire to uphold the ability of all students to find communities where they can feel accepted and included, and where they can gather around shared passions and perspectives. The diversity of student organizations on public college campuses is beautiful and allows each person to find a group centered around something important to them—ranging across many topics including religion, career interests, service opportunities, hobbies, or various forms of activism. These groups should all be given the opportunity to flourish, including

religious student organizations. The current rule is necessary and ensures that religious organizations have the same opportunities given to other groups.

As the Department noted in the blog post, for many college students, actively “expressing their faith” is an important part, not just of their identity, but of their college experience. Protecting students’ ability to openly talk about faith and to associate with fellow members of their religious communities is a crucial part of free speech and religious exercise. Unfortunately, these First Amendment Freedoms have not adequately been “worked out” by universities, students and the courts, making the rule all the more critical. A number of universities continue to misapply First Amendment principles related to religion. In fact, many religious groups continue to be targeted and singled out for different treatment. Some are singled out for derecognition simply because of their leadership requirements that leaders agree with and model the faith and beliefs of the group, a commonsense expectation that ensures a consistent religious identity from year to year. For instance, the University of Iowa deregistered Sikh, Muslim, Protestant, and Latter-day Saint groups simply due to their requirement that their leaders agree with their religious beliefs. *InterVarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021). Wayne State University took the same position. *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, ---F. Supp. 3d---, 2021 WL 1387787 (E.D. Mich. 2021). Students involved in many religious organizations also have personal stories of being treated differently as religious groups—challenges that do not result in formal court proceedings, but that are very disruptive to their college experience.

The Rule does not give religious groups special privileges or enable discrimination. It simply codifies and ensures that universities recognize the importance of key Supreme Court cases. *See, e.g., Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

To protect religious expression requires a nuanced understanding. A policy is not “neutral” just because it has the same words applying to every group, if those words by definition uniquely impact one group differently and result in disparate treatment. This is true when the word “religion” in a nondiscrimination statement is unreasonably applied to religious organizations’ selection of their leaders. That term means, applied to nonreligious groups, that they may not distinguish based on religious identity, but they may expect their leaders or members to agree with their group’s non-religious purposes and beliefs. Yet applied to a religious group, it means that they may neither distinguish based on religious identity *nor* expect their leaders or members to agree with their purposes and beliefs, because those beliefs are religious. In the enumerated statuses, religion is the only one that results in this unequal treatment, because it is the only listed category where status and belief are intertwined and inseparable. Accordingly, the Rule’s statement that religious groups must be given the same opportunities as other groups is not a special privilege, but a necessary clarification and a helpful reminder for universities.

Diverse religious groups are in agreement that this clarification is crucial to preserve religious diversity and expression—including many Jewish, Christian, Muslim, and Catholic groups,

among others. In fact, the rule was celebrated by a wide range of religious groups because it exactly preserves their ability to authentically represent and faithfully preserve the tenets of their particular faith traditions. *See* InterVarsity Press Release of Sept 9, 2020, <https://intervarsity.org/news/intervarsity-welcomes-stronger-protections-religious-student-groups>; Slugh, Howard, “Religious Groups Led by Co-Religionists—It Shouldn’t Be Controversial,” Nov 23, 2018, <https://www.nationalreview.com/2018/11/religious-groups-government-must-not-dictate-leaders/>.

In addition, the Rule does not impose significant additional requirements. No particular policy must be adopted – the regulation simply asks that the policy be applied to ensure religious groups are given all the privileges “otherwise afforded to other student organizations.” Nor does the current rule prevent a school from choosing a “true all-comers policy,” as was clarified in the Preamble to the Final Rule, 85 Fed. Reg. 59939 (Sept. 23, 2020). It does, however, require that, if any groups are allowed to select based upon agreement with the group’s purpose, then religious groups should be allowed to do so as well, not treated differently just because their beliefs are religious.

Notably, “all-comers” policies, as defined in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), are restricted to a very limited set of policies. They refer to policies that equally prohibit all student organizations from holding to any status or belief-based requirements of any kind for membership or leadership, without exception—not limited to enumerated protected categories. *Id.*, at 675. Schools with all-comers policies must not allow any exceptions for any status-based requirements, and must ensure that no group requires agreement with its purpose or beliefs. They may not apply their policies in a viewpoint discriminatory manner, targeting only disfavored groups for examination as to whether they meet the standard. We are aware of no public universities that have true all-comers policies, as most policies restrict consideration only of the enumerated categories, allow exceptions for a number of single gender groups, and do not think to question the ability of groups to associate around shared ideas that they expect their leaders to agree with.

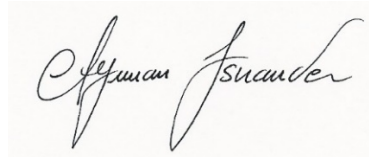
The Rule is also consistent with the Department’s goals. We agree with the importance of promoting “inclusive learning environments” for all students, and believe that having robust religious student organizations can be an important factor in enabling that vision, as they are often among the most diverse groups on campus. Students should all feel part of the greater university community, and should also have the opportunity to connect in smaller communities where they have a sense of belonging. Universities have a critical role in encouraging everyone to seek to understand others and to dialogue with respect. The college campus should be a place where differing perspectives are allowed to remain distinct, so that authentic dialogue and understanding across difference are possible. This is especially important for minority religious groups, formed around specific shared beliefs, the erosion of which can alter their identity and compromise the sense of safety for students associating around that religious identity. In order for this to be true, policies must not be targeted at silencing certain perspectives, whether directly or indirectly. *See Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993).

We respectfully request that you preserve the Rule’s provision that clarifies that religious student organizations are to be treated fairly, meaning that—absent a true all-comers policy in place—universities are to allow religious organizations to authentically express and live out their religious beliefs and practices, in part through holding to belief-based leadership standards. This is a commonsense solution that is important to all religious student organizations.

Sincerely,



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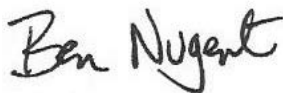
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