

Religious Liberty and Free Inquiry Notice of Proposed Rulemaking

Equal Participation of Faith-Based Organizations in Department of Education's Programs: Interagency Implementation of Executive Order 13831

On January 16, 2020 (National Religious Freedom Day)¹, eight agencies,² including the Department of Education, will publish in the *Federal Register*—and one agency³ will transmit to Congress—notices of proposed rulemaking to implement President Trump's Executive Order 13831.⁴ The proposed rules would ensure that religious and non-religious organizations are treated equally by the federal government, and that organizations are not discriminated against simply because they are religious in nature. The proposed rules remove certain regulatory requirements imposed by the Obama Administration on religious organizations, but not secular organizations. Those requirements placed unequal burdens on religious organizations and cast unwarranted suspicion on them. By singling out religious organizations for unique regulatory burdens, the requirements infringed upon the organizations' religious liberty rights. The proposed rules would remove discriminatory regulatory burdens that the Obama Administration placed on religious organizations that receive grants from the Department; otherwise ensure that religious organizations can compete on a level playing field for federal funding opportunities; and ensure that the Department's direct grant programs and state-administered formula grant programs are implemented in a manner consistent with religious-liberty protections in federal law, including the First Amendment and the Religious Freedom Restoration Act.

ED's Other Proposed Regulations to Preserve and Protect Religious Liberty

In addition to the regulations that the Department and several other federal agencies are proposing, the Department proposes to amend regulations governing the Strengthening Institutions Program, the Developing Hispanic-Serving Institutions Program, the Strengthening Historically Black Colleges and Universities Program, and the Strengthening Historically Black Graduate Institutions Program under the Higher Education Act of 1965, as amended. The proposed revisions address constitutional concerns about the prohibition to use development grants for activities or services if they merely relate to "sectarian instruction" and "religious worship." The proposed regulations prohibit use of such grants for activities or services that constitute religious instruction, religious worship, or proselytization consistent with the First Amendment to the U.S. Constitution and other federal laws. The Department also proposes to

¹ National Religious Freedom Day commemorates the Commonwealth of Virginia General Assembly's adoption of President Thomas Jefferson's "Virginia Statute for Religious Freedom" on January 16, 1786. Presidents have annually proclaimed Religious Freedom Day on January 16 since 1993. Last year's proclamation is available at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-religious-freedom-day-2019/>.

² U.S. Department of Justice (DOJ), U.S. Department of Agriculture (USDA), U.S. Department of Labor (DOL), U.S. Department of Homeland Security (DHS), Veterans Affairs (VA), U.S. Agency for International Development (USAID), U.S. Department of Health and Human Services (HHS), and the U.S. Department of Education (ED).

³ U.S. Department of Housing and Urban Development (HUD).

⁴ Executive Order 13831, Executive Order on the Establishment of a White House Faith and Opportunity Initiative, 83 Fed. Reg. 20715 (May 3, 2018).

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amend the definition of a “school or department of divinity” in a manner that is more consistent with the First Amendment and other federal laws.

The Department also proposes to clarify how an educational institution may demonstrate that it is controlled by a religious organization for purposes of Title IX, 20 U.S.C. § 1681. Federal law currently provides that Title IX “shall not apply” to educational institutions that are “controlled by a religious organization,” to the extent that application of Title IX “would not be consistent with the religious tenets of such organization.” Likewise, federal regulations echo the fact that Title IX does not apply to certain schools “controlled by a religious organization.” Neither Title IX nor its regulations define what it means for a school to be “controlled by a religious organization.” Over the years, the Department of Education’s Office for Civil Rights (OCR) has posted on its website several internal memoranda on this question. Because these OCR memoranda constitute only non-binding, non-regulatory guidance, the Department desires to engage in notice and comment rulemaking on this issue and to obtain the views of the public in crafting an appropriate regulation. Accordingly, one section of the Department proposes a non-exhaustive list of concrete factors to consider as to whether an educational institution is “controlled by a religious organization” for Title IX purposes.

Improving Free Inquiry: Implementation of Executive Order 13864

To implement Executive Order 13864, *Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities*, the Department proposes regulations to ensure public institutions of higher education that receive Federal research or education grants comply with the First Amendment to the U.S. Constitution, as a material condition of a direct grant under 34 CFR Part 75 or a subgrant from a state-administered formula grant program under 34 CFR Part 76. The Department also proposes regulations to ensure that private institutions of higher education that receive Federal research or education grants comply with their stated institutional policies regarding freedom of speech, including academic freedom, as a material condition of a direct grant under 34 CFR Part 75 or a subgrant from a state-administered formula grant program under 34 CFR Part 76.

The Department acknowledges that state and federal courts remain the best arbiters of alleged violations of First Amendment freedoms with respect to public institutions and alleged violations of free speech protections in stated institutional policies with respect to private institutions. The Department proposes to determine that a public institution has not complied with the First Amendment only if there is a final, non-default judgment by a state or federal court that the public institution or an employee of the public institution, acting in his or her official capacity, violated the First Amendment. The Department proposes to determine that a private institution has not complied with its stated institutional policies regarding freedom of speech, including academic freedom, only if there is a final, non-default judgment by a state or federal court to the effect that the private institution or an employee of the private institution, acting on behalf of the private institution, violated such a stated institutional policy. The Department will not make such determinations itself.

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The Department also recognizes the important role of student organizations, including faith-based student organizations, at public institutions of higher education and their First Amendment rights, including the freedom of association. The Department thus seeks to address discrimination against faith-based student organizations by ensuring that public institutions treat faith-based student organizations the same as other student organizations. Accordingly, the proposed regulations require that as a material condition of a direct grant under 34 CFR Part 75 or a subgrant from a state-administered formula grant program under 34 CFR Part 76, a public institution of higher education not deny to a faith-based student organization any of the rights, benefits, or privileges otherwise afforded to non-faith-based student organizations.

The Department may pursue existing remedies for an institution's noncompliance with these proposed material conditions. Existing remedies include imposing special conditions, temporarily withholding cash payments pending correction of the deficiency, suspension or termination of a federal award, and potentially debarment, as described in Subpart G of Part 75 and Subpart I of Part 76 of Title 34 of the Code of Federal Regulations.