AMERICAN ATHEISTS

February 18, 2020

Lynn Mahaffie
Deputy Assistant Secretary for Policy, Planning, and Innovation
Office of Postsecondary Education
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Comment from American Atheists Concerning Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program (Docket No. ED-2019-OPE-0080, RIN 1840-AD45)

Dear Ms. Mahaffie:

On behalf of American Atheists, I write in strong opposition to the Department of Education's (the "Department") Proposed Rule to implement Executive Order 13831[1] affecting grants and services provided by religious organizations, as published in the Federal Register on January 17, 2020.[2] Through this proposal, the Department creates, ex nihilo, a mandatory religious exemption for religious student organizations applicable to public colleges and universities. Moreover, the Proposed Rule undermines religious equality and strips away essential religious freedom protections from people who receive from government-funded social services. This Rule will lead to beneficiaries forgoing needed services, particularly harming atheists, religious minorities, women, and LGBTQ people. This conflicts with the very goals of social services programs by putting the interests of taxpayer-funded organizations ahead of the needs and religious freedom of people seeking these critical services. This proposal is dangerous, unnecessary, it contravenes constitutional requirements and federal law, and it opens recipients of government services to discrimination, harassment, and religious coercion. We strongly urge you to withdraw the Proposed Rule in its entirety.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. Religious liberty is an individual right guaranteed by the First Amendment, and

[1] Exec. Order 13831, Establishment of a White House Faith and Opportunity Initiative, 83 Fed. Reg. 20715, May 8, 2018.
[2] Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190, Docket No. ED-2019-OPE-0080, RIN 1840-AD45 (proposed Jan. 17, 2020) [hereinafter "Proposed Rule"].

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therefore government programs should have clear boundaries and safeguards to protect the religious freedom and equality of every beneficiary of government-funded social services.

The Proposed Rule undermines free speech at public colleges and universities in violation of the First Amendment and federal and state law.

The Department proposes a new religious exemption that requires public colleges and universities to recognize and grant full benefits to religious student groups, even if they violate campus nondiscrimination or all comers policies,[3] providing that:

> (d) Each State or subgrantee that is a public institution shall not deny to a religious student organization at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including full access to the facilities of the public institution and official recognition of the organization by the public institution) because of the beliefs, practices, policies, speech, membership standards, or leadership standards of the religious student organization.[4]

We object to these provisions because they are both unconstitutional and they undermine the ability of public colleges and universities to have nondiscrimination or all comers policies that are applied universally. The majority of public colleges and universities have nondiscrimination or all comers policies,[5] because these policies are an important contribution to campus life. Research shows that participation in student organizations contributes to overall student satisfaction and success. These organization provide opportunities for peer-to-peer connection, reduce isolation, develop leadership skills, and relieve stress.[6] Because of these benefits, and to foster student engagement, most public colleges and universities strive to offer a variety of student organizations and to encourage students to participate. Therefore, many provide significant benefits to recognized student groups including: funding, meeting space, promotion in school media, advertising space, inclusion on student organization fairs, and use of school communication platforms. Students are usually charged a student fee in order to help fund student organizations and pay for these benefits. Having robust nondiscrimination or all comers policies in place also furthers this goal by ensuring that all students are able to access various organizations and explore different ideas and identities.

Nevertheless, the Department now proposes to undermine campus nondiscrimination and all comers policies based on a purposeful misinterpretation of US Supreme Court precedent. The Proposed Rule prevents public college and universities from enforcing these policies because it asserts that these educational institutions must recognize religious student organizations regardless of their "membership

[3] "All comers" policies are those in which the college or university treats all student organizations neutrally by requiring them to accept all students who might wish to participate as members or leaders of the organization.
[4] Proposed Rule, 42 C.F.R. § 76.500(d); *see also* Proposed Rule, 42 C.F.R. § 76.500(d).
[5] For example, Campus Pride has identified over 1,000 public and private institutions of higher education that prohibit discrimination on the basis of sexual orientation and gender identity. Campus Pride, Colleges and Universities with Nondiscrimination Policies that Include Gender Identity/Expression, *available at* https://www.campuspride.org/tpc/nondiscrimination/.
[6] *See, e.g.,* Foubert J.D. and Grainger L.U., Effects of Involvement in Clubs and Organizations on the Psychosocial Development of First-Year and Senior College Students, *NASPA Journal*, 2006, Vol. 43, No. 1, *available at* https://www.albany.edu/involvement/documents/effects_of_involvement.pdf.

standards, or leadership standards." The Department justifies this Proposed Rule by noting that the First Amendment requires public colleges and universities to treat religious organizations the same as secular organizations. Specifically, the Department states that, "This right to expressive association includes the right of a student organization to limit its leadership to individuals who share its religious beliefs without interference from the institution or students who do not share the organization's beliefs," and supports this argument by citing to two cases, *Rosenberger v. Rector & Visitors of Univ. of Va*.[7] and *Business Leaders in Christ v. Univ. of Iowa.*[8]

However, this is a serious misreading of these cases. While the *Rosenberger* decision does stand for the proposition that public colleges and universities must treat religious student groups the same as secular ones, there is no indication that the educational institution cannot have nondiscrimination and all comers policies. In fact, this question was directly decided by the *Christian Legal Society v. Martinez*[9] decision, which was decided after *Rosenberger* and specifically provided that public colleges and universities may have all comers policies and refuse to recognize student groups that do not comply with them. *CLS* specifically clarified that *Rosenberger* stood for the proposition that any access barrier rule must be "reasonable and viewpoint neutral."[10] All comers policies are viewpoint neutral in that they prohibit discrimination by any student group and therefore, they are allowable.[11]

In the district court case cited by the Department, *Business Leaders in Christ*, the University of Iowa failed to conform to their own all comer policy and placed requirements on only certain religious groups, which was not allowable. However, the decision makes clear that all comers policies themselves are allowable under the law, stating specifically that "There is no fault to be found with the policy itself."[12]

Moreover, the Proposed Rule is actually prohibited by the very Supreme Court decisions that the Department cites. Although the Department purports to treat religious student organizations the same as secular ones, it creates a new exemption for religious organizations which allows them, and them alone, to discriminate based on their "membership standards, and leadership standards." As *Rosenberger* teaches, student organizations at public colleges and universities constitute a public forum. Therefore, these institutions may not discriminate based on viewpoint, nor may they favor some viewpoints, such as by granting special exemptions only to religious organizations. The Court explicitly

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[7] 515 U.S. 819 (1995) [hereinafter "Rosenberger"].
[8] 360 F. Supp. 3d 885, 899 (S.D. Iowa 2019).
[9] 561 U.S. 661 (2010) [hereinafter "CLS"].
[10] *CLS,* like *Rosenberger* and other cases in this line of Supreme Court analysis, recognized that public colleges and universities create a public forum by recognizing student groups, and therefore they are subject to First Amendment limitations that apply to the operation of a public forum. Specifically, governmental entities cannot restrict speech based on the content of the speech expressed or viewpoint of the participant, however they may place reasonable, viewpoint-neutral restrictions on the time, place, or manner of speech. *See also* *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Healy* v. *James*, 408 U.S. 169 (1972).
[11] *CLS,* at 694-695.
[12] *Bus. Leaders in Christ,* at 899.

employed this very analysis in *CLS*, clarifying that exempting religious groups from an all comers policy would provide the student groups with "preferential, not equal, treatment."[13]

Moreover, the Department's attempt to regulate speech by preferencing religious organizations on college campuses is not subject to strict scrutiny like viewpoint-neutral restrictions; they are flatly prohibited.[14] While the Department may argue that it is seeking to foster the religious freedom of student organizations, even if such rationale is otherwise compelling, it is nevertheless constrained by this precedent.

We note also that the Department's attempt to accommodate religious groups through this blanket exemption imposed upon public college and universities is subject to Establishment Clause limitations. Specifically, the government may not make accommodations for religion that impose significant burdens on third parties, such as students or nonreligious organizations.[15]

Finally, the Proposed Rule conflicts with federal and state civil rights laws that require campus nondiscrimination and all comers policies. Title IX,[16] and other federal civil rights laws,[17] prohibit public institutions of higher education from discriminating on the basis of sex and other protected characteristics in employment, admission, and all other aspects of their educational programs and activities. This prohibition certain applies to creating and operating the public forum allowing participation by student groups, as well as to the benefits provided to student groups and the participation by students in such groups. The Administrative Procedures Act forbids the Department from issuing regulations such as these that directly contravene federal law.[18]

While the Department may preempt state law, it has failed to do so here expressly by setting aside state civil rights protections.[19] Moreover, the Department failed to conduct a federalism analysis, as required under Executive Order 13132 when a federal regulation "have substantial direct effects on the States."[20] The Proposed Rule would directly prohibit states from applying their nondiscrimination laws and constitutional protections in the public educational institutions that they fund. For example, in states whose laws prohibit discrimination based on sex, a state-funded public university must apply these prohibitions to its educational activities, and therefore it may not be allowed to fund or recognize a student group that discriminates on that basis. This proposed rule puts public colleges and universities

[13] *CLS*, at 697 n.27 ("In seeking an exemption from Hastings' across-the-board all-comers policy, CLS . . . seeks preferential, not equal treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause.").

[14] *Rosenberger*, at 829 ("Viewpoint discrimination is… an egregious form of content discrimination. The government must abstain from regulating speech when the… opinion of perspective of the speaker is the rationale for the restriction.").

[15] A more thorough treatment of the applicability of the Establishment Clause to the Proposed Rule is provided below, pages 8-9.

[16] Title IX of the Education Amendments of 1972, 20 U.S.C.A. §§ 1681-1688.

[17] Including Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act pf 1973.

[18] See APA analysis below, pages 7-8.

[19] The "presumption against preemption" provides that federal law should not be read to preempt state law "unless that was the clear and manifest purpose of Congress*." Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[20] Exec. Order 13132, § 1(a).

in the untenable position of having to choose between following state law and following the Department's novel interpretation of federal law.

The Proposed Rule undermines access to and the efficacy of government-funded social services.

Department social services programs affected by the Proposed Rule would include, but not be limited to, grants for college prep and work-study programs intended to help high school students from low-income families prepare for college as well as afterschool and summer learning programs for students in high-poverty, low-performing schools.

The Proposed Rule runs counter to the intended purpose of these programs by increasing the likelihood of inefficiencies, exposing beneficiaries to potential harms, and hindering access to vital government services. First, the Proposed Rule eliminates the requirement that religious providers take reasonable steps to refer beneficiaries to alternative providers if requested. Although this component was stripped by President Trump's May 2018 Executive Order, it is essential because millions of Americans are not comfortable receiving social services from religious providers, and therefore, they may forgo getting the services they need because they are unable to find an alternative provider.

Second, the Proposed Rule strips the requirement that funded religious providers give beneficiaries written notice of their right to religious freedom. Without this information, beneficiaries of these services become vulnerable because they would lack awareness that they can object to discrimination, proselytization, or religious coercion when receiving government-funded services.

Third, the Proposed Rule greatly widens religious exemptions for government-funded religious providers by 1) expanding who qualifies for religious exemptions, 2) expanding the scope of those exemptions, and 3) encouraging use of exemptions by religious entities. For example, the Department seeks to allow colleges and universities to claim the broad religious exemption to Title IX even if they are not controlled by a religious organization, as long as they subscribe to "specific moral beliefs or principles." While existing regulations already allowed government-funded religious organizations to discriminate in employment on the basis of religion,[21] the Proposed Rule would make it easier for providers to use religion as a pretext to discriminate on other bases. But this proposal goes even further, requiring the Department and state grantees to add special notices to grant announcements to inform religious organizations about additional religious exemptions from federal laws and regulations they can seek.

Lastly, the Proposed Rules eliminate safeguards that help prevent religious coercion in government-funded voucher programs or indirect aid. Existing regulations require that recipients must have at least one secular option to choose from in order to make a meaningful decision that they want to receive services from a religious organization. Courts have permitted different rules to apply to vouchers than direct funding to religious organizations because beneficiaries can make an informed and real choice about which provider they receive services from. However, without the requirement for a secular alternative, beneficiaries can be forced to receive essential benefits from religious providers that engage in religious coercion, condition their services on participation in religious activities such as worship, or

[21] Note that American Atheists strongly objects to existing regulations that allow government-funded religious organizations to discriminate in employment on the basis of religion as well. No organization should be allowed to engage in invidious discrimination with government funding merely because of their religious beliefs.

limit access to services based on religion. It is remarkable that the Department would propose such a clear and unmistakable violation of the First Amendment, sacrificing the religious freedom of beneficiaries in order to benefit politically powerful religious providers.

The Department's justifications for the Proposed Rule, as well as its interpretation of Supreme Court precedent, are meritless and legally incorrect.

In justifying this Proposed Rule, the Department relies heavily on *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[22] misinterpreting the Supreme Court's decision to mean that the government cannot require faith based organizations to provide alternative providers or notification to beneficiaries if the same is not required of secular organizations. On its face, this is a ridiculous interpretation – why should secular government-funded organizations be required to meet notice and referral requirements meant to prevent religious coercion when they, by definition, cannot engage in the type of conduct that endangers the religious freedom of beneficiaries? But even if the Department were correct about its interpretation of *Trinity Lutheran*, the correct rule change would be to impose the notice and referral requirements on all government-funded providers, not to strip away essential religious freedom protections for beneficiaries. These requirements are of de minimis burden, and they can easily be absorbed by organizations already receiving federal funding.

Moreover, the Department's reading of *Trinity Lutheran* is an exceedingly broad interpretation of a very narrow decision. *Trinity Lutheran* was expressly limited to discrimination based on religious identity with respect to playground resurfacing, and it explicitly stated it did not "address religious uses of funding or other forms of discrimination."[23] However, even if we take this case at its broadest possible interpretation, "that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can only be justified by a state interest 'of the highest order,'"[24] this decision remains inapplicable. The existing regulations already allow religious organizations to compete for government grants to fund social service programming on the same basis as secular organizations – they do not exclude religious organizations based on their religious identity.

Finally, even if *Trinity Lutheran* were to apply, the existing safeguards to protect the religious freedoms of beneficiaries further "a compelling government interest" and are narrowly tailored in a way to not exclude faith-based providers from seeking government grants. The costs to providers in to provide notice and have a list of alternative providers are minimal compared to the costs to beneficiaries seeking the government-funded social services they need. And again, if the Department wanted to ensure these requirements could not be perceived as a burden solely on religious organizations, they could simply impose them on all government-funded grantees.

The Department also expresses concerns the alternative provider requirement may violate the Religious Freedom Restoration Act,[25] but the current regulations already account for RFRA. RFRA asks whether the law places a "substantial burden" on religious exercise, and if it does the government must indicate a "compelling government interest" by the "least restrictive means." Firstly, we note that the strict

[22] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) [hereinafter "Trinity Lutheran"].
[23] *Id.,* Footnote 3.
[24] *Id.,* at 2019 (citations omitted).
[25] 42 U.S.C. § 2000bb, et seq. [hereinafter "RFRA"].

scrutiny test established by RFRA goes beyond constitutional requirements,[26] and any exemption granted through this law is subject to constitutional restrictions.[27] As noted below, any interpretation of this statute must meet Establishment Clause requirements.

Moreover, protections under RFRA do not apply to de minimis burdens or even significant burdens on religious exercise when there are significant countervailing interests. Requiring groups that partner with the government and receive government funding to respect the religious freedoms of others by providing notice and referrals to other providers does not represent a substantial burden. Religious organizations voluntary partner with the government, and if they don't want to fulfill requirements designed to improve efficiencies and meet objectives, or if they believe these minor requirements are a burden that outweighs the funding they receive to implement these social service programs, they can decline the funding.[28]

The Department failed to meet its burden under the Administrative Procedures Act to justify the Proposed Rule and to meet constitutional requirements, and therefore the Proposed Rule is arbitrary and capricious.

The Administrative Procedures Act (APA) proscribes regulations that are "arbitrary, capricious…or otherwise not in accordance with law…"[29] The Department is required to provide "adequate reasons for its decisions."[30] It is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[31] Furthermore, it cannot "fail[] to consider an important aspect of the problem, [or offer] an explanation...[that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[32] Finally, "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."[33] When an administrative agency substantially changes its position, these requirements are heightened because of the threat to "serious reliance interests,"[34] and any "[u]nexplained inconsistency is…a reason for holding an interpretation to be an arbitrary and capricious

[26] *See Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990) ("The "compelling government interest" requirement seems benign, because it is familiar from other fields…. What it produces in those other fields -- equality of treatment, and an unrestricted flow of contending speech -- are constitutional norms; what it would produce here -- a private right to ignore generally applicable laws -- is a constitutional anomaly…. The First Amendment's protection of religious liberty does not require this.")
[27] *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 544 (refusing to enforce RFRA against the states because doing so would be unconstitutional).
[28] We note that the Department's argument here could apply equally to *any* requirement of these programs, not just those relating to notice and referral. If the Department is going to look at every aspect of each program individually to meet a compelling interest test, then in effect, religious organizations would be free to simply take government funding without strings or even meeting basic program requirements. This outrageous outcome is clearly not contemplated by *Trinity Lutheran*, RFRA, nor the First Amendment.
[29] 5 U.S.C.A. § 706(2)(A).
[30] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).
[31] *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983).
[32] *Id.*, at 43.
[33] *Michigan v. E.P.A.,* 135 S. Ct. 2699, 2707 (2015).
[34] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

change from agency practice…"[35] Moreover, the APA broadly prohibits regulations "contrary to constitutional right[s]."[36]

The Department has failed to meet its burden under the APA because did not explain why the Proposed Rule was necessary, nor did it consider the burden on beneficiaries. The notice and referral requirements were instituted under the Obama Administration based on recommendations from the President's Advisory Council on Faith-Based and Neighborhood Partnerships.[37] This landmark convening of various viewpoints on matters of religious freedom, including several prominent faith-based institutions, achieved consensus on 12 unanimous recommendations which formed the basis of Executive Order 13559.[38] This common ground honored our nation's commitment to religious freedom while not imposing unnecessary burdens upon religious providers in carrying them out. At the time, the Council determined that the changes would both "improve social services and strengthen religious liberty."

Regulations based on Executive Order 13559 have been working well since 2016, and the Department has not provided any reason for the Proposed Rule except that it assumes, without evidence, that there is a significant burden to religious organizations.[39] The Department admits this, saying that it "does not have adequate information available at this time to estimate" what, if any, cost savings removal of the alternative provider requirement would benefit providers.[40] Nor does the Department identify monetary cost savings associated with eliminating the notice requirement. Similarly, while the Department purports to encourage religious organizations to participate in government programs, it is has not demonstrated that religious organizations are not participating because of these requirements, nor that there are insufficient providers participating to meet program needs.

Moreover, the Department did not examine the impact that eliminating these important religious freedom protections would have on third parties. Not only does this failure undermine the reasoned analysis required by the APA, this kind of special privileging of religious organizations also violates the Establishment Clause. Specifically, the Establishment Clause requires the consideration of any impact an accommodation or religious exemption would have on third parties. The First Amendment bars the government from crafting "affirmative" accommodations within its programs if the accommodations

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[35] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) (citation omitted).

[36] 5 U.S.C.A. § 706(2)(B).

[37] President's Advisory Council on Faith-Based and Neighborhood Partnerships, A New Era of Partnerships: Report of Recommendations to the President 127 (2010), available at http://bit.ly/2A0yhXA. Members included: Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America; Dr. Frank Page, Vice-President of Evangelization, North American Mission Board, and Past President of the Southern Baptist Convention; Anthony R. Picarello, Jr., General Counsel, United States Conference of Catholic Bishops; The Reverend Larry J. Snyder, President and CEO, Catholic Charities USA; and Richard E. Stearns, President, World Vision United States.

[38] Exec. Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 81 Fed. Reg. 19353, April 4, 2016.

[39] Moreover, as discussed above, the Department's *Trinity Lutheran* analysis is deeply flawed and therefore insufficient justification.

[40] Proposed Rule, 85 Fed. Reg. at 3217-19.

would harm any program beneficiaries.[41] The Constitution commands that "an accommodation must be measured so that it does not override other significant interests;"[42] "impose unjustified burdens on other[s];"[43] or have a "detrimental effect on any third party."[44] Therefore, any regulations established by the Department to accommodate religion must do so without significantly burdening third parties.

In fact, the Proposed Rule would unconstitutionally harm at least two groups of third parties. The first group are those harmed by the expansion of the religious exemptions in employment. Atheists, religious minorities, LGBTQ persons, and women would be most likely to suffer because they either reject dominant religious beliefs or act inconsistently with employers' interpretations of those beliefs. Those groups have also historically been some of the most likely to face employment discrimination. But even followers of dominant religious beliefs may be harmed by discrimination from government-funded religious employers who interpret their beliefs differently or who follow a different religion. In order to resist religious coercion, these groups might have to forego employment opportunities, higher pay, and promotions. This discrimination could take many forms, including refusing to hire employees, firing employees, mistreating employees, imposing onerous restrictions on employees' private practices, denying them benefits, or paying employees less. For example, a Christian employer could penalize a female employee who got an abortion by refusing to increase her pay or firing her.

The second group of third parties harmed by the Proposed Rule are beneficiaries of government-funded social services and those seeking such services. As a general matter people, both religious and nonreligious, object to being subject to religious programming in social services that conflicts with their beliefs. Moreover, some beneficiaries, especially LGBTQ, atheist, or religious minorities, could not in good conscience take advantage of government services provided by religious organizations that they know discriminate against certain types of employees. Such beneficiaries may forgo needed services rather than receive them from a provider that they fine objectionable. The Department failed to examine the cost to these beneficiaries, as well as the negative impact on program efficacy, because of the elimination of these religious freedom protections. Moreover, while the Department kept in place prohibitions on discrimination against beneficiaries based on religion or participation in religious activities, it did not examine whether such inappropriate behavior would increase if beneficiaries are not made aware of their rights.

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[41] U.S. Const. Amend. I; *Cutter v. Wilkinson*. 554 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and must ensure that the accommodation is "measured so that it does not override other significant interests") (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

[42] *Cutter v. Wilkinson*, 544 U.S. at 722.

[43] *Id.* at 726.

[44] *Id*. at 720, 722; *See also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2781; *Estate of Thornton v. Caldor*, 472 U.S. at 710 ("unyielding weighting" of religious exercise "over all other interests…contravenes a fundamental principle" by having "a primary effect that impermissibly advances a particular religious practice."); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries"); *United States v. Lee*, 455 U.S. 252 (1982) ("the limits [followers of a particular sect] accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

American Atheists and other organizations serving nonreligious people frequently receive complaints from nonreligious beneficiaries of government-funded programs who object because they are denied services by religious service providers or because such providers violate their religious freedom. For example:

- In 2019, a student in the nursing program at Seminole State College (SSC) in Florida reached out to American Atheists for assistance. The nursing program, a partnership between SSC and the University of Central Florida, received grant funding from the Health Resources and Services Administration (HRSA) at the Department of Health and Human Services (HHS) in addition to funding from the Department of Education.

  As part of the nursing program at SSC, the student was required to complete a clinical rotation. She was assigned to Advent Health, a local medical provider affiliated with the Seventh Day Adventist church. As part of her duties during her clinical rotation, she was required to counsel patients on the benefits of prayer and accompany patients to chapel services if they required supervision. In addition, the placement effectively denied her the ability to network with providers that might hire her in the future and was instead required to work for an employer that would discriminate against her based on her religious viewpoint in its future hiring decisions. She had not been referred to an equivalent secular health care provider for her clinic, nor was she provided written notice that she had the right to do so. In fact, the SSC staff administering the program initially denied her request to switch her clinical assignment to a secular provider. After discussing the matter with SSC's general counsel, American Atheists was able to resolve the issue constructively. The student was assigned to a different, secular health care provider for the upcoming semester.

- In 2019, a student in hospitality and tourism at Valencia College in Florida sought assistance from American Atheists. Valencia College receives funds through the Department of Education. All students in a course titled “Event Industry: Meetings, Expos, Events and Conventions” were required to organize fundraising events to support a nonprofit organization, Children of the Nations, that the professor selected. Children of the Nations is an explicitly sectarian Christian organization that ministers to communities in Africa. Over the course of the semester, the students (working in teams of three) would be required to organize two events in support of the charity: an initial promotional event to raise the profile of the organization and a final fundraising event on the organization's behalf. The student assisted by American Atheists had not been referred to an equivalent secular charity, nor was she provided written notice that she had the right to request such an accommodation. Over several phone conversations with the general counsel at Valencia College, American Atheists was able to arrange for the student to complete a solo project in which she would support a secular charity that had been involved in the course in prior years.

Although these outcomes were favorable, it is not clear that similar beneficiaries to the Department’s programs would be able to access suitable services without the existing notice and referral requirements. While the foregoing examples pertain to nonreligious people, many religious individuals also object to being subject to religious programming in social services that conflicts with their beliefs. However, such individuals may not be aware of or have access to organizational support to help them enforce their rights, forcing them to either endure these violations of their religious freedom or to forgo essential social services.

Our research indicates there is significant discrimination against nonreligious people in education, which further demonstrates the impact of the Proposed Rule on this population and the need for robust referral procedures. In a recent study of nearly 34,000 nonreligious participants, 29.4% reported they had negative experiences in education because of their nonreligious identity.[45] Moreover, 42.8% of participants "mostly" or "always" concealed their nonreligious identity while in educational settings, indicating a high level of stigmatization.

The provisions of the Department's Proposed Rule relating to indirect aid are unconstitutional and contrary to Supreme Court precedent.

We are extremely perturbed by the Department's Proposed Rule changes concerning what it frames as "indirect Federal Financial assistance," which demonstrate both a fundamental misunderstanding of the Supreme Court decisions the Department cites and a lack of concern about the religious coercion it is casually foisting upon beneficiaries. Under existing regulations, a religious grantee may not use its funding to pay for "religious worship, instruction, or proselytization,"[46] moreover:

> A private organization that engages in explicitly religious activities, such as religious worship, instruction, or proselytization, must offer those activities separately in time or location from any programs or services supported by a contract with a grantee or subgrantee, including a State, and attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the contract must be voluntary.[47]

However, neither of these restrictions applies to providers that receive government funding indirectly through vouchers. This exemption is based on *Zelman v. Simmons-Harris,*[48] in which the Supreme Court determined a private school voucher program did not violate the Establishment Clause, because the "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." Under current regulations, the exemption for indirect aid is only applicable if "the beneficiary has at least one adequate secular option for use of the voucher, certificate, or other similar means of government-funded payment."[49]

The Department now proposes to amend its definition of "indirect Federal Financial assistance" in order to remove even this modest safeguard to protect the religious freedom of beneficiaries in voucher programs. *Zelman*, like its predecessor cases, turned on a question of fact: was the beneficiary able to make a genuine, independent choice whether or not to receive services from a religious organization? This Establishment Clause analysis required in *Zelman* an evaluation of all the options available to program beneficiaries, including the availability of services directly provided by the government and secular options. The Court elaborates thusly, "the Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating all options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program

[45] Unpublished data from the US Secular Survey, American Atheists, 2019. Publication forthcoming.
[46] 34 C.F.R. § 75.532.
[47] 34 C.F.R. § 3474.15(d)(1).
[48] 536 U.S. 639 (2002) [hereinafter "Zelman"].
[49] 34 C.F.R. § 75.52(c)(3)(ii).

scholarship and then choose a religious school."[50] *Zelman* does not justify the possibility of a single religious provider as the only option for a public voucher, because the additional secular options were essential to the ruling.[51]

By definition, the inability to reject a religious provider in favor of a secular option means voucher recipients have no genuine, independent choice. Therefore, not providing a secular option for beneficiaries means that the government would be adding a religious test to government services, leaving them with no choice or forcing them into a program that includes explicitly religious content or requirements.[52] Moreover, by designing a program in such a way that only religious providers are available as options, *it is the government, not the beneficiary*, that is determining that the government aid reaches inherently religious programs. In this instance, it is impossible for the "government program through which the beneficiary receives the voucher, certificate, or similar means of government-funded payment" to be "neutral toward religion," as required by *Zelman*.

Lastly, we note that the Department failed to provide any sort of justification or reasoning for this dramatic departure from well-established law and stripping away of religious freedom protections. The Department cites to *Trinity Lutheran* and RFRA, but it fails to clarify how *Trinity Lutheran* or RFRA applies when existing regulations neither prevent religious organizations from participating in these programs nor impose any specific burden upon them. Again, the Department proposes this rule change heedless of cost to beneficiaries, in violation of the Establishment Clause. No beneficiary in "direct" or "indirect" programming should be turned away from a government funded program based on religion, a religious belief, a refusal to hold a religious belief, or refusal to attend or participate in religious activities.

[50] *Zelman,* at 655-6.

[51] The case language the Department cites pertaining to the percentage or number of religious versus secular providers is inapposite here. In every location in Cleveland, there was at least one secular provider available as well as the public schools. Because the Proposed Rule would apply this proposed definition beyond this limited school context, these assumptions do not hold.

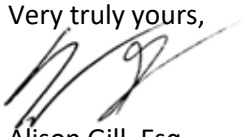
[52] In other contexts where the government conditions benefits indirectly on participation in religious activities, such as in the field of addiction recovery, the courts have readily struck down these requirements. *See, e.g., Hazle v. Crofoot,* 727 F.3d 983 (9th Cir. 2013); *Inouye v. Kemna,* 504 F.3d 705 (9th Cir. 2007).

Conclusion

Because the Proposed Rule is irreconcilable with the First Amendment, needlessly harmful to program beneficiaries, and it undermines vital religious freedom protections, it should be withdrawn in its entirety. Moreover, we object to the fact that the Department issued this Proposed Rule, with a significant and sweeping impact on its programs, with only a 30-day comment period, knowingly doing so at the same time seven other agencies issued similar rules. Each such rule requires a unique analysis of the affected programs of the agency and the impact of the rule. This type of tactical manipulation of rulemaking is at odds with the concept of notice and comment at the heart of the APA.

If you should have any questions regarding American Atheists' opposition to the Proposed Rule, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Very truly yours,



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