

U.S. Department of Education

Religious Liberty and Free Inquiry Final Rule

The U.S. Department of Education has issued the Religious Liberty and Free Inquiry Final Rule (Final Rule) to help ensure that public institutions uphold fundamental rights guaranteed by the First Amendment to the U.S. Constitution and that private institutions adhere to their stated institutional policies regarding freedom of speech, including academic freedom.

The Final Rule also ensures the equal treatment and constitutional rights of religious student organizations at public institutions, and separately provides clarity to faith-based institutions with respect to their non-discrimination duties under Title IX. This rulemaking follows months of careful deliberation and extensive input from stakeholders, represented by over 17,000 public comments.

Improving Free Inquiry: Implementation of Executive Order 13864

The Department has taken historic action to implement Executive Order 13864, entitled *Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities*. The Final Rule helps ensure that public institutions of higher education uphold fundamental rights guaranteed in the First Amendment to the U.S. Constitution, including protections for freedom of speech, association, press, religion, assembly, petition, and academic freedom, and that private institutions of higher education adhere to their own stated institutional policies regarding freedom of speech, including academic freedom. Public institutions of higher education must 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. Private institutions of higher education must 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 recognizes that state and federal courts have a well-developed body of case law to determine whether a public institution has violated the First Amendment, or whether a private institution has violated its own stated institutional policies regarding freedom of speech, including academic freedom. Accordingly, the Department will rely upon a final, non-default judgment by a state or federal court to determine whether a public or private institution has violated these material grant conditions. A public or private institution must report any such final, non-default judgment to the Department no more than 45 calendar days after such judgment is entered.

The Department may pursue existing remedies for an institution's noncompliance with these 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.

ED's Regulations to Preserve and Protect Religious Liberty

Clarification of Title IX Religious Exemption

The Department recognizes that educational institutions, stakeholders, and the public benefit from greater clarity concerning religious exemptions to Title IX, and greater transparency as to what factors the Department considers when evaluating a school's invocation of a religious exemption. The Final Rule, for the first time, codifies how an educational institution may demonstrate that it is controlled by a religious organization for purposes of Title IX, 20 U.S.C. § 1681(a)(3). Federal law already 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

U.S. Department of Education

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organization.”¹ Likewise, federal regulations echo the fact that Title IX does not apply to certain schools “controlled by a religious organization.”² Before now, neither Title IX nor its implementing regulations have ever defined what it means to be “controlled by a religious organization.” Now, the Final Rule gives schools and other stakeholder clarity on the meaning of this phrase.

The Final Rule gives fair notice to stakeholders and the public of when the religious exemption under Title IX applies, and balances the Department’s interest in securing religious freedom for educational institutions with its interest in ensuring vigorous enforcement of Title IX’s prohibition of discrimination on the basis of sex. The Final Rule provides a non-exhaustive list of criteria that an educational institution may use to satisfy the definition of “controlled by a religious organization.”

Equal Treatment of Religious Student Organizations at Public Institutions

The Department recognizes the important role of student organizations, including religious student organizations, at public institutions of higher education and their First Amendment rights. The Final Rule requires that a public institution must not deny to any student organization whose stated mission is religious in nature any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution, 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. For example, a religious student organization would have the same rights as other student organizations at the public institution to receive official recognition, to use the institution’s facilities, and to receive student fee funds. In this manner, the Final Rule prohibits discrimination against religious student organizations because of their beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs.

Programs under Title III and Title V of the Higher Education Act of 1964, as Amended

The Department amends 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 Final Rule addresses constitutional concerns about the prohibition to use development grants for activities or services if they merely relate to “sectarian instruction” and “religious worship.” The Final Rule prohibits 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 Final Rule also addresses constitutional concerns about part of the definition of a “school or department of divinity” as an institution, or department, or program of instruction designed to prepare the students to teach “theological subjects,” which may, for example, prohibit an institution from using a grant for a secular department of religion that prepares students to teach various religions in a comparative religion course. The Final Rule amends the definition of a “school or department of divinity” to mean an institution, or a department of an institution, whose program is solely to prepare students to become ministers of religion or to enter into some other religious vocation. This definition is more consistent with the First Amendment and other federal laws.

¹ 20 U.S.C. § 1681(a)(3).

² 34 C.F.R. § 106.12(a).