INSTITUTE FOR REGULATORY ANALYSIS AND ENGAGEMENT
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M E M O R A N D U M

To: **Hon. Miguel Cardona, Secretary, US Department of Education**
From: **Andrew Langer, Chairman, Institute for Regulatory Analysis and Engagement**
Date: **March 23, 2023**
Re: **Comments Regarding the DOE Notice of Proposed Rulemaking, Direct Grant Programs, State-Administered Formula Grant Programs Proposed Rule, aka "The Free Inquiry Rule," Docket ID ED-2022-OPE-0157**

Secretary Cardona:

The following are the comments of the Institute for Regulatory Analysis and Engagement (IRAE) on the United States Department of Education Notice of Proposed Rulemaking, Direct Grant Programs, State-Administered Formula Grant Programs Proposed Rule, Docket ID ED-2022-OPE-0157, published February 22, 2023. This rule is also known as the "Free Inquiry Rule".

IRAE is a non-profit, non-partisan research, education and advocacy organization. Our mission is to inject a common-sense perspective into the regulatory process, to ensure that risks and costs of regulation are fully considered based on sound scientific and economic evidence and to ensure the voices, interests and freedoms of Americans, and especially of small business, are fully represented in the regulatory process and debates. Finally, we work to ensure that regulatory proposals address real problems, that the proposals serve to ameliorate those problems, and, perhaps most-important, that those proposals do not, in fact, make public policy problems worse.

We are especially interested in issues with a fundamental constitutional bearing, as this proposal certainly is. While many regulatory analyses start and end with an underlying statutory framework and how a proposed rule aligns with an agency's obligations under the Administrative Procedure Act, this analysis focuses in no small measure on the constitutional questions underlying the latest Department of Education (DOE) proposal—and the Department's attempt to sidestep its constitutional obligations by couching this proposal in a cost-benefit analysis framework.

To be clear, we fundamentally oppose what DOE is proposing to do here. Not only is it a departure from existing federal law, but is has enormous implications for the rights of conscience of students currently protected by DOE regulations.

The First Amendment, Faith, and Using The Regulatory Process to Undermine Both

Many Americans were deeply concerned about how the outcome of the last presidential election might impact religious freedoms in the United States. But few could have predicted the multi-front assault on religious freedom that this administration has undertaken through the administrative and regulatory processes. IRAE recently filed comments in a regulatory proceeding at the Department of Health and Human Services that similarly seeks to overturn rules promulgated and finalized by the previous administration that protected rights of conscience of medical providers in delivering health care. Here, we have the administration attempting to undermine protections for students on college campuses when those students want to create organizations centered around matters of faith.

For the last half-century especially, the intersection of all of the rights guaranteed under the First Amendment (including free speech, freedom of religion and freedom of association) and the powers exercised by post-secondary education communities have been the subject of intense debate and scrutiny. Which groups can form on college campuses, what activities they may engage in, where on campus those activities may be undertaken—all of these questions have been examined, and as times have changed, in many ways answered.

The answer, by and large, whether it is because of federal courts speaking out in defense of an expansive view of the First Amendment or because the public has been vocal in ensuring that federal regulators do the right thing, has been to weigh in on the side of ***more*** speech, to allow for ***more*** avenues for expression and association.

The rules that the Department of Education is working to rescind here were a positive and important step in that direction.

Our colleagues at Advancing American Freedom, another not-for-profit, non-partisan public interest organization, put it cogently when they say in their comments that,

> **"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."**

More importantly, universities especially should be places where all manner of ideas can be debated and discussed fully—especially controversial ideas that benefit the most for vigorous debate and discussion. Our colleagues at the Academic Freedom Alliance have said it well:

> **"We should be particularly wary of public officials imposing limitations on what ideas can be discussed inside the university. The temptation to abuse such a power in order to suppress ideas that incumbent politicians or transient majorities find threatening to their interests and sensibilities is far too great. Conservatives have rightly warned that campus speech codes are used to silence points of view that some members of the campus community did not like. Campus speech codes imposed by legislators or trustees should spark the same concern, even if the targeted speech is different. Repugnant ideas on a college campus should be challenged through criticism and debate, not through the tools of censorship."**

The entire purpose of our First Amendment is to protect unpopular speech (so that it can be subjected to rigorous discussion, debate and criticism". Popular speech, after all, needs no such protections (though, of course, it has it).

UCLA law professor and noted constitutional scholar Eugene Volokh has said:

> **"[A] university campus is a place where counterspeech is especially likely to be effective in combating such overwhelmingly condemned evil speech, both intellectually (in the sense of providing a persuasive response, if any is likely to be required) and emotionally (in the sense of making the targets of the speech feel welcome and valued on campus)..."**

With regards to this particular set of rules, the Department of Education underscored the relationship between religious association and free inquiry, noting in their release upon the rule's final publication that:

> **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.**

This administration wants to undo that. As they want to undo protections for expressions of faith and/or matters of conscience in other areas of federal regulatory policy.

<u>One Cannot Use "Cost/Benefit Analysis" to Sidestep the Constitution</u>

Nobody recognizes the importance of sound regulatory analysis more than IRAE. We believe in the use of cost/benefit analyses (CBAs, known by some as benefit/cost analyses), though we believe that they are one dimensional (only telling us if a particular action either costs or benefits the public as a whole, or a regulated community as a whole, given the metrics that are being used to assess them). But they cannot identify comparative risks, risks from unintended consequences, or tell us if a rulemaking makes sense given those other assessments (we believe that the federal government does an overall poor job of assessing comparative risks or identifying potential consequences of regulations).

Despite the limitations of CBAs, they are important tools in a regulatory agency's rulemaking process.

But cost/benefit analyses cannot be used to justify sidestepping the Constitution.

In the same manner that we are seeing this administration use the regulatory process to attack people and matters of faith, we are also seeing this administration use the regulatory process to try and sidestep constitutional obligations. This has its roots in the Obama Administration's efforts to use IRS regulations to silence opposing viewpoints, regulatory enforcement powers at the FDIC, Treasury, and even the EPA to attack rights protected under the Second Amendment, and the Obama Administration's own efforts to undermine rights of conscience with rulemakings at the Department of Health and Human Services.

We question the metrics DOE is using to justify their so-called CBA in this proposed rescinding. Having received no complaints regarding the rule that DOE is proposing to rescind, one wonders just what "real world" numbers DOE is using to undergird its analysis—especially when it comes to their measurement of benefits.

IRAE would submit that DOE vastly underestimates the economic benefits to universities of protecting the First Amendment rights of its students.

Adam Millsap, formerly a research fellow at the Mercatus Center (a research and education organization affiliated with George Mason University), now a Senior Fellow at Stand Together, another non-profit, non-partisan research and education organization, wrote in US News and World Report in 2016 that:

> **"The theory that ideas and innovation are crucial to economic growth is an old one. Joseph Schumpeter's "creative destruction" is perhaps the best known explanation of the role that innovation plays in the economy. Schumpeter explained that competition requires firms to constantly innovate, since those that don't will quickly be replaced by those that do. Ultimately micro-level creative destruction helps drive macro-level economic growth…**
>
> **Since spreading ideas and information requires communication – people talking to one another, attending lectures and presentations, watching videos, etc. – it's likely**

> **that limiting speech, either formally or informally, would have pernicious effects on innovation and harm economic growth in the United States…**
>
> **Currently the United States is one of the most economically competitive countries in the world as well as the most supportive of free expression. I don't think this is a coincidence: America's unique commitment to free speech and the open exchange of ideas has given entrepreneurs in the United States a competitive advantage."**

In that piece, Millsap singled out attempts to suppress free speech on college campuses as problematic for innovation in the United States over the long term. Innovation on college campuses attracts investment—investment in the form of grants and large donations for research. Dialogue on campus begets that innovation. That dialogue can only be had if the university campus is a place where that dialogue is both protected and encouraged.

Further, the DOE misses the relationship between the climate on a campus while students are attending, and the relationship of that climate to how students view that university over the long term (and how alumni may view a university that suppresses speech). The growth of a university's endowment over the long term can be severely impacted by the climate that university administrators create on campus vis a vis protection of First Amendment rights.

DOE's CBA ignores this. DOE ignores this because they want to use their flawed CBA to justify sidestepping the First Amendment's protections. When legislation (or, in this case, regulation) comes into conflict with the Constitution, the Constitution rules. This is ***fundamental.*** As Alexander Hamilton wrote in Federalist #78:

> **[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the *fundamental* laws, rather than by those which are not *fundamental*. (emphasis added)**

Conclusion

This proposal is bad policy. It is being enacted for political reasons, not substantive ones. It is being done because the current administration's political base is openly hostile to religious practice and matters of conscience—and this administration has pledged to use the regulatory process to sideline those who express either. In creating this proposal for political reasons, the Administration, specifically the Department of Education, is ignoring the fundamental rights to freedom of speech, religion and association of millions of American students.

This. Is. Wrong.

The First Amendment stands as the first in the Bill of Rights for a reason. James Madison felt that it was the bedrock which undergirded all other rights he was seeking to protect.

The Department of Education should withdraw this proposal completely.