AMERICAN ATHEISTS

July 12, 2019

Ms. Diane Auer Jones
Principle Deputy Under Secretary
Office of Postsecondary Education
US Department of Education
400 Maryland Ave. SW
Mail Stop 294-20
Washington, DC 20202

Re: Comments regarding Student Assistance General Provisions, the Secretary's Recognition of Accrediting Agencies, the Secretary's Recognition of Procedures for State Agencies (Docket No. ED-2018-OPE-0076)

Dear Under Secretary Jones:

American Atheists writes in response to the request for public comments regarding the proposed rulemaking entitled "Student Assistance General Provisions, The Secretary's Recognition of Accrediting Agencies, The Secretary's Recognition Procedures for State Agencies," published on June 12, 2019.[1] American Atheists previously testified in opposition to the creation of a negotiated rulemaking process on these issues.[2] Although the proposed rule involves a vast array of topics relating to accreditation of institutions of higher education, we comment only upon the five provisions related to religious institutions of higher education.[3] American Atheists has grave concerns about these provisions and believe that the proposed changes are unwarranted and harmful. We strongly urge you to remove these religion provisions from any final rule on this subject.

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 guaranteed by the First Amendment to protect individual beliefs; it does not create special rights for religious individuals and organizations to violate neutral laws or discriminate against groups they disfavor.

[1] Notice of Proposed Rulemaking on Student Assistance General Provisions, The Secretary's Recognition of Accrediting Agencies, The Secretary's Recognition Procedures for State Agencies. Docket No. ED-2018-OPE-0076. 84 Fed. Reg. 27404, Jun. 12, 2019.
[2] Testimony of American Atheists Regarding Rulemaking Concerning Federal Student Aid Programs Pursuant to Title IV of the Higher Education Act of 1965 (Docket ID ED-2018-OPE-0076), submitted Sep. 11, 2018.
[3] Proposed Rule, 34 C.F.R. §§ 600.2, 600.9(b), 602.18(b)(3), 602.32(k), and 602.32(e); hereinafter referred to as "religion provisions" or "proposed rule."

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These religion provisions undermine the Higher Education Act (HEA) by giving religiously affiliated institutions of postsecondary and higher education wide-ranging exemptions to requirements for accreditation and recognized standards of education. They undercut the quality of education of postsecondary education institutions, restrict accrediting agencies from enforcing any reasonable accreditation standards, and prevent meaningful review of education standards and requirements for religious institutions.

Our nation has a long history of fostering diverse educational institutions, including both religious and secular institutions of higher education. Recognizing that the separation of religion and government is the bedrock of religious liberty, the Supreme Court has stepped in to ensure that states and the federal government refrain from unconstitutionally favoring religious educational institutions or impeding their ability to operate. In *Lemon v. Kurtzman*, the Supreme Court clarified limitations on State funding of religious educational institutions to prevent unconstitutional entanglement between religious organizations and the government.[4] More recently, in *Mitchell v. Helms*, the Court ruled that the government can provide funding on a neutral basis to religious schools, so long as it does not pay for indoctrination, favor a particular religion, or promote entanglement between the government and religion.[5] Finally, in *Locke v. Davey*, the Court clarified that the government may constitutionally choose not to fund a particular category of religious instruction, in this instance by excluding from educational grants students pursuing divinity degrees.[6] Through such decisions, the Court has established guidelines on how the government may choose to involve itself in religious education between what the Establishment Clause permits and the Free Exercise Clause compels. The existing regulations regarding Title IV programs push the level of allowable involvement to its very limit, and any efforts made to loosen regulations to fund religious education or to favor religious institutions will almost certainly implicate the Establishment Clause.

The Department previously clarified that this rulemaking process was initiated, in part, to revise regulations based on the decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, a 2017 Supreme Court decision which was expressly limited to discrimination based on religious identity with respect to playground resurfacing.[7] Legally, this case has precisely zero effect on federal regulations pertaining to the HEA. However, the case has been repeatedly misapplied to justify special dispensation and regulatory exemptions for religious organizations.[8] Even if we take this case at its broadest possible interpretation, which is 'religious organizations should not be denied funding simply because they are religious organizations,' the fundamental protections for religious liberty, guaranteed by the Establishment Clause and the Free Exercise Clause, as well as statutory requirements, still apply.

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[4] 403 U.S. 602 (1971). The Lemon test consists of three prongs; the statute or policy must 1) have a secular purpose, 2) have the primary effect of neither advancing nor inhibiting religion, and 3) not result in an excessive government entanglement with religion.
[5] 530 U.S. 793 (2000).
[6] 540 U.S. 712 (2004).
[7] No. 15-577, slip op. 1, 14, n. 3 (June 26, 2017). (Hereinafter referred to as "Trinity Lutheran").
[8] *See, e.g.,* FEMA, Public Assistance Program and Policy Guide, FP-104-009-2 (January 2018). Available https://www.fema.gov/media-library-data/1515614675577-be7fd5e0cac814441c313882924c5c0a/PAPPG_V3_508_FINAL.pdf

This rule creates a new a definition of "religious mission" that gives unlimited discretion to religious institutions and dangerously constricts the oversight of accrediting agencies.

For over two decades, the federal codes concerning accreditation and institutions of higher education have worked well. The current regulations do not define "religious mission" or "religious mission-based policies." However, the proposed definition, "A published institutional mission that is approved by the governing body of an institution of postsecondary education and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings,"[9] would undermine the academic integrity of institutions of higher education by greatly broadening the meaning and scope of religious missions, which are due unusual deference under the proposed rule. The breadth of the proposed definition has no stopping point – nearly any mission of an institution of higher education can "refer to" or be "predicated upon religious tenets, beliefs, or teachings."

Take for example Harvard College, which is not a religious educational institution and has a mission to "educate the citizens and citizen-leaders for our society. We do this through our commitment to the transformative power of a liberal arts and sciences education."[10] One could reasonable claim that this mission is "predicated upon religious… teachings" based on the Christian bible (Proverbs 2:6: "For the Lord gives wisdom; from his mouth comes knowledge and understanding."). Moreover, when claiming that an institution has a religious mission will privilege that institution in terms of accreditation review, as required by the religion provisions, why would educational institutions not claim this new benefit?

The newly-defined term would have wide-ranging implications in a number of regulations, including: 34 C.F.R. § 600.11, which would grant institutions with a religious mission or religious mission-based policies exemptions from rules preventing accreditor-shopping if they claim an accreditor was not respecting their religious mission; and 34 C.F.R. § 602.18(b)(3) would forbid accrediting agencies from considering policies or practices based on a religious mission as a "negative factor" in the accreditation process, even if the religious mission-based policy or practice is contrary to the agency's well-established standards. Injecting the newly proposed definition of "religious mission" into sections of the regulations where the term is already present would eviscerate student nondiscrimination protections, prevent enforcement of general education standards, and undermine the separation of religion and government.

The Department stated throughout the rulemaking process that there is no evidence of an institution being denied accreditation because of adherence to its religious mission. Therefore, there is no evidence to show this change is necessary. The Department contends that the purpose of the proposed definition is intended "to clarify related State authorization requirements . . .", while simultaneously giving "wide latitude" to "religious institutions" to "[carry] out its religious mission across all aspects of its academic and non-academic programs…." However, this is inconsistent with the proposed changes to 34 C.F.R. § 600.9, which would leave the definition of "religious institution" to a determination of respective State law, without mention of "religious mission."

[9] Proposed rule, 34 C.F.R. § 600.2.
[10] Harvard University, Harvard at a Glance. Available at https://www.harvard.edu/about-harvard/harvard-glance.

The proposed rule delegates definition of "religious institution" to respective State law, undermining the intent of the statute and frustrating constitutional aims.

The proposed rule eliminates the current definition of "religious institutions,"[11] leaving that determination to State law. By doing so, the Department will grant exemptions to State authorization requirements for institutions only peripherally related to religion or religious practices, significantly broadening the scope of exemptions and allowing an increasing number of institutions to evade these requirements.

The existing regulations are intended to effectuate a fundamental constitutional principle – that religions should be able to prepare leaders and teachers in order to carry out their religious mission.[12] As presently written, the exemption applies to what are, in essence, seminaries. American jurisprudence recognizes that governments should generally not be interfering in the internal apparatuses of houses of worship, denominational sects, and their seminaries.[13] Correspondingly, the limited scope of the current regulations adequately reflect core constitutional principles and sensibly protect the most students of higher education.

Despite the fact that the Department was unable furnish any evidence to show that the previous definition of "religious institution" created any obstacles or complications in the authorization process, it now seeks to let the states define religious institution however they see fit. In fact, the existing system has worked well for the roughly 2 million students enrolled in nearly 900 religiously affiliated institutions of higher education across the country.[14] Unfortunately, this change will threaten the integrity, robustness, and quality of postsecondary education by allowing states to declare that institutions even loosely affiliated with religion are to be granted the broad latitude previously allowed only to religious training institutions.

The religious provisions together establish a system where religious mission-based policies cannot be viewed as a "negative factor" by an accrediting agency, regardless of other considerations, creating an unconstitutionally broad religious exemption.

This proposed rule gives extremely broad deference to religious missions (which is also defined extraordinarily broadly).[15] In essence, an institution with a religious mission has license to ignore accreditation standards, so long as the institution justifies those policies with reference to its religious mission. The only exception to this provision, is that the accrediting agency may enforce core curricular requirements. This proposal is clearly designed to allow religious

[11] "An institution that (i) is owned, controlled, operated, and maintained by a religious organization lawfully operating as a nonprofit religious corporation, and (ii) awards only religious degrees or certificates including, but not limited to, a certificate of Talmudic studies, an associate of Biblical studies, a bachelor of religious studies, a master of divinity, or a doctor of divinity." 34 C.F.R. § 600.9(b)(2).
[12] U.S. Const. amend. I; see also Letter from Thomas Jefferson, President of the U.S., to the Danbury Baptist Ass'n of Conn. (Jan. 1, 1802), https://www.loc.gov/loc/lcib/9806/danpre.html.
[13] *See* Presbyterian Church v. Hull Church, 393 U.S. 440 (1969) (recognizing that the State cannot generally pass judgment on the internal deliberations of sectarian doctrine, policy, or practices).
[14] Dig. of Educ. Stat., Nat'l Ctr. for Educ. Stat., Table 303.90, Fall Enrollment and Number of Degree-Granting Postsecondary Institutions, by Control and Religious Affiliation of Institution (2016).
[15] Accrediting agencies must "Base[] decisions regarding accreditation and preaccreditation on the agency's published standards and… not use as a negative factor the institution's religious mission-based policies, decisions, and practices in the areas covered by § 602.16(a)(1)(ii), (iii), (iv), (vi), and (vii) provided, however, that the agency may require that the institution's or program's curricula include all core components required by the agency." Proposed rule at 34 C.F.R. § 602.18(b)(3).

colleges and universities to continue or newly implement discriminatory policies and practices, especially towards women and LBGTQ persons, even if an accrediting agency would have standards barring such policies and practices.

The rule would privilege religious missions above the missions or all other educational institutions. However, the HEA requires that *all* missions are to be accorded respect throughout the accreditation process.[16] The Department cannot and should not single out institutions with religious missions for special preference. Moreover, the proposed requirement that an accrediting agency "does not treat [religious missions] as a negative factor" goes significantly further than the term "respect" used in the statute.

The proposed rule implicates the Establishment Clause by creating this sweeping and vague accommodation for religious missions. The Supreme Court has stated that the Establishment Clause requires consideration of any impact that a religious accommodation or exemption would have on third parties. Specifically, the Constitution bars the government from crafting "affirmative" accommodation within its programs if the accommodations would harm any program beneficiaries.[17] The Constitution commands that "an accommodation must be measured so that it does not override other significant interests;"[18] "impose unjustified burdens on other[s];"[19] or have a "detrimental effect on any third party."[20] Therefore, any proposed rule intended to accommodate or create exemptions for religion must do so without burdening third parties or unconstitutionally favoring religious entities over secular beneficiaries and institutions. However, the proposed rule defies these principles by strictly prohibiting the accrediting agencies from giving any negative weight to a policy or practice justified by a religious mission, regardless of whether the policy or practices harms students or other beneficiaries.

The Department stated throughout the rulemaking process that there have been no complaints from religious institutions that their mission was not properly respected by an accrediting agency, nor that such institutions lost accreditation as a result of their adherence to their religious mission. The proposed rule seeks to address a problem that does not exist, and it does so in a way which is not only unconstitutional, but which will drastically undermine the ability of accrediting agencies to maintain quality education standards.[21]

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[16] 34 U.S.C. § 1099b(a)(4)(A).
[17] U.S. Const. amend. I; *Cutter v. Wilkinson*, 554 U.S. 709, 720-22 (2005) (complying with the Establishment Clause requires courts to "take adequate account of the burdens a requested accommodation may impose on non-beneficiaries" 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).
[18] *Cutter*, 544 U.S. at 722.
[19] *Id.* at 726.
[20] I*d.* 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) (holding religious accommodations may not impose "substantial burdens on non-beneficiaries").
[21] *See* 34 C.F.R. § 602.16(a).

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The proposed rule would give the Department unfettered discretion to punish accrediting agencies that enforce standards relating to professional licensure or certification.

The proposed rule would allow Department staff to view any evidence that an accrediting agency is part of a "concerted effort to unnecessarily restrict the qualifications necessary for a student to sit for licensure or certification examination or otherwise be eligible for entry into a profession" as a negative factor for purposes of initial recognition or expansion of scope.[22] The Department justifies this bizarre provision as intended to discourage accrediting agencies from "work[ing] with licensing bodies or States to unnecessarily increase the qualifications necessary for a student to sit for licensure or certification." Logically, of course, it would make sense for accrediting agencies to work with licensing bodies and States to ensure that educational institutions are meeting quality education standards that meet the needs of various professions and State requirements. Moreover, what qualifications are necessary or unnecessary for licensure is subjective,[23] which would give the Department discretion whether to count any given qualification as "unnecessar[y]" and use that as a factor against the accrediting agency. These provisions will make it more difficult to prepare students for their future professional careers and make accrediting agencies less able to review student preparation for licensure or certification, and so they should be withdrawn.

Moreover, the Department has not provided any evidence that unnecessary qualifications are being imposed on students preparing for professional licensure or certification "as a result of demands of multiple stakeholders." Nor has the Department demonstrated that this will "lead to more coursework required by the student and possibly a higher cost of education and other opportunity costs."

Instead, the Department shows the real intent of these provisions in the overview of the proposed rule, providing that:

> Proposed § 602.32(e) would allow Department staff to view as a negative factor when considering an application for initial, or expansion of scope of recognition as proposed by an agency, among other factors, any evidence that the agency was part of a concerted effort to unnecessarily restrict an institution's religious mission, the qualifications necessary for a student to sit for a licensure or certification examination, or the ability for a student to otherwise be eligible for entry into a profession.
>
> …
>
> Proposed § 602.32(k), like proposed § 602.32(e), provides that the Department may view as a negative factor in considering issues of scope any evidence that the agency was part of a concerted effort to unnecessarily restrict an institution's religious mission, the qualifications necessary for a student to sit for licensure or certification, or the ability for a student to otherwise be eligible for entry into a profession.

[22] Proposed rule, 34 C.F.R. §§ 602.32(e), 602.32(k).
[23] Although we would posit that licensing bodies and States would be best situated to determine what qualifications are necessary for licensure or certification.

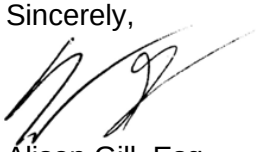
Although the actual proposed rule did not reflect this language,[24] the Department clearly linked restrictions on accrediting agencies' ability to review qualifications for licensure, certification, and entry into a profession to agencies' ability to review institutions with a religious mission. This, perhaps unsurprisingly, aligns with efforts by Christian supremacists to give state-license professionals permission to refuse services, usually to women and LGBTQ people, based on their 'sincerely held religious belief.'[25] Similarly, these provisions are transparently intended to prevent accrediting agencies from working with licensing bodies and States to prohibit discrimination.

Conclusion

Protections for religiously affiliated educational institutions are already built into the existing HEA regulations. These regulations are fair and balanced, and they have worked well, while the proposed religion provisions are unnecessary, harmful, and constitutionally suspect. By revising these provisions to grant sweeping religious exemptions to institutions with a (broadly defined) religious mission, the Department would undermine the religious freedom of students, as well as educational standards for millions of postsecondary students. The proposed religion provisions would unconstitutionally favor religious institutions over their secular counterparts, facilitate discrimination by institutions of higher education, and prevent accrediting agencies from enforcing their well-established standards. Therefore, we urge the Department to remove these provisions from any final rule.

If you should have any questions regarding American Atheists' position on these comments, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Sincerely,



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[24] Allowing the Department to consider it a negative factor against an accrediting agency when any institution with a religious mission feels "unnecessarily restrict[ed]" would prevent any meaningful review of these institutions, and it is clearly unworkable.

[25] *See, e.g.,* Brockman D.R., "Texas Republicans' Push for a Religious 'License to Discriminate' is Depressingly Familiar," Texas Observer, Apr. 17, 2019. Available at https://www.texasobserver.org/texas-republicans-push-for-a-religious-license-to-discriminate-is-depressingly-familiar/.